

# THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE  
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,  
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME XXVIII.

*TRUSTS AND TRUSTEES.  
VALUERS AND APPRAISERS.  
WATER SUPPLY.  
WATERS AND WATERCOURSES.  
WEIGHTS AND MEASURES.  
WILLS.  
WORK AND LABOUR.*

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*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

WORKSHOPS.

*See* FACTORIES AND SHOPS.

WOUNDING.

*See* CRIMINAL LAW AND PROCEDURE.

WRECK.

*See* ADMIRALTY ; CONSTITUTIONAL LAW ; COPYHOLDS ; CRIMINAL LAW AND PROCEDURE ; SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

WRIT OF RIGHT.

*See* ACTION ; REAL PROPERTY AND CHATTELS REAL.

WRITS.

*See* ACTION ; ADMIRALTY ; CROWN PRACTICE ; ELECTIONS ; EXECUTION ; JUDGMENTS AND ORDERS ; PARLIAMENT ; PRACTICE AND PROCEDURE.

WRONGFUL DISMISSAL.

*See* MASTER AND SERVANT.

YACHTS.

*See* SHIPPING AND NAVIGATION.

YARDS.

*See* METROPOLIS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

YEAR.

*See* TIME.

YEARLY TENANCY.

*See* LANDLORD AND TENANT.

YEOMANRY.

*See* ROYAL FORCES.

YORKSHIRE REGISTRY.

*See* MORTGAGE ; REAL PROPERTY AND CHATTELS REAL ;  
SALE OF LAND.

YOUNG PERSONS.

*See* FACTORIES AND SHOPS ; INFANTS AND CHILDREN.

YOUNGER CHILDREN.

*See* INFANTS AND CHILDREN ; SETTLEMENTS ; WILLS.

YOUTHFUL OFFENDERS.

*See* CRIMINAL LAW AND PROCEDURE ; INFANTS AND CHILDREN.

ZANZIBAR.

*See* DEPENDENCIES AND COLONIES.

ZINC WORKS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.





# ABBREVIATIONS

## USED IN THIS WORK.

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A. C. (preceded by date)..	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> [1891] A. C.)
A.-G. .. ..	Attorney-General
Act. .. ..	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El. .. ..	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam .. ..	Adam's Justiciary Reports (Scotland), 1893—(current)
Add. .. ..	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen. .. ..	Advocate-General
Alc. & N. .. ..	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas. .. ..	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn .. ..	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb. .. ..	Ambler's Reports, Chancery, 2 vols., 1725—1783
And. .. ..	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr. .. ..	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon. .. ..	Anonymous
Anst. .. ..	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas. .. ..	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley .. ..	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O. .. ..	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn. .. ..	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H. .. ..	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C. .. ..	Aspinall's Maritime Law Cases, 1870—(current)
Ashb. .. ..	Ashburner's Principles of Equity, 1902
Atk. .. ..	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan. .. ..	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par. .. ..	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad... ..	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald. .. ..	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C. .. ..	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S. .. ..	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
B. W. C. C. .. ..	Butterworth's Workmen's Compensation Cases
Bac. Abr. .. ..	Bacon's Abridgment
Bail Ct. Cas. .. ..	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild. .. ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B. .. ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. .. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	..	..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	..	..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	..	..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	..	..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	..	..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	..	..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	..	..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	..	..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	..	..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	..	..	Beaves's Lex Mercatoria
Bellewe	..	..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.
Bell, C. C.	..	..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	..	..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	..	..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	..	..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	..	..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	..	..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	..	..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	..	..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	..	..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	..	..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	..	..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	..	..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com...	..	..	Blackstone's Commentaries
Bl. D. & Osb.	..	..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	..	..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	..	..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	..	..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	..	..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	..	..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	..	..	Sir J. Brooke's Abridgment
Bro. C. C.	..	..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	..	..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	..	..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	..	..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor.	..	..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	..	..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	..	..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	.. ..	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	.. ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	.. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	.. ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	.. ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	.. ..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	.. ..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	.. ..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	.. ..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	.. ..	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	.. ..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	.. ..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	.. ..	Court of Appeal
C. B.	.. ..	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. s.)	.. ..	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	.. ..	Court of Criminal Appeal
C. C. Ct. Cas.	.. ..	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	.. ..	Common Law Reports, 3 vols., 1853—1855
C. P. D.	.. ..	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	.. ..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	.. ..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	.. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	.. ..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	.. ..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	.. ..	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	.. ..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	.. ..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	.. ..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	.. ..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	.. ..	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	.. ..	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	.. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	.. ..	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	.. ..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	.. ..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb.	.. ..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date)	.. ..	Law Reports, Chancery Division, since 1890 ( <i>e.g.</i> , [1891] 1 Ch.)
Ch. App.	.. ..	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	.. ..	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	.. ..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas. . . . .	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. . . . .	Charley's Chamber Cases, 1 vol., 1875—1876
Chit. . . . .	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin. . . . .	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay. . . . .	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick. . . . .	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph. . . . .	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe . . . . .	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent. . . . .	Coke's Entries
Co. Inst. . . . .	Coke's Institutes
Co. Litt. . . . .	Coke on Littleton (1 Inst.)
Co. Rep. . . . .	Coke's Reports, 13 parts, 1572—1616
Coll. . . . .	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid. . . . .	Collectanea Juridica, 2 vols.
Colles . . . . .	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt. . . . .	Coltman's Registration Cases, 1 vol., 1879—1885
Com. . . . .	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas. . . . .	Commercial Cases, 1895—(current)
Com. Dig. . . . .	Comyns' Digest
Comb. . . . .	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law. . . . .	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al. . . . .	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. . . . .	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg. . . . .	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G. . . . .	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas. . . . .	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. temp. Brough. . . . .	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834
Coop. temp. Cott. . . . .	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D. . . . .	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper . . . . .	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp. . . . .	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C. . . . .	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk. . . . .	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas. . . . .	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H. . . . .	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J. . . . .	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M. . . . .	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R. . . . .	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph. . . . .	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep. . . . .	Cohen's Criminal Appeal Reports, 1909—(current)
Craw. & D. . . . .	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846



Craw. & D. Abr. C.	..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas.	..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas.	..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	..	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	..	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	..	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	..	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	..	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	..	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	..	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	..	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	..	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	..	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	..	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	..	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	..	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	..	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	..	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	..	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	..	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	..	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	..	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	..	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	..	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	..	Justinian's Digest or Pandects
Dirl.	..	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	..	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	..	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	..	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	..	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	..	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	..	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	..	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	..	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	..	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	..	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	..	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	..	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	..	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	..	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury temp. Nap.	..	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury temp. Sug.	..	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	..	Dugdale's Origines Juridicales
Dunl. (Ct. of Sess.)	..	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning..	..	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	..	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	..	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	..	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	..	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	..	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	..	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	..	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	..	East's Pleas of the Crown
Ecc. & Ad.	..	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	..	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	..	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	..	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	..	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
Eng. Pr. Cas.	..	Roscoe's English Prize Cases, 2 vols., 1745—1858
Eq. Cas. Abr.	..	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744
Eq. Rep.	..	Equity Reports, 3 vols., 1853—1855
Esp.	..	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810
Exch.	..	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856
Ex. D.	..	Law Reports, Exchequer Division, 5 vols., 1875—1880
F. & F.	..	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867
F. (Ct. of Sess.)	..	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906
Fac. Coll. (with date)	..	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), fol., 1st and 2nd series, 21 vols., 1752—1825



Fac. Coll. (N. S.) (with date)	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), New Series, 16 vols., 1825—1841
Falc. . . . .	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751
Falc. & Fitz. . . . .	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838
Ferg. . . . .	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817
Fitz-G. . . . .	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1728—1731
Fitz. Nat. Brev. . . . .	Fitzherbert's Natura Brevium
Fl. & K. . . . .	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842
Fonbl. . . . .	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852
For. . . . .	Forrest's Reports, Exchequer, 1 vol., 1800—1801
Forb. . . . .	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713
Fort. De Laud. . . . .	Fortescue, De Laudibus Legum Angliæ
Fortes. Rep. . . . .	Fortescue's Reports, fol., 1 vol., 1692—1736
Fost. . . . .	Foster's Crown Cases, 1 vol., 1743—1760
Fount. . . . .	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712
Fox & S. Ir. . . . .	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825
Fox & S. Reg. . . . .	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895
Freem. (CH.) . . . . .	Freeman's Reports, Chancery, 1 vol., 1660—1706
Freem. (K. B.) . . . . .	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704
Gal. & Dav. . . . .	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843
Gale . . . . .	Gale's Reports, Exchequer, 2 vols., 1835—1836
Gib. Cod. . . . .	Gibson's Codex Juris Ecclesiastici Anglicani
Giff. . . . .	Giffard's Reports, Chancery, 5 vols., 1857—1865
Gilb. . . . .	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714
Gilb. C. P. . . . .	Gilbert's History and Practice of the Court of Common Pleas
Gilb. (CH.) . . . . .	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726
Gilm. & F. . . . .	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686
Gl. & J. . . . .	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828
Glanv. . . . .	Glanville, De Legibus et Consuetudinibus Regni Angliæ
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## Part I.—Trusts.

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Definitions  
and Classi-  
fication.

## Trust.

1. A trust, in the modern and confined sense of the word (*a*), is a confidence reposed in a person with respect to property of which he has possession or over which he can exercise a power to the intent that he may hold the property or exercise the power for the benefit of some other person or object (*b*).

(*a*) The word "trust" was regarded in Blackstone's time as including certain transactions cognisable in a court of law, such as deposits, bailments, and implied undertakings to account for money received to another's use (3 Bl. Com. 432). "Wherever persons agree concerning any particular subject, that, in a court of equity as against the party himself and any claiming under him voluntarily or with notice, raises a trust" (*Legard v. Hodges* (1792), 1 Ves. 477, *per* Lord THURLOW, L.C., at p. 478). In reference to real estate, and for the purpose of the Statute of Uses (27 Hen. 8, c. 10), it may, if the context so requires or admits, be construed as synonymous with "use" (1 Cru. Dig., tit. 12, Trust, s. 1 (2); *Bushell v. Burland* (1708), Holt (K. B.), 733, 736; *Altham (Lord) v. Anglesea (Lord)* (1709), 11 Mod. Rep. 210, *per* HOLT, C.J., at p. 211; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* Lord MANSFIELD, C.J., at p. 217; *Doe d. Terry v. Collier* (1809), 11 East, 377, 380; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43, *per* CHITTY, J., at p. 48). The Statute of Uses (27 Hen. 8, c. 10) united the estates of the legal tenant in fee simple and of the *cestui que use*; but a redivision of them was effected by limiting the use to the feoffee, who was declared a trustee, and then, there being one use which the statute executed and another which it did not, trusts succeeded uses. For as there could not be a use upon a use it took the name of a trust, and as the law would not meddle with it equity did so (*Burgess v. Wheate, A.-G. v. Wheate, supra, per* CLARKE, M.R., at p. 194; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 271 *et seq.*).

(*b*) Co. Litt. 272 b; *Burgess v. Wheate, A.-G. v. Wheate, supra, per* HENLEY, Lord Keeper, at p. 240; *Wilson v. Bury (Lord)* (1880), 5 Q. B. D. 518, C. A., *per* BRETT, L.J., at pp. 530, 531; *Dooby v. Watson* (1888), 39 Ch. D. 178, *per* KEKEWICH, J., at pp. 181, 182; *Re Barney, Barney v. Barney*, [1892] 2 Ch. 265, *per* KEKEWICH, J., at p. 272; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A., *per* LINDLEY, L.J., at pp. 18, 19. A trust is the binding of the conscience of one to the intention of another (Bacon, Reading upon the Statute of Uses, p. 9). An obligation to do an act with respect to property creates a trust (*Fleeming v. Howden* (1868), L. R. 1 Sc. & Div. 372, *per* Lord WESTBURY, at p. 383). The object of the trust is generally some person or persons; but it may be some private or public purpose; see title CHARITIES, Vol. IV., pp. 106 *et seq.*, 114 *et seq.* A guardianship is a trust (*Beaufort (Duke) v. Berty* (1721), 1 P. Wms. 703, *per* Lord MACCLESFIELD, L.C., at p. 705; *Mathew v. Brise* (1851), 14 Beav. 341, *per* ROMILLY, M.R., at p. 345; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 117, 121 *et seq.*). An agency is not in itself a trust (*Cave v. Mackenzie* (1877), 46 L. J. (Ch.) 564), but may in certain circumstances involve a trust; see pp. 58, 206, *post*; title AGENCY, Vol. I., pp. 157, 182, 184. The existence of a contractual relationship, such as, for instance, that of banker and customer (*Foley v. Hill* (1848), 2 H. L. Cas. 28), does not constitute a trust (*Ferguson v. Wilson* (1866), 2 Ch. App. 77, *per* TURNER, L.J., at pp. 87, 88; *Wilson v. Bury (Lord)*, *supra*, at pp. 530, 531; *Soar v. Ashwell*, [1893] 2 Q. B. 390, C. A., *per* Lord ESHER, M.R., at p. 393). As to the



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Definitions  
and Classi-  
fication.

Trustee and  
*cestui que*  
*trust*.

Fiduciary  
position.

Trust  
property.

It is an equitable obligation or, in other words, is enforceable only in a court in which equity is administered (*c*).

2. The person in whom the confidence is reposed is called a trustee (*d*), and the person for whose benefit the trust is to be exercised is called a *cestui que trust* (*e*), or sometimes a beneficiary (*f*).

The trustee is possessed of the property or power in a fiduciary capacity, and stands in a fiduciary relation to the *cestui que trust* (*g*). A person may be at the same time trustee and one of the *cestuis que trust* (*h*).

3. The property affected by the confidence is called the trust property or trust estate. It is usually in the legal ownership or under the legal control of the trustee (*i*). The *cestui*

*quasi*-fiduciary position of a railway company which works the railway of another, see title RAILWAYS AND CANALS, Vol. XXIII., p. 706. As to powers in the nature of trusts, see p. 17, *post*; title POWERS, Vol. XXIII., pp. 69 *et seq.* The trustee must have the legal possession or control of the property, which would be complete but for the equitable interest therein of the *cestui que trust* (*Re Barney, Barney v. Barney*, [1892] 2 Ch. 265, 272, 273, 276).

(*c*) Co. Litt. 272 b; Bacon, Reading upon the Statute of Uses, p. 9; 3 Bl. Com. 431; *Sturt v. Mellish* (1743), 2 Atk. 610, *per* Lord HARDWICKE, L.C., at p. 612; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* Lord MANSFIELD, C.J., at p. 223; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A., *per* LINDLEY, L.J., at p. 19; and see title EQUITY, Vol. XIII., pp. 88 *et seq.*, 154 *et seq.* As to passive trusts, see note (*o*), p. 86, *post*.

(*d*) 21 Vin. Abr. 508 *et seq.* A trustee is a person holding the legal title to property under an express or implied agreement to apply it and the income arising from it to the use and benefit of another person (*Wilson v. Bury (Lord)* (1880), 5 Q. B. D. 518, C. A., *per* BRETT, L.J., at pp. 530, 531). In a broad sense every person who has the legal ownership of property in which another person has a beneficial interest is a trustee for that person (Story, s. 964, 2nd ed. (1892), pp. 626, 627). But funds in the hands of public officials for distribution among certain persons are not trust funds of which they are trustees for such persons (*Grenville-Murray v. Clarendon (Earl)* (1869), L. R. 9 Eq. 11; *Kinloch v. Secretary of State for India in Council* (1880), 15 Ch. D. 1, C. A.). As to a bare trustee, see pp. 86, 87, *post*; and as to a constructive trustee and a trustee *de son tort*, see pp. 87 *et seq.*, *post*.

(*e*) *Beckford v. Wade* (1805), 17 Ves. 89, P. C., *per* GRANT, M.R., at p. 95; see Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7.

(*f*) See Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 14 (1), 45 (1).

(*g*) *Plowright v. Lambert* (1885), 52 L. T. 646, *per* FIELD, J., at p. 652; *Barnes v. Addy* (1874), 9 Ch. App. 244, *per* Lord SELBORNE, L.C., at p. 251; *Re Barney, Barney v. Barney, supra*; *Mara v. Browne*, [1896] 1 Ch. 199, C. A., *per* A. L. SMITH, L.J., at p. 209; and see pp. 92 *et seq.*, *post*.

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50; see pp. 65, 66, 80, 81, *post*.

(*i*) *Re Barney, Barney v. Barney, supra*, at pp. 272, 273, 276. A trustee may have merely an equitable estate in property which is legally vested in another person (*Head v. Teynham (Lord)* (1783), 1 Cox, Eq. Cas. 57; *Poole v. Pass* (1839), 1 Beav. 600; *Knight v. Bowyer* (1857), 23 Beav. 609, *per* ROMILLY, M.R., at p. 635; and see title EQUITY, Vol. XIII., p. 155, note (*m*)); but there can be no trust where there is not a legal estate in the trust property co-extensive with it (*Burgess v. Wheate, A.-G.*



*que trust* is said to have a beneficial or equitable interest in it (*k*).

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fication.

SUB-SECT. 2.—*Classification.*

4. Trusts are either (1) express, which are created by the actual terms of some instrument or declaration (*l*), or (2) constructive, or implied, which arise when property, to which no express trust is for the time being attached, is acquired or held by a person in circumstances which render him bound in equity to hold it in trust for the benefit of some other person or object as *cestui que trust* or beneficiary (*m*).

Express,  
implied, or  
constructive  
trusts.

5. Express trusts may be either (1) executed, or (2) executory. A trust is executed in the technical sense where the terms of the trust are designated by the instrument or declaration creating it (*n*), even though the creator directs a settlement to be executed embodying the designated provisions (*o*). A trust is executory in the technical sense where the instrument or declaration by which it is created directs the subsequent execution of an instrument

Executed or  
executory  
trusts.

*v. Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 207). This estate, however, need not be immediately vested in a trustee; see note (*h*), p. 20, *post*.

(*k*) *Goodright d. Alston v. Wells* (1781), 2 Doug. (K. B.) 771, 778, 779; Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (viii.).

(*l*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 25; *Fitzgerald v. Stewart* (1831), 2 Russ. & M. 457, *per* Lord BROUGHAM, L.C., at p. 460; *Cunningham v. Foot* (1878), 3 App. Cas. 974, *per* Lord CAIRNS, L.C., at p. 984; *Banner v. Berridge* (1881), 18 Ch. D. 254, 262 *et seq.*; *Sands to Thompson* (1883), 22 Ch. D. 614, *per* FRY, J., at p. 617; and see title EQUITY, Vol. XIII., pp. 154, 155. Where there is no actual evidence of an express trust, but the court considers that the circumstances necessarily point to its having been created, it is called a presumptive trust (*Cook v. Fountain* (1676), 3 Swan. 585, *per* Lord NOTTINGHAM, L.C., at p. 591).

(*m*) Bac. Abr., tit. Uses and Trusts, Trusts (C.); Statute of Frauds (29 Car. 2, c. 3), s. 8; *Cook v. Fountain*, *supra*, *per* Lord NOTTINGHAM, L.C., at p. 591; *Fitzgerald v. Stewart*, *supra*, at p. 460; *Petre v. Petre* (1852), 1 Drew. 371, *per* KINDERSLEY, V.-C., at p. 393; and see title EQUITY, Vol. XIII., pp. 155, 156. A constructive trust is a trust to be made out by circumstances (*Soar v. Ashwell*, [1893] 2 Q. B. 390, C. A., *per* BOWEN, L.J., at p. 396). Trusts are neither created nor implied by law to defeat the intentions of donors or settlors. They are created or implied, or held to result in favour of donors or settlors, in order to carry out and give effect to the true intentions of the donors or settlors, whether expressed or implied (*Standing v. Bowring* (1885), 31 Ch. D. 282, C. A., *per* LINDLEY, L.J., at p. 289; and see pp. 12 *et seq.*, *post*). The law never implies, and the court never presumes, a trust unless it is absolutely necessary to do so (*Cook v. Fountain*, *supra*, at pp. 591, 592).

(*n*) *Glenorchy (Lord) v. Bosville* (1733), Cas. temp. Talb. 3, *per* Lord TALBOT, L.C., at p. 19. Generally, a trust is executed when the creator of it has been his own conveyancer in defining it (*Franks v. Price* (1839), 3 Beav. 182; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 61, 210; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Fullerton v. Martin* (1860), 1 Drew. & Sm. 31; *De Havilland v. De Saumarez*, *De Havilland v. Bingham* (1865), 14 W. R. 118; *Re Nelley's Trusts* (1877), 26 W. R. 88). A trust or bequest of personal estate "to be enjoyed with and go with the title" to a peerage is executed and not executory (*Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538).

(*o*) *Egerton v. Brownlow (Earl)*, *supra*.

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fication.

Precatory  
trusts.

defining the trust and does not itself define with absolute precision the terms of that instrument (*p*).

6. A precatory trust is a trust created by precatory words, such as expressions of confidence, request, or desire that property will or shall be applied for the benefit of a definite person or object, where these words are construed in equity as imperatively constituting a trust (*q*).

Secret trusts.

7. A secret trust is created where property is in law given to a person either absolutely or upon an indefinite trust, but there has been an undertaking by him or an understanding between him and the donor, not clothed with the requisite formalities for the creation of a legal trust, that it shall be applied for the benefit of some other person or object (*r*).

Constructive,  
resulting,  
and other  
implied  
trusts.

8. Constructive or implied trusts may be subdivided into (1) constructive trusts, where property not otherwise subject to a trust becomes by the law trust property (*s*); (2) resulting trusts, where the law imposes on trust property a trust not expressed at the time when the trust was created (*t*); and (3) trusts implied from contractual or other relations subsisting between parties (*u*).

(*p*) *Glenorchy (Lord) v. Bosville* (1733), *Cas. temp. Talb.* 3; *Bagshaw v. Spencer* (1748), 1 *Wils.* 238; and see pp. 22 *et seq.*, *post*. In one sense all trusts are executory, since they have to be executed or carried out by the trustee (*Bellamy v. Burrow* (1735), *Cas. temp. Talb.* 97; *Jervoise v. Northumberland (Duke)* (1820), 1 *Jac. & W.* 559, *per* Lord ELDON, L.C., at pp. 570 *et seq.*; *Egerton v. Brownlow (Earl)* (1853), 4 *H. L. Cas.* 1, *per* Lord St. LEONARDS, at pp. 61, 210). In some cases it is a doubtful point whether a trust is executed or executory (*Jervoise v. Northumberland (Duke)*, *supra*, at pp. 570 *et seq.*). In all cases of executory trusts something is left to the judgment of the trustees (*Stanley v. Lennard* (1758), 1 *Eden*, 87, *per* HENLEY, Lord Keeper, at p. 95).

(*q*) *Knight v. Knight* (1840), 3 *Beav.* 148, *per* Lord LANGDALE, M.R., at pp. 171 *et seq.*; see pp. 13 *et seq.*, *post*. The expression "precatory trust" is a roundabout way of saying that the court finds that there is a trust, although the trust is not expressed as such, but by words of prayer or suggestion (*Re Sanson, Sanson v. Turner* (1896), 12 *T. L. R.* 142, *per* CHITTY, J.). It is in fact a misleading nickname (*Re Williams, Williams v. Williams*, [1897] 2 *Ch.* 12, *C. A.*, *per* RIGBY, L.J., at p. 27).

(*r*) *M'Cormick v. Grogan* (1869), *L. R.* 4 *H. L.* 82, *per* Lord HATHERLEY, L.C., at pp. 88, 89; *Re Stead, Witham v. Andrew*, [1900] 1 *Ch.* 237, *per* FARWELL, J., at pp. 240, 241; see pp. 21, 22, *post*.

(*s*) See p. 7, *ante*, pp. 47 *et seq.*, *post*.

(*t*) See pp. 49 *et seq.*, *post*.

(*u*) *Sands to Thompson* (1883), 22 *Ch. D.* 614, *per* FRY, J., at pp. 616 *et seq.*; *Soar v. Ashwell*, [1893] 2 *Q. B.* 390, *C. A.*, *per* Lord ESHER, M.R., at p. 393, *per* BOWEN, L.J., at p. 396, and *per* KAY, L.J., at pp. 400, 405; and see pp. 58 *et seq.*, *post*. A person affected with a constructive trust becomes a constructive trustee (*Soar v. Ashwell*, *supra*, at p. 393). This term is also applied to a stranger who by his conduct becomes affected with an express trust, and the trust so affecting him is sometimes called a constructive trust (*Barnes v. Addy* (1874), 9 *Ch. App.* 244, *per* Lord SELBORNE, L.C., at p. 251; *Soar v. Ashwell*, *supra*, *per* KAY, L.J., at pp. 400, 405). It has, however, been suggested that in such circumstances the trust remains an express trust and that the stranger who by his conduct has become affected by it is, more properly speaking, an express trustee *de son tort* (*Soar v. Ashwell*, *supra*, *per* Lord ESHER, M.R., at p. 394).

SECT. 2.—*Express Trusts.*

SECT. 2.

**Express  
Trusts.**SUB-SECT. 1.—*Capacity of Disposer.*

9. Any person or corporation (a) capable at law or in equity of alienating to any extent property or an interest in property, either *inter vivos* or, in the case of an individual, by a testamentary instrument, is to the same extent capable of creating a trust in that property or interest, or of disposing thereof in trust, either *inter vivos* or, in the case of an individual, by a testamentary instrument (b). Creator of the trust, or disposer.

SUB-SECT. 2.—*Capacity of Beneficiaries and Legality of Objects.*

10. Any person or corporation capable at law or in equity of taking and holding to any extent property or an interest in property either by a transaction operating *inter vivos* or by a testamentary disposition is to the same extent capable of taking and holding a beneficial interest as *cestui que trust* or beneficiary under a trust of that property or interest (c). Moreover, so far as is permitted by the law against perpetuities (d) and by considerations of public policy (e), the interposition of a trustee enables trusts to be created in favour of persons not yet in existence and objects incapable of taking a benefit under a direct gift (f). Cestui que trust or beneficiaries.

11. Subject to the law against perpetuities (g), property may be devised in trust for a person in fee simple or absolutely, with an executory devise or limitation in trust in favour of some other person or persons on the happening of a specific contingency (h). Executory devises and limitations.

(a) Except so far as by statute or otherwise legally restrained, a corporation has the same power of disposing of property as a private individual (*Colchester Corporation v. Lowten* (1813), 1 Ves. & B. 226, per Lord ELDON, L.C., at p. 244; *Evan v. Avon Corporation* (1860), 29 Beav. 144, per ROMILLY, M.R., at p. 149); see title CORPORATIONS, Vol. VIII., pp. 356, 365 *et seq.*

(b) *Rycroft v. Christy* (1840), 3 Beav. 238; *Knight v. Bowyer* (1857), 23 Beav. 609, per ROMILLY, M.R., at p. 635; *Gilbert v. Overton* (1864), 2 Hem. & M. 110. The person enabled by law to declare a trust of property is the beneficial owner of it (*Tierney v. Wood* (1854), 19 Beav. 330, per ROMILLY, M.R., at pp. 335, 336). In the construction of trusts the courts of equity adopt the rules of law applicable to legal estates (21 Vin. Abr., tit. Trust (A.), (D.); 8 Bac. Abr., tit. Uses and Trusts, Trusts (A.); Sanders, Uses and Trusts, 5th ed., Vol. I., p. 280; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, per CLARKE, M.R., at p. 194; *Wright v. Cadogan* (Lord) (1764), 2 Eden, 239, per Lord NORTHINGTON, L.C., at pp. 257, 258; and see pp. 40, 41, *post*).

(c) See note (b), *supra*.

(d) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(e) See p. 26, *post*.

(f) *Re Bowles, Amedroz v. Bowles*, [1902] 2 Ch. 650, and see pp. 25 *et seq.*, *post*. The Crown can only own copyholds by the interposition of a trustee; see titles CONSTITUTIONAL LAW, Vol. VII., pp. 197, 198; COPYHOLDS, Vol. VIII., p. 13. As to the administration in court of a trust fund in which a foreign sovereign is interested, see *Morgan v. Larivière* (1875), L. R. 7 H. L. 423.

(g) *Leake v. Robinson* (1817), 2 Mer. 363; *Blagrove v. Hancock* (1848), 16 Sim. 371; and see title PERPETUITIES, Vol. XXII., pp. 317 *et seq.*

(h) *Spence v. Handford* (1858), 4 Jur. (N. S.) 987; *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, C. A.; *Re Morgan* (1883), 24 Ch. D. 114.



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Trusts.

A devise of this nature is construed, not as an equitable remainder (*i*), but as an executory limitation (*j*).

SUB-SECT. 3.—*Creation of Trusts.*

(i.) *In General.*

Mode of  
declaration.

12. A trust may be created *inter vivos* or by will (*k*).

A declaration of trust of real estate must be made or proved by a writing signed by the person who creates it (*l*). The trust need not be constituted by the writing; it is sufficient if the writing is evidence of the fact of the trust (*m*). The writing must, however, show its terms and not merely its existence (*a*). A writing is not necessary to support a trust which is actually in course of being carried out by the person alleged to be a trustee (*b*); nor will the absence of a writing enable a person who knows that land was conveyed to him as a trustee to claim it as his own (*c*). Similarly, in the case of partnership property the absence of writing is immaterial (*d*). A declaration after bankruptcy is effectual if the trust existed before (*e*).

(*i*) See titles EQUITY, Vol. XIII., pp. 93 *et seq.*; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 214 *et seq.*, 278 *et seq.*

(*j*) *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, C. A.

(*k*) 21 Vin. Abr., tit. Trusts (G.); 8 Bac. Abr., tit. Uses and Trusts, Trusts (B.). As to what constitutes a declaration of trust, see also titles CONTRACT, Vol. VII., pp. 498, 499; GIFTS, Vol. XV., pp. 413, 414.

(*l*) Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 7; *Riddle v. Emerson* (1682), 1 Vern. 108; *Willis v. Willis* (1740), 2 Atk. 71; *Adlington v. Cann* (1774), 3 Atk. 141; *Leman v. Whitley* (1828), 4 Russ. 423; *De Biel v. Thomson* (1841), reported in *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, 61 *et seq.*, note (c); *Tierney v. Wood* (1854), 19 Beav. 330; *Kronheim v. Johnson* (1877), 7 Ch. D. 60; *Dye v. Dye* (1884), 13 Q. B. D. 147, C. A.; *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478. As to the application of the Statute of Frauds (29 Car. 2, c. 3) to trusts of copyholds, see *Acherley v. Acherley* (1733), 7 Bro. Parl. Cas. 273; *Withers v. Withers* (1752), Amb. 151.

(*m*) *O'Hara v. O'Neill* (1718), 7 Bro. Parl. Cas. 227; *Forster v. Hale* (1800), 5 Ves. 308, C. A., *per* Lord LOUGHBOROUGH, L.C., at p. 315; *Randall v. Morgan* (1805), 12 Ves. 67, *per* GRANT, M.R., at p. 74; *Morton v. Tewart* (1842), 2 Y. & C. Ch. Cas. 67; *Dale v. Hamilton* (1846), 5 Hare, 369, 394; see also titles CONTRACT, Vol. VII., p. 381; EQUITY, Vol. XIII., p. 75. As to the stamp duty chargeable on the declaration, see note (f), p. 11, *post*.

(*a*) *Smith v. Matthews* (1861), 3 De G. F. & J. 139, 151, 152, C. A.; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, C. A.

(*b*) *Harris v. Horwell* (1708), Gilb. (CH.) 11. A declaration of trust may after a length of time be presumed to have been made but to have been lost (*A.-G. v. Boulton* (1794), 2 Ves. 380, 385; *Re Gore's (Bishop) Charities* (1843), 2 Con. & Law. 411).

(*c*) *Riddle v. Emerson* (1682), 1 Vern. 108; *Hutchins v. Lee* (1737), 1 Atk. 447; *Knight v. Pechey* (1759), 1 Dick. 327; *Stickland v. Aldridge* (1804), 9 Ves. 516; *Morton v. Tewart*, *supra*; *Childers v. Childers* (1857), 1 De G. & J. 482, C. A.; *Davies v. Otty* (1864), 2 De G. J. & Sm. 238, C. A.; *Davies v. Otty* (No. 2) (1865), 35 Beav. 208; *Haigh v. Kaye* (1872), 7 Ch. App. 469; *Booth v. Turle* (1873), L. R. 16 Eq. 182; *Re Marlborough (Duke)*, *Davis v. Whitehead*, [1894] 2 Ch. 133; *Rochevoucauld v. Boustead*, *supra*, at p. 206; compare title EQUITY, Vol. XIII., pp. 75, 76.

(*d*) *Dale v. Hamilton*, *supra*; see title PARTNERSHIP, Vol. XXII., p. 22.

(*e*) *Gardner v. Rowe* (1828), 5 Russ. 258.



A trust of personal estate *inter vivos* may be declared either in writing (*f*) or by parol (*g*).

**13.** A person or corporation capable of disposing of property or of an interest therein by way of trust (*h*) may at any time create a trust thereof by a declaration made in the proper legal mode (*i*) to the effect that it shall be thenceforth held in trust for a specified person or object (*k*). A declaration of trust of real property by a married woman made with the formalities required by the Fines and Recoveries Act, 1833 (*l*), is a disposition by her within that Act (*m*), which binds the property as against her heir (*a*). On the

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of trust with-  
out transfer  
of property.

(*f*) *Gee v. Liddell* (No. 1) (1866), 35 Beav. 621. A declaration of trust concerning property by any writing, other than a will or an instrument chargeable with *ad valorem* duty as a settlement, is chargeable with a stamp duty of 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., title "Declaration"). As to stamp duties generally, see title REVENUE, Vol. XXIV., pp. 700 *et seq.*

(*g*) *Pary v. Juxon* (1669), 3 Rep. Ch. 21 [38]; *Bellasis (Lady) v. Compton and Frankland* (1693), 2 Vern. 294; *Bayley v. Boulcott* (1828), 4 Russ. 345; *Benbow v. Townsend* (1833), 1 My. & K. 506; *M'Fadden v. Jenkyns* (1842), 1 Ph. 153, *per* Lord LYNDBURST, L.C., at p. 157; *Peckham v. Taylor* (1862), 31 Beav. 250; *Grant v. Grant* (1865), 34 Beav. 623, *per* ROMILLY, M.R., at p. 625; *Jones v. Lock* (1865), 1 Ch. App. 25; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437, *per* Lord SELBORNE, at p. 457; and see pp. 12, note (*f*), 21, *post*; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 374.

(*h*) See p. 9, *ante*.

(*i*) *Wright v. Cadogan (Lord)* (1764), 2 Eden, 239; *Middleton v. Pollock, Ex parte Elliott* (1876), 2 Ch. D. 104; *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, C. A.; see *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478, 484; for forms, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 33 *et seq.*; as to the proper legal mode, see p. 10, *ante*; and the text, *supra*. If a person adds money of his own to a fund which he holds in trust and declares that he has done so, it is a good declaration of trust of that money (*Thorpe v. Owen* (1842), 5 Beav. 224; *Gray v. Gray* (1852), 2 Sim. (N. S.) 273).

(*k*) If the property is at the time vested in the disposer, he declares that he himself will thenceforth so hold it in trust, or to that effect (*Scott v. Bentley* (1855), 1 K. & J. 281; *Richards v. Delbridge* (1874), L. R. 18 Eq. 11, *per* JESSEL, M.R., at pp. 14, 15; *Kelly v. Walsh* (1878), 1 L. R. Ir. 275). If it is vested at his disposal in another person, he declares or directs that such other person shall so hold it, or to that effect (*Rycroft v. Christy* (1840), 3 Beav. 238; *Bentley v. Mackay* (1851), 15 Beav. 12; *Moore v. Darton* (1851), 4 De G. & Sm. 517; *Paterson v. Murphy* (1853), 11 Hare. 88, 92). An effectual declaration of trust may be made by entries in books of account and memoranda (*Salter v. Cavanagh* (1838), 1 Dr. & Wal. 668, 686; *Stapleton v. Stapleton* (1844), 14 Sim. 186; *Vandenberg v. Palmer* (1858), 4 K. & J. 204; *Evans v. Jennings* (1858), 4 Jur. (N. S.) 551; *Re Glover* (1862), 2 John. & H. 186; *Patrick v. Simpson* (1880), 24 Q. B. D. 128; *Brewster v. Prior* (1886), 55 L. T. 771; *Re Gompertz's Estate, Parker v. Gompertz* (1910), 55 Sol. Jo. 76; but see *Morgan v. Larivière* (1875), L. R. 7 H. L. 423; *Re Rowe, Jacobs v. Hind* (1889), 58 L. J. (CH.) 703, C. A.; *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478). A power of attorney may amount to a declaration of trust (*Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 150; *Airey v. Hall* (1856), 3 Sm. & G. 315). But the approval of an incomplete draft of a trust instrument does not create a binding trust (*Re Sykes's Trusts* (1862), 2 John. & H. 415).

(*l*) 3 & 4 Will. 4, c. 74; see title HUSBAND AND WIFE, Vol. XVI., p. 381.

(*m*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77. As to a declaration of trust of copyholds by a married woman under the Act, see title COPYHOLDS, Vol. VIII., p. 108.

(*a*) *Carter v. Carter*, [1896] 1 Ch. 62.

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How far a bill of sale.

Declaration of trust on transfer of property.

Declaration subsequent to transfer.

Certainty of language.

other hand, a declaration of trust by a tenant in tail of real property is not such an assurance as under the Fines and Recoveries Act, 1833 (*b*), will bar his estate tail therein (*c*).

14. A declaration of trust in writing of personal chattels without transfer, if it otherwise falls within the terms of the Bills of Sale Act, 1878 (*d*), is a bill of sale within the meaning of that Act (*e*).

15. On a transfer of property or of an interest in property, which of itself would vest the beneficial ownership thereof in the transferee, the declaration of trust may be made by the instrument of transfer, if any, or by another instrument taking effect contemporaneously with the instrument of transfer, or, in the case of a transfer of personal estate *inter vivos*, by a contemporaneous parol declaration (*f*).

16. Where a transfer of property is made to a person in such a manner or in such circumstances that he is thereby constituted a trustee thereof for the disposer and not the absolute owner, the disposer may at any time afterwards declare a specific trust of the property (*g*).

(ii.) *Declaratory Words.*

17. A trust can be created by any language which is clear enough to show an intention to create it (*h*). In order to create a trust there must be (1) a declaration which is or can be construed as imperative in its terms; (2) a designation of the subject-matter or property to be affected by it within the limits permitted by law; and (3) a designation of the object or the person or persons to be benefited by it within the limits permitted by law (*i*).

(*b*) 3 & 4 Will. 4, c. 74; see *ibid.*, ss. 15, 40; and title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 244, 255.

(*c*) *Green v. Paterson* (1886), 32 Ch. D. 95, C. A.

(*d*) 41 & 42 Vict. c. 31.

(*e*) *Ibid.*, s. 4; see title BILLS OF SALE, Vol. III., pp. 6, 8.

(*f*) *Wright v. Cadogan* (Lord) (1764), 2 Eden, 239, *per* Lord NORTHINGTON, L.C., at p. 256; *Childers v. Childers* (1857), 1 De G. & J. 482, C. A.; *Re Bellasis' Trust* (1871), L. R. 12 Eq. 218. A parol trust *inter vivos* may attach to a testamentary gift (*Nab v. Nab* (1718), 10 Mod. Rep. 404). As to a parol trust attaching to the gift of a promissory note and to a deposit of title deeds, see *Lloyd v. Chune* (1860), 2 Giff. 441; *Arthur v. Clarkson* (1866), 35 Beav. 458; *Re Caplen's Estate, Bulbeck v. Silvester* (1876), 45 L. J. (CH.) 280; *Re Richards, Shenstone v. Brock* (1887), 36 Ch. D. 541; but see *Re Whitaker (a Person of Unsound Mind)* (1889), 42 Ch. D. 119, C. A., *per* COTTON, L.J., at p. 125.

(*g*) *Crook v. Brooking* (1689), 2 Vern. 50, 106; *Forster v. Hale* (1798), 3 Ves. 696, *per* ARDEN, M.R., at p. 707.

(*h*) *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A., *per* LINDLEY, L.J., at pp. 18, 19. As to charitable trusts, see title CHARITIES, Vol. IV., pp. 145 *et seq.*

(*i*) *Cruwys v. Colman* (1804), 9 Ves. 319, *per* GRANT, M.R., at p. 323; *Wright v. Atkyns* (1823), Turn. & R. 143, *per* Lord ELDON, L.C., at p. 157; *Knight v. Knight* (1840), 3 Beav. 148, *per* Lord LANGDALE, M.R., at pp. 172, 173; *Dooby v. Watson* (1888), 39 Ch. D. 178; *Hill v. Hill*, [1897] 1 Q. B. 483, C. A., *per* CHITTY, L.J., at p. 493; *Re Williams, Williams v. Williams*, *supra*, *per* RIGBY, L.J., at p. 28; and as to charitable trusts, see title CHARITIES, Vol. IV., pp. 145 *et seq.* As to the limits permitted by law, see title PERPETUITIES, Vol. XXII., pp. 300 *et seq.*; as to the designation of a trustee, see pp. 20, 67, *post*.

18. In declaring a trust the word usually and technically employed is "trust," or, more rarely, "use" or "confidence" (*k*). A trust may, however, be created by the general tenor of an instrument without the use of these words (*l*). When the creator of the trust is to be the trustee, any expressions will suffice from which it is clear that the party using them considers himself a trustee and adopts that character (*m*). A promise to declare a trust may be sufficient (*n*); but a promise or an expression of intention, or to give an imperfect gift, is not effectual as a declaration of trust (*o*). In case of doubt the contemporaneous and subsequent acts of the settlor may be looked at (*p*).

19. In testamentary instruments a trust may be created by words intimating a request (*q*), entreaty (*r*), recommendation (*s*),

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Precatory  
words con-  
strued as  
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(*k*) Statute of Frauds (29 Car. 2, c. 3), s. 7; *Cave v. Mackenzie* (1877), 46 L. J. (CH.) 564, 567; *Hill v. Hill*, [1897] 1 Q. B. 483, C. A. The word "use" is a proper word to create a trust (*Atkinson v. Atkinson* (1890), 62 L. T. 735, *per* FRY, L.J., at p. 736). The word "confidence" was the old name for trust, and may now by virtue of the context be of the same efficacy as the word "trust" (*Eaton v. Watts* (1867), L. R. 4 Eq. 151, *per* STUART, V.-C., at p. 155).

(*l*) *Lewis v. Madocks* (1803), 8 Ves. 150; *Cary v. Cary* (1804), 2 Sch. & Lef. 173; *Ex parte Pye*, *Ex parte Dubost* (1811), 18 Ves. 140; *King v. Denison* (1813), 1 Ves. & B. 260, *per* Lord ELDON, L.C., at p. 273; *Rycroft v. Christy* (1840), 3 Beav. 238; *Dillon v. Cruise* (1840), 3 I. Eq. R. 70, 83; *Crockett v. Crockett* (1848), 2 Ph. 553, C. A.; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176, 194, C. A.; *Page v. Cox* (1852), 10 Hare, 163, *per* TURNER, V.-C., at pp. 168, 169; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Jacquet v. Jacquet* (1859), 27 Beav. 332; *Grant v. Grant* (1865), 34 Beav. 623, *per* ROMILLY, M.R., at p. 625; *Gee v. Liddell* (No. 1) (1866), 35 Beav. 621; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Bird v. Harris* (1870), L. R. 9 Eq. 204; *Morgan v. Malleson* (1870), L. R. 10 Eq. 475; *Armstrong v. Timperon* (1871), 24 L. T. 275; *Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Fox v. Hawks*, *Hawks v. Fox* (1879), 13 Ch. D. 822; *Talbot v. O'Sullivan* (1880), 6 L. R. Ir. 302; *Re Flavell*, *Murray v. Flavell* (1883), 25 Ch. D. 89, C. A. A mere direction to pay dividends may be sufficient (*Bentley v. Mackay* (1851), 15 Beav. 12).

(*m*) *Dipple v. Corles* (1853), 11 Hare, 183, *per* WOOD, V.-C., at p. 184; *Re Bankhead's Trust* (1856), 2 K. & J. 560; *Richards v. Delbridge* (1874), L. R. 18 Eq. 11, 14; *Heartley v. Nicholson* (1875), L. R. 19 Eq. 233.

(*n*) *Bellamy v. Burrow* (1735), Cas. temp. Talb. 97; but see *Scales v. Maude* (1855), 6 De G. M. & G. 43, C. A.

(*o*) *Dipple v. Corles*, *supra*; *Forbes v. Forbes* (1857), 3 Jur. (N. S.) 1206; *Penfold v. Mould* (1867), L. R. 4 Eq. 562; *Re Stallon*, *Stallon v. Stallon* (1907), 51 Sol. Jo. 626; *O'Flaherty v. Browne*, [1907] 2 I. R. 416, C. A.; and see title GIFTS, Vol. XV., pp. 414, 428, 429. Words which imply an intention to make a revocable or ambulatory or testamentary disposition do not suffice (*Gason v. Rich* (1887), 19 L. R. Ir. 391, C. A.; *Towers v. Hogan* (1889), 23 L. R. Ir. 53; *Re Cozens*, *Green v. Brisley*, [1913] 2 Ch. 478). As to communication to a beneficiary, see p. 20, *post*.

(*p*) *Bentley v. Mackay*, *supra*, at p. 19.

(*q*) *Pierson v. Garnet* (1787), 2 Bro. C. C. 226, C. A.; *Eade v. Eade* (1820), 5 Madd. 118; *Foley v. Parry* (1833), 2 My. & K. 138, C. A.; *Hughes v. Stubbs* (1842), 1 Hare, 476; *Re O'Bierne* (1844), 1 Jo. & Lat. 352; *Blacket v. Lamb* (1851), 14 Beav. 482, 489, 490; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Willis v. Kymer* (1877), 7 Ch. D. 181; *Re Maddock*, *Llewelyn v. Washington*, [1902] 2 Ch. 220, C. A.

(*r*) *Taylor v. George* (1814), 2 Ves. & B. 378; *Prevost v. Clarke* (1816), 2 Madd. 458; *Heneage v. Andover* (*Lord*) (1822), 10 Price, 230, *per* RICHARDS, C.B., at p. 270; *Corbet v. Corbet* (1873), 7 I. R. Eq. 456.

(*s*) *Malim v. Keighley* (1795), 2 Ves. 529; *Malim v. Barker* (1796),



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advice (*t*), will or wish (*a*), desire (*b*), reliance or confidence (*c*), or hope (*d*), that a devisee or legatee of property will apply it for the benefit of a specified person or object (*e*). The expression of intention must, however, be definite having regard to the whole context (*f*),

3 Ves. 150; *Tibbitts v. Tibbitts* (1816), 19 Ves. 656; *Horwood v. West* (1823), 1 Sim. & St. 387; *Kingston (Lord) v. Lorton (Lord)* (1829), 2 Hog. 166, 184, 185; *Ford v. Fowler* (1840), 3 Beav. 146; *Cholmondeley v. Cholmondeley* (1845), 14 Sim. 590; *Knott v. Cottee* (1847), 2 Ph. 192; *Hart v. Tribe* (No. 4) (1863), 32 Beav. 279.

(*t*) *Parker v. Bolton* (1835), 5 L. J. (CH.) 98.

(*a*) *Clowdsley v. Pelham* (1686), 1 Vern. 411; *Eales v. England* (1702), Prec. Ch. 200; *Harding v. Glyn* (1739), 1 Atk. 469, per VERNEX, M.R., at p. 470; *Forbes v. Ball* (1817), 3 Mer. 437; *Hinxman v. Poynder* (1832), 5 Sim. 546; *Foley v. Parry* (1833), 2 My. & K. 138, C. A.; *Liddard v. Liddard* (1860), 28 Beav. 266; *Proby v. Landor* (1860), 28 Beav. 504; *Gray v. Gray* (1860), 11 L. Ch. R. 218; *Godfrey v. Godfrey* (1863), 8 L. T. 200; *Birch v. Wade* (1814), 3 Ves. & B. 198; *Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215; but see *Teasdale v. Braithwaite* (1877), 5 Ch. D. 630, 631, C. A.; *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. (CH.) 370, C. A.

(*b*) *Brest v. Offley* (1664), 1 Rep. Ch. 130 [246]; *Jones v. Nabbs* (1718), 1 Eq. Cas. Abr. 404, 405; *Harding v. Glyn, supra*; *Medlicot v. Bowes* (1749), 1 Ves. Sen. 207; *Nowlan v. Nelligan* (1785), 1 Bro. C. C. 489; *Cruwys v. Colman* (1804), 9 Ves. 319; *Cary v. Cary* (1804), 2 Sch. & Lef. 173, 189; *Birch v. Wade* (1814), 3 Ves. & B. 198; *Forbes v. Ball, supra*; *Bonser v. Kinnear* (1860), 2 Giff. 195; *Liddard v. Liddard, supra*; *Stead v. Mellor* (1877), 5 Ch. D. 225; but see *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219; *Re Jevons, Jevons v. Public Trustee* (1911), 56 Sol. Jo. 72.

(*c*) *Massey v. Sherman* (1739), Amb. 520; *Wright v. Atkyns* (1810), 17 Ves. 255; (1813), 1 Ves. & B. 313; *Parsons v. Baker* (1812), 18 Ves. 476; *Forbes v. Ball, supra*; *Horwood v. West, supra*; *Wood v. Cox* (1837), 2 My. & Cr. 684; *Bardswell v. Bardswell* (1838), 9 Sim. 319; *Baker v. Mosley* (1848), 12 Jur. 740; *Briggs v. Penny* (1849), 3 De G. & Sm. 525; *Wace v. Mallard* (1851), 21 L. J. (CH.) 355; *Smith v. Smith* (1856), 2 Jur. (N. S.) 967; *Barnes v. Grant* (1856), 2 Jur. (N. S.) 1127; *Gully v. Cregoe* (1857), 24 Beav. 185; *Shepherd v. Nottidge* (1862), 2 John. & H. 766, per WOOD, V.-C., at p. 773; *Shovelton v. Shovelton* (1863), 32 Beav. 143; *Hart v. Tribe* (No. 4), *supra*; *Eaton v. Watts* (1867), L. R. 4 Eq. 151, per STUART, V.-C., at p. 155; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Curnick v. Tucker* (1874), L. R. 17 Eq. 320; *Le Marchant v. Le Marchant* (1874), L. R. 18 Eq. 414; *House v. House* (1874), 31 L. T. 427; *Fordham v. Speight* (1875), 23 W. R. 782; *Stead v. Mellor, supra*; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A., per LINDLEY, L.J., at p. 18; but see *Re Hutchinson and Tenant* (1878), 8 Ch. D. 540; *Re Williams, Williams v. Williams, supra*; *Re Lovett, Lovett v. Lovett* (1912), 132 L. T. Jo. 297.

(*d*) *Harland v. Trigg* (1782), 1 Bro. C. C. 142, per Lord THURLOW, L.C., at pp. 143, 144; *Paul v. Compton* (1803), 8 Ves. 375, per Lord ELDON, L.C., at p. 380; *Stead v. Mellor, supra*.

(*e*) *Bute (Earl) v. Stuart* (1762), 1 Bro. Parl. Cas. 476, 485; *Bull v. Vardy* (1791), 1 Ves. 270; *Brown v. Casamajor* (1799), 4 Ves. 498; *Paul v. Compton, supra*, at p. 380; *Cary v. Cary, supra*, at p. 189; *Knight v. Knight* (1840), 3 Beav. 148, per Lord LANGDALE, M.R., at pp. 172 *et seq.*; *Bernard v. Minshull* (1859), John. 276.

(*f*) *Hill v. London (Bishop)* (1737), 1 Atk. 618; *Bland v. Bland* (1745), 2 Cox, Eq. Cas. 349; *Randal v. Hearle* (1793), 1 Anst. 124, 127; *Meggison v. Moore* (1795), 2 Ves. 630; *Meredith v. Heneage* (1824), 1 Sim. 542, H. L.; *Lechmere v. Lavie* (1832), 2 My. & K. 197; *Hoy v. Master* (1834), 6 Sim. 568; *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, H. L.; *Bardswell v. Bardswell, supra*; *Knight v. Knight, supra*, per Lord LANGDALE, M.R., at pp. 173 *et seq.*, affirmed, *sub nom. Knight v. Boughton*



and must sufficiently indicate both the subject-matter (*g*) and the objects to be benefited (*h*). A request or recommendation or expression of confidence does not control or annex a trust to a gift which is expressed to be absolute (*i*) or to a devise in tail (*k*).

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On the other hand, if the circumstances so require, the use of the

(1844), 11 Cl. & Fin. 513, H. L.; *Young v. Martin* (1843), 2 Y. & C. Ch. Cas. 582, 590, 591; *Johnston v. Rowlands* (1848), 2 De G. & Sm. 356; *Fitch v. Friend* (1848), 2 De G. & Sm. 405; *Huskisson v. Bridge* (1851), 4 De G. & Sm. 245; *Re Pinckard's Trust* (1858), 4 Jur. (N. S.) 1041, C. A.; *Shepherd v. Nottidge* (1862), 2 John. & H. 766; *Scott v. Key* (1865), 35 Beav. 291; *Eaton v. Watts* (1867), L. R. 4 Eq. 151; *Re Crockford's Estate* (1869), 21 L. T. 85; *Greene v. Greene* (1869), 3 I. R. Eq. 90; *Reid v. Atkinson* (1871), 5 I. R. Eq. 373, C. A.; *Creagh v. Murphy* (1873), 7 I. R. Eq. 182; *Re Bond, Cole v. Hawes* (1876), 4 Ch. D. 238; *Stead v. Mellor* (1877), 5 Ch. D. 225; *Morrin v. Morrin* (1886), 19 L. R. Ir. 37; *Re Sanson, Sanson v. Turner* (1896), 12 T. L. R. 142; *Hill v. Hill*, [1897] 1 Q. B. 483, C. A. It is an observation incident to all trusts created by precatory words, that the testator might, if he had intended, have created an express trust (*Knight v. Boughton* (1844), 11 Cl. & Fin. 513, H. L., per Lord COTTENHAM, at p. 553). A trust will not be held to be created by precatory language if the general scope of the will leads to the inference that it was not intended by the testator (*Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, 406 et seq., C. A.; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A.).

(*g*) *Bland v. Bland* (1745), 2 Cox, Eq. Cas. 349; *Cunliffe (Sir R.) v. Cunliffe (Lady)* (1770), Amb. 686; *Wynne v. Hawkins* (1782), 1 Bro. C. C. 179; *Pushman v. Filliter* (1795), 3 Ves. 7; *Paul v. Compton* (1803), 8 Ves. 375, per Lord ELDON, L.C., at p. 380; *Wilson v. Major* (1805), 11 Ves. 205; *Dashwood v. Peyton* (1811), 18 Ves. 27, per Lord ELDON, L.C., at p. 41; *Eade v. Eade* (1820), 5 Madd. 118; *Curtis v. Rippon* (1820), 5 Madd. 434; *Abraham v. Alman* (1826), 1 Russ. 509; *Lechmere v. Lavie* (1832), 2 My. & K. 197; *Hoy v. Master* (1834), 6 Sim. 568; *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, 154, H. L., at p. 154; *Pope v. Pope* (1839), 10 Sim. 1; *Cowman v. Harrison* (1852), 10 Hare, 234; *Green v. Marsden* (1853), 1 Drew. 646; *Palmer v. Simmonds* (1854), 2 Drew. 221; *Re Pinckard's Trust, supra*; *Graves v. Graves* (1862), 13 I. Ch. R. 182; *Re Bond, Cole v. Hawes, supra*; *Parnall v. Parnall* (1878), 9 Ch. D. 96; *Mussoorie Bank v. Raynor* (1882), 7 App. Cas. 321, P. C.; *Re Moore, Moore v. Roche* (1886), 55 L. J. (CH.) 418; and see pp. 17, 18, *post*.

(*h*) *Harland v. Trigg* (1782), 1 Bro. C. C. 142; *Randal v. Hearle* (1793), 1 Anst. 124, 127; *Paul v. Compton, supra*, at p. 380; *Dashwood v. Peyton, supra*, at p. 41; *Crawford v. Crawford* (1825), 3 L. J. (O. S.) (CH.) 105; *Sale v. Moore* (1827), 1 Sim. 534; *Ex parte Payne* (1837), 2 Y. & C. (EX.) 636; *Shaw v. Lawless, supra*, at p. 154; *Reeves v. Baker* (1854), 18 Beav. 372; *Re Bond, Cole v. Hawes, supra*; and see pp. 18 et seq., *post*.

(*i*) *Winch v. Brutton* (1844), 14 Sim. 379; *Webb v. Wools* (1852), 2 Sim. (N. S.) 267; *Macnab v. Whitbread* (1853), 17 Beav. 299; *Fox v. Fox* (1859), 27 Beav. 301; *M'Culloch v. M'Culloch* (1863), 11 W. R. 504; *Hood v. Oglander* (1865), 34 Beav. 513; *Lambe v. Eames* (1871), 6 Ch. App. 597; *Mackett v. Mackett* (1872), L. R. 14 Eq. 49; *Ellis v. Ellis* (1875), 44 L. J. (CH.) 225; *Re Hutchinson and Tenant* (1878), 8 Ch. D. 540; *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, C. A.; *Re Diggles, Gregory v. Edmondson* (1888), 39 Ch. D. 253, C. A.; *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370, C. A.; *Re Williams, Williams v. Williams, supra*; *Re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549, C. A.; *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219. The decision in *Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415, C. A., in favour of the gift being absolute was reversed in the House of Lords, *sub nom. Comiskey v. Bowring-Hanbury*, [1905] A. C. 84, on account of the further direction contained in the will.

(*k*) *Dawkins v. Penrhyn (Lord)* (1878), 4 App. Cas. 51.

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Desire as to employment of a person.

Language negating trust.

Trusts by imposition of a condition.

Trust by creation of a charge.

word "trust" or an express declaration of trust in a will is construed as merely precatory or recommendatory (*l*).

**20.** A direction or desire or recommendation in a will that a particular person shall be employed as agent or in some other capacity in connexion with the testator's estate does not create a trust in his favour (*m*).

**21.** A trust will not be imposed where the language of the disposer expressly negatives his intention to impose a trust (*n*).

**22.** Where property is given to a person upon condition that he does a certain act or confers a certain benefit on another person, the condition may constitute a trust if it is directed to be, or must necessarily be, performed and satisfied out of the property, and consequently imposes a fiduciary obligation in respect of the property (*o*); but it will not be construed as a trust if this is not the case and the condition merely imposes a collateral duty (*p*). Similarly, a devise of land upon condition of paying a sum of money or an annuity does not create a trust, though it may create a charge (*q*).

**23.** A charge does not in itself create a trust (*r*), but it may do so if it is coupled with other trusts or the context otherwise so requires (*s*). Conversely a trust may amount merely to a charge (*t*).

(*l*) *Hughes v. Evans* (1843), 13 Sim. 496; *Quayle v. Davidson* (1858), 12 Moo. P. C. C. 268; *Williams v. Roberts* (1857), 4 Jur. (N. S.) 18; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Te Teira Te Paea v. Te Roera Tareha*, [1902] A. C. 56, P. C. Even the express constitution of a person as trustee may, if the context so requires, be disregarded (*Morrin v. Morrin* (1886), 19 L. R. Ir. 37).

(*m*) *Beckford v. Beckford* (1783), 4 Bro. Parl. Cas. 38; *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, H. L.; *Finden v. Stephens* (1846), 2 Ph. 142; *Foster v. Elsley* (1881), 19 Ch. D. 518.

(*n*) *Re Pitt Rivers, Scott v. Pitt Rivers*, [1902] 1 Ch. 403, C. A.

(*o*) *Wright v. Wilkin* (1862), 2 B. & S. 232, 259, Ex. Ch.; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512; *A.-G. v. Wax Chandlers' Co. (Master, Wardens, etc.)* (1873), L. R. 6 H. L. 1; *Cunningham v. Foot* (1878), 3 App. Cas. 974, per Lord O'HAGAN, at p. 995; *Re Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431, C. A., per FRY, J., at p. 436; *Re Richardson, Shulldham v. Royal National Lifeboat Institution* (1887), 56 L. J. (CH.) 784; *Re Richardson, Richardson v. Richardson*, [1904] 2 Ch. 777, per JOYCE, J., at p. 780.

(*p*) *Kingham v. Lee* (1846), 15 Sim. 396 (not to commit waste); *Re Richardson, Richardson v. Richardson, supra* (to provide a home for a lunatic if the latter chose).

(*q*) *Hodge v. Churchward* (1847), 16 Sim. 71; *Cunningham v. Foot, supra*, at pp. 990, 995, 1002.

(*r*) *King v. Denison* (1813), 1 Ves. & B. 260; *Messenger v. Andrews* (1828), 4 Russ. 478; *Harrison v. Duignan* (1842), 2 Dr. & War. 295, 304; *Hughes v. Kelly* (1843), 3 Dr. & War. 482; *Francis v. Grover* (1845), 5 Hare, 39, 49 *et seq.*; *Charitable Donations and Bequests (Commissioners) v. Wybrants* (1845), 2 Jo. & Lat. 182; *Hodge v. Churchward* (1847), 16 Sim. 71; *Jacquet v. Jacquet* (1859), 27 Beav. 332; *Dickenson v. Teasdale* (1862), 1 De G. J. & Sm. 52, C. A.; *Williams v. Arkle* (1875), L. R. 7 H. L. 606; *Cunningham v. Foot, supra*, per Lord O'HAGAN, at pp. 991 *et seq.*; and see title CHARITIES, Vol. IV., pp. 170 *et seq.*

(*s*) *Ball v. Harris* (1839), 4 My. & Cr. 264; *Charitable Donations and*

(*t*) For note (*t*) see p. 17, *post*.

**24.** Where a person, in terms which import a duty to exercise the power, is empowered to apply property for the benefit of such members of a specified class of beneficiaries as he in his discretion thinks fit, and there is no gift over in the event of his not exercising the power, a trust is created in favour of the class; and the whole class, if and so far as the trustee does not exercise his discretion, takes the property in equal shares (*a*). The power does not, however, assume the nature of a trust if there is a gift over in the event of its not being exercised (*b*), or if the language does not intimate an intention to make the exercise of the power a duty, or to benefit the class otherwise than by the exercise of the power (*c*).

A power given by will to trustees to confer a benefit on a person in an event which virtually takes place in the testator's lifetime may confer the benefit on that person (*d*).

SECT. 2.  
Express  
Trusts.

Power in the  
nature of a  
trust.

(iii.) *Designation of Subject-matter or Property.*

**25.** In order to raise a trust, the property to be affected by it must be either expressly designated (*e*) or so defined that it is capable of being ascertained (*f*). Otherwise the trust is void for uncertainty (*g*).

Certainty  
of subject-  
matter.

*Bequests (Commissioners) v. Wybrants* (1845), 2 Jo. & Lat. 182; *Hunt v. Bateman* (1848), 10 I. Eq. R. 360; *Jacquet v. Jacquet* (1859), 27 Beav. 332; *Saltmarsh v. Barrett* (1861), 3 De G. F. & J. 279, C. A.; *Barrs v. Fewkes* (1864), 2 Hem. & M. 60, *per* WOOD, V.-C., at p. 65.

(*t*) *Dawson v. Clarke* (1811), 18 Ves. 247, *per* Lord ELDON, L.C., at p. 257; *Barrs v. Fewkes*, *supra*, at pp. 65, 66; and see note (*m*), p. 63, *post*.

(*a*) *Doyley v. A.-G.* (1735), 4 Vin. Abr. 485; *Longmore v. Broom* (1802), 7 Ves. 124; *Brown v. Higgs* (1803), 8 Ves. 561, affirmed (1813), 8 Ves. 576, H. L.; *Cruwys v. Colman* (1804), 9 Ves. 319; *Cole v. Wade* (1807), 16 Ves. 27, varied on appeal, *sub nom. Walter v. Maunde* (1815), 19 Ves. 424; *Parsons v. Baker* (1812), 18 Ves. 476; *Birch v. Wade* (1814), 3 Ves. & B. 198; *Grant v. Lynam* (1828), 4 Russ. 292; *Grieveson v. Kirsopp* (1838), 2 Keen, 653; *Burrough v. Philcox*, *Lacey v. Philcox* (1840), 5 My. & Cr. 73; *Penny v. Turner* (1848), 2 Ph. 493; *Little v. Neil* (1862), 10 W. R. 592; *Re Caplin's Will* (1865), 2 Drew. & Sm. 527; *Butler v. Gray* (1869), 5 Ch. App. 26; *Carthew v. Enraght* (1872), 26 L. T. 834; *Re Susanni's Trusts* (1877), 47 L. J. (CH.) 65; and see titles CHARITIES, Vol. IV., p. 150; EQUIT, Vol. XIII., pp. 69, 70. Equal division is made on the principle that "equality is equity" (*Doyley v. A.-G.*, *supra*).

(*b*) *Re Brierley*, *Brierley v. Brierley* (1894), 43 W. R. 36, C. A. It is immaterial that the gift over is void for remoteness (*Re Sprague, Miley v. Cape* (1880), 43 L. T. 236); but a mere gift of residue is not such a gift over as will prevent the class taking if the power is not exercised (*Re Brierley*, *Brierley v. Brierley*, *supra*).

(*c*) *Marlborough (Duke) v. Godolphin (Lord)* (1750), 2 Ves. Sen. 61; *Crossling v. Crossling* (1794), 2 Cox, Eq. Cas. 396; *Carberry v. McCarthy* (1881), 7 L. R. Ir. 328; *Re Weekes' Settlement*, [1897] 1 Ch. 289. As to the distinction between trusts and powers, see, further, title POWERS, Vol. XXIII., p. 69; Farwell on Powers, p. 9; *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408.

(*d*) *Tweedale v. Tweedale* (1878), 7 Ch. D. 633.

(*e*) *Sprange v. Barnard* (1789), 2 Bro. C. C. 585, 587, 588.

(*f*) *Stead v. Mellor* (1877), 5 Ch. D. 225; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, C. A. A trust of dividends for a period which is incapable of being ascertained cannot be upheld (*Re Moore, Prior v. Moore*, [1901] 1 Ch.

(*g*) For note (*g*) see p. 18, *post*.



## SECT. 2.

**Express Trusts.**

Trust of residue of a fund.

Trust of future fund.

Certainty of objects.

A trust of the residue of a fund after a gift thereof of an undefined amount for an object which for any cause fails will be an effectual trust of the whole fund (*h*).

**26.** A trust may be declared of a fund contingently on the fund subsequently coming into existence (*i*).

(iv.) *Designation of Objects or Persons to be Benefited.*

**27.** Except where the objects are charitable, in which case some latitude is allowed (*j*), the objects or persons to be benefited by a trust must be expressly designated (*k*), or so defined that they are capable of being ascertained (*l*). Otherwise the trust is void for uncertainty (*m*), and there is a resulting trust (*n*).

936). Where a fund is given in trust as to a part, the amount of which is capable of being ascertained, for an object which fails, and as to the remainder for another object, the gift is held to fail as to the part but to be good as to the remainder (*Mitford v. Reynolds* (1842), 1 Ph. 185; *Re Vaughan, Vaughan v. Thomas* (1886), 33 Ch. D. 187; and in the case of charitable trusts, see title CHARITIES, Vol. IV., pp. 148 *et seq.*). As to a trust of a sum secured by a promissory note or deposit of title deeds, see note (*f*), p. 12, *ante*.

(*g*) *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; and see p. 15, *ante*, p. 27, *post*.

(*h*) *Fisk v. A.-G.* (1867), L. R. 4 Eq. 521; *Hunter v. Bullock* (1872), L. R. 14 Eq. 45; *Dawson v. Small* (1874), L. R. 18 Eq. 114; *Re Williams* (1877), 5 Ch. D. 735; *Re Birkett* (1878), 9 Ch. D. 576; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715; and see title CHARITIES, Vol. IV., pp. 149 *et seq.* Formerly such a gift was held to be void for uncertainty (*Chapman v. Brown* (1801), 6 Ves. 404; *A.-G. v. Hinxman* (1820), 2 Jac. & W. 270; *Cramp v. Playfoot* (1858), 4 K. & J. 479; *Limbrzy v. Gurr* (1819), Madd. & G. 151; *Fowler v. Fowler* (1864), 33 Beav. 616).

(*i*) *Woods v. Woods* (1836), 1 My. & Cr. 401.

(*j*) *Morice v. Durham (Bishop)* (1805), 10 Ves. 522, 541 *et seq.*; see title CHARITIES, Vol. IV., pp. 108 *et seq.*, 147, 153, 155, 156; but see note (*m*), *infra*.

(*k*) *Sprange v. Barnard* (1789), 2 Bro. C. C. 585, 587, 588; *Morice v. Durham (Bishop)*, *supra*, at pp. 542, 543; *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866.

(*l*) *Wright v. Atkyns* (1823), Turn. & R. 143, *per* Lord ELDON, L.C., at pp. 158, 159; *Stead v. Mellor* (1877), 5 Ch. D. 225; and see p. 27, *post*. A trust for a person's family is sufficiently definite (*Grant v. Lynam* (1828), 4 Russ. 292; *Woods v. Woods, supra*); and so is a trust of a sum whereout to satisfy the judgment, if any, in a contemplated suit, or if none, then on specified trusts (*Portugal (King) v. Russell* (1861), 3 Giff. 287). As to where a trust is created by words of reference to another declared trust, see *Hindle v. Taylor* (1855), 5 De G. M. & G. 577; *Boyd v. Boyd* (1863), 9 L. T. 166; *Heasman v. Pearse* (1870), L. R. 11 Eq. 522, 538; *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258; *Sweeting v. Prideaux* (1876), 2 Ch. D. 413; *Re Berners, Berners v. Calvert* (1892), 67 L. T. 849; *Re Marke Wood, Wodehouse v. Wood*, [1913] 2 Ch. 574, C. A.; *Re Beaumont, Bradshaw v. Packer*, [1913] W. N. 259, C. A.; *Re Fraser, Ind v. Fraser*, [1913] 2 Ch. 224.

(*m*) *Morice v. Durham (Bishop)*, *supra*, at p. 543; *Buckle v. Bristow* (1864), 10 Jur. (N. S.) 1095; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Re Hetley, Hetley v. Hetley, supra*; *Te Teira Te Paea v. Te Roera Tareha*, [1902] A. C. 56, P. C. A trust for such benevolent purposes, or other purposes, not being exclusively charitable, as the trustees may determine (*James v. Allen* (1817), 3 Mer. 17; *Ellis v. Selby* (1836), 1

(*n*) For note (*n*) see p. 19, *post*.



28. Where several objects are designated, a discretion may be given to the trustees as to which shall be benefited and in what proportions (o).

29. Trustees may be given a discretion as to the mode in which a designated object or person shall be benefited (p). If they fail to exercise the discretion through inability to do so or otherwise, the object or person nevertheless takes under the trust (a).

30. Trustees may be given power to vary the object or person to be benefited by the trust (b). Where they have an absolute discretion as to the conversion of the trust property either from realty into personality or from personality into realty, their exercise or non-exercise of the discretion may affect the respective rights to the trust property of the real or personal representatives of a beneficiary who dies while the trust is subsisting (c).

SECT. 2.

**Express Trusts.**

Discretion of trustees as to objects.

Discretion as to mode of benefit.

Power of trustees to vary object.

My. & Cr. 286, C. A.; *Re Hewitt's Estate, Gateshead Corporation v. Hudspeth* (1883), 53 L. J. (CH.) 132; *Blair v. Duncan*, [1902] A. C. 37; *Re Gardom, Le Page v. A.-G.* (1913), 108 L. T. 955, reversed on another point, [1914] 1 Ch. 663, C. A.), or for such charitable or religious institutions as the trustees may select (*Grimond (or Macintyre) v. Grimond*, [1905] A. C. 124, 603), or "for missionary purposes" (*Scott v. Brownrigg* (1881), 9 L. R. Ir. 246), or "for the Lord's work" (*Re King's Estate* (1888), 21 L. R. Ir. 273), or of money "to be given in private charity" (*Ommaney v. Butcher* (1823), Turn. & R. 260), is void for uncertainty. A trust is void where the directions are so vague that it cannot be said what the testator meant, so that he has in effect given to someone else power to make a will for him instead of making a will for himself (*Grimond (or Macintyre) v. Grimond*, *supra*, per Lord HALSBURY, L.C., at p. 126); but a trust for such charities and other public purposes as lawfully may be in a named parish is good (*Dolan v. Macdermot* (1868), 3 Ch. App. 676). It seems to follow from *Gott v. Nairne* (1876), 3 Ch. D. 278, that a trust of a sum of money wherewith to buy an advowson and present "such fit and proper person as" the trustees may in their uncontrolled discretion select, is valid. See also title CHARITIES Vol. IV., pp. 147, 148.

(n) *Morice v. Durham (Bishop)* (1805), 10 Ves. 522, per Lord ELDON, L.C., at pp. 537, 543: see pp. 49 *et seq.*, *post*.

(o) *Page v. Way* (1840), 3 Beav. 20; *Re Douglas, Obert v. Barrow* (1887), 35 Ch. D. 472, C. A.; *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443, C. A., per COTTON, L.J., at p. 451; *Smith v. Cock*, [1911] A. C. 317, P. C. As to where the trustees do not exercise the discretion entrusted to them, see p. 17, *ante*. As to when trustees for charitable objects may exercise a choice or discretion in respect of the objects, see title CHARITIES, Vol. IV., pp. 134, 147, 150, 274.

(p) *Livesey v. Harding, Livesey v. Beckett* (1830), Tam. 460; *Godden v. Crouhurst* (1842), 10 Sim. 642, per SHADWELL, V.-C., at p. 656; *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324. As to the exercise by trustees of powers of advancement for the benefit of *cestuis que trust*, see pp. 28, 29, *post*; title INFANTS AND CHILDREN, Vol. XVII., pp. 92, 93.

(a) *Gough v. Bult* (1847), 17 L. J. (CH.) 401, C. A.; see p. 17, *ante*. Where trustees are bound to apply the income of property for the benefit of a person during his life, a discretion vested in them as to the mode of applying it does not prevent its passing on his bankruptcy to his trustee in bankruptcy (*Green v. Spicer* (1830), 1 Russ. & M. 395); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 149.

(b) *Christ's Hospital v. Grainger* (1849), 1 Mac. & G. 460.

(c) *Curling v. May* (1734), cited in *Guidot v. Guidot* (1745), 3 Atk. 254, 255; *Walker v. Denne* (1793), 2 Ves. 170; *Amler v. Amler* (1798), 3 Ves. 583; *Wheldale v. Partridge* (1803), 8 Ves. 227; *Van v. Barnett* (1812), 19 Ves. 102; *Polley v. Seymour* (1837), 2 Y. & C. (EX.) 708; *Smithwick v. Smithwick* (1861), 12 I. Ch. R. 181.

## SECT. 2.

Express  
Trusts.

Discretion as  
to wasting  
securities.

**31.** Trustees may be given a discretion as to the retention or conversion of trust property of a wasting nature (*d*). In that case the mode in which they exercise their discretion may affect the respective interests of persons beneficially interested in the trust property for life and in remainder (*e*).

(*v.*) *Complete Constitution of a Trust.*

Immaterial  
omissions.

**32.** A trust may be completely constituted without communication thereof to the trustee or to the *cestui que trust* (*f*).

A trust is not affected by the fact that no trustee is named, or by the fact that the trustee who is named either refuses or is unable, through death or otherwise, to act (*g*).

A trust of property does not depend on the immediate existence of a legal estate in a trustee to support it (*h*).

A settlement of a policy of assurance is complete without notice to the assurance office (*i*), and a settlement of an equitable interest in stock is complete without notice to the trustees (*k*).

Failure to  
transfer  
immaterial.

**33.** The fact that the creator of a trust does not transfer to the trustee the legal estate in the trust property which he subsequently gets in is immaterial (*l*). Similarly, an assignment of debts to

(*d*) *Wrey v. Smith* (1844), 14 Sim. 202; *Mackie v. Mackie* (1845), 5 Hare, 70; *Sparling v. Parker* (1846), 9 Beav. 524; *Murray v. Glasse* (1853), 17 Jur. 816; *Johnstone v. Moore* (1858), 4 Jur. (N. S.) 356; *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; and see pp. 30 *et seq.*, 128, 129, *post*. Trustees who exercise the discretion by postponing conversion will be presumed to do so properly, and are not bound to exercise the discretion in writing or preserve evidence of their exercise of it (*Re Oddy, Connell v. Oddy* (1910), 104 L. T. 128, 131).

(*e*) *Murray v. Glasse*, *supra*; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654, C. A.; *Gray v. Siggers* (1880), 15 Ch. D. 74; *Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42, C. A.; *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22. But the intention of the creator of the trust that the interests of the parties shall be affected by the exercise of the discretion must be clear (*Green v. Britten* (1863), 1 De G. J. & Sm. 649, C. A.; *Re Sheldon, Nixon v. Sheldon* (1888), 39 Ch. D. 50; *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482).

(*f*) *Tate v. Leithead* (1854), Kay, 658; *Armstrong v. Timperon* (1871), 24 L. T. 275; *Middleton v. Pollock, Ex parte Elliott* (1876), 2 Ch. D. 104; *Standing v. Bowring* (1885), 31 Ch. D. 282, C. A., *per* LINDLEY, L.J., at p. 290; *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, C. A.; but see *Re Cozens, Green v. Brisley*, [1913] 2 Ch. 478.

(*g*) *Dickenson v. Teasdale* (1862), 1 De G. J. & Sm. 52, *per* Lord WESTBURY, L.C., at p. 59; *Siggers v. Evans* (1855), 5 E. & B. 367, *per* CROMPTON, J., at p. 374; and see pp. 24, 67, *post*.

(*h*) *A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at p. 225; and see p. 67, *post*. As to charitable trusts, see title CHARITIES, Vol. IV., p. 168; but see *Gravenor v. Hallum* (1767), Amb. 643, *per* Lord CAMDEN, L.C., at p. 644; and note (*i*), p. 6, *ante*.

(*i*) *Fortescue v. Barnett* (1834), 3 My. & K. 36; *Pearson v. Amicable Assurance Office* (1859), 27 Beav. 229; *Re King, Sewell v. King* (1879), 14 Ch. D. 179; *Justice v. Wynne* (1860), 12 I. Ch. R. 289, C. A.; but see *Ward v. Audland* (1845), 8 Beav. 201.

(*k*) *Donaldson v. Donaldson* (1854), Kay, 711; *Vogle v. Hughes* (1854), 2 Sm. & G. 18; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A., where the settlor retained the deed in his possession and subsequently destroyed it and made a will disposing of the property.

(*l*) *Gilbert v. Overton* (1864), 2 Hem. & M. 110; *Re King, Sewell v. King*, *supra*; *Nanney v. Morgan* (1887), 37 Ch. D. 341, C. A.

trustees is a complete constitution of the trust, although there is no assignment or delivery to them of the securities for the debts (*m*). The disposer must not, however, retain a control over the property which is inconsistent with an intention to create a trust (*a*).

SECT. 2.  
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SUB-SECT. 4.—*Secret Trusts.*

34. Where a person either under a legal instrument *inter vivos* or under a testamentary instrument is given property either absolutely or upon an indefinite trust, but there has been some parol or written undertaking or understanding between him and the disposer of the property, not clothed with the requisite formalities for creating a trust in law, that he will hold it in trust for some particular person or object, that trust, if it can take effect (*b*), is enforced in equity on the ground that his failure to perform it would be an act of fraud (*c*); if, on the other hand, the trust is for an object which is prohibited by law, the gift is void (*d*). Where, however, the intended trust, though not actually void in law, cannot take effect (*e*), or is not communicated to the donee, or is not assented to by the donee during the lifetime of the disposer, or, in the case of a transaction *inter vivos*, before the donee has otherwise lawfully dealt with the property, the following rules apply, namely:—(1) If the gift is to the donee ostensibly for his own benefit (*f*) he is regarded both in law and in equity as entitled to the property, so that if he applies it for the benefit of the object secretly indicated by the disposer, he does so as a voluntary gift from himself (*g*); and (2) if

Secret understanding with donee as to a trust.

(*m*) *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82, C. A.; compare *Parker v. Stones* (1868), 38 L. J. (CH.) 46.

(*a*) *Wheatley v. Purr* (1837), 1 Keen, 551.

(*b*) *Burney v. Macdonald* (1845), 15 Sim. 6.

(*c*) *Pary v. Juxon* (1669), 3 Rep. Ch. 21 [38]; *Crook v. Brooking* (1688), 2 Vern. 50; *Pring v. Pring* (1689), 2 Vern. 99; *Nab v. Nab* (1718), 10 Mod. Rep. 404; *Hutchins v. Lee* (1738), 1 Atk. 447; *Adlington v. Cann* (1744), 3 Atk. 141; *Drakeford v. Wilks* (1747), 3 Atk. 539; *Barrow v. Greenough* (1796), 3 Ves. 152; *Chamberlain v. Agar* (1813), 2 Ves. & B. 259; *Smith v. Attersoll* (1826), 1 Russ. 266; *Podmore v. Gunning* (1836), 7 Sim. 644; *Russell v. Jackson* (1852), 10 Hare, 204; *Tee v. Ferris* (1856), 2 K. & J. 357; *Carter v. Green* (1857), 3 K. & J. 591, per Wood, V.-C., at pp. 602, 603; *Moss v. Cooper* (1861), 1 John. & H. 352; *A.-G. v. Dillon* (1862), 13 I. Ch. R. 127, C. A.; *Jones v. Badley* (1868), 3 Ch. App. 362; *McCormick v. Grogan* (1869), L. R. 4 H. L. 82; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Riordan v. Banon* (1876), 10 I. R. Eq. 469; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Re King's Estate* (1888), 21 L. R. Ir. 273; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237; *Morrison v. M'Ferran*, [1901] 1 I. R. 360; *Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220, C. A.; *Re Gardom, Le Page v. A.-G.* (1913), 108 L. T. 955, reversed on another point, [1914] 1 Ch. 663, C. A. As to secret trusts for charities, see title CHARITIES, Vol. IV., pp. 143, 144.

(*d*) *Muckleston v. Brown* (1801), 6 Ves. 52; *Stickland v. Aldridge* (1804), 9 Ves. 516; *Russell v. Jackson*, *supra*; *Tee v. Ferris*, *supra*; *Springett v. Jennings* (1871), 6 Ch. App. 333; *Rowbotham v. Dunnett* (1878), 8 Ch. D. 430.

(*e*) *Burney v. Macdonald*, *supra*.

(*f*) *Wallgrave v. Tebbs* (1855), 2 K. & J. 313; *Moss v. Cooper*, *supra*; *Jones v. Badley*, *supra*; *McCormick v. Grogan*, *supra*; *Rowbotham v. Dunnett*, *supra*; *Geddis v. Semple*, [1903] 1 I. R. 73, C. A.

(*g*) *Lomax v. Ripley* (1855), 3 Sm. & G. 48, 78; *Geddis v. Semple*, *supra*.



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the gift is to the donee ostensibly on an indefinite trust (*h*) or on terms which in the circumstances create a resulting trust in favour of the disposer (*i*), he holds the property in trust for the disposer or the heir or next-of-kin or residuary devisees or legatees of the disposer according to the circumstances and the nature of the property.

Acceptance  
by tacit  
acquiescence.

**35.** A person accepts a secret trust if he silently acquiesces in it when it is communicated to him (*k*).

Gift to several  
on secret  
under-  
standing  
with one.

**36.** Where the property is given to more than one on an undertaking or understanding with one of them that it shall be held in trust for some particular person or object, the question whether the interest of the other donee under the gift is affected depends upon the time when the undertaking or understanding was entered into. Both donees are bound if the undertaking or understanding was entered into on behalf of both previously to or at the time of the making of the gift, although it was without the knowledge or consent of the other donee (*l*); but it is otherwise if the undertaking or understanding is entered into by one only after the gift has been made (*m*). The fact of the gift being to the two as tenants in common, or otherwise separately, strengthens the case in favour of the interest of the other not being affected (*n*).

SUB-SECT. 5.—*Executory Trusts.*

Construction.

**37.** An executory trust, where the declaration of trust is in the form of a direction to create by a subsequent instrument certain trusts not defined with absolute precision by the disposer (*o*), is not, like an executed trust (*p*), construed according to the legal effect of the language used, but is construed so as best to give effect to the apparent intention of the disposer (*q*).

(*h*) *Johnson v. Ball* (1851), 5 De G. & Sm. 85; *Re Biddulph, Ex parte Norris* (1869), 4 Ch. App. 280; *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531.

(*i*) *Brick v. Blagrove* (1755), Amb. 264.

(*k*) *Paine v. Hall* (1812), 18 Ves. 475; *Lomax v. Ripley* (1855), 3 Sm. & G. 48, per STUART, V.-C., at p. 73; *Tee v. Ferris* (1856), 2 K. & J. 357, 363, 364; *Rowbotham v. Dunnitt* (1878), 8 Ch. D. 430; *Re King's Estate* (1888), 21 L. R. Ir. 273, per MONROE, J., at p. 277.

(*l*) *Russell v. Jackson* (1852), 10 Hare, 204; *Moss v. Cooper* (1861), 1 John. & H. 352, per WOOD, V.-C., at p. 367; *Re King's Estate, supra*, per MONROE, J., at p. 278; *Re Stead, Witham v. Andrew*, [1900] 1 Ch. 237, per FARWELL, J., at p. 241; *Geddis v. Semple*, [1903] 1 I. R. 73, C. A.

(*m*) *Moss v. Cooper, supra*, at p. 367; *Re King's Estate, supra*, at p. 278; *Re Stead, Witham v. Andrew, supra*, at p. 241; *Geddis v. Semple, supra*.

(*n*) *Tee v. Ferris, supra*; *Rowbotham v. Dunnitt, supra*; *Geddis v. Semple, supra*.

(*o*) See p. 7, *ante*.

(*p*) See pp. 12 *et seq.*, *ante*.

(*q*) *Fearne, Contingent Remainders*, 10th ed., 1844, Vol. I., pp. 136 *et seq.*; *Leonard v. Sussex (Earl)* (1705), 2 Vern. 526; *Papillon v. Voice* (1728), 2 P. Wms. 471; *Glenorchy (Lord) v. Bosville* (1733), Cas. temp. Talb. 3; *Wright v. Pearson* (1758), 1 Eden, 119; *Austen v. Taylor* (1759), 1 Eden, 361, 366; *Lecky v. Knox* (1809), 1 Ball & B. 210, 215; *Blackburn v. Stables* (1814), 2 Ves. & B. 367; *Jervoise v. Northumberland (Duke)* (1820),



38. An executory trust may be declared for an object not at the time in existence (*r*).

SECT. 2.  
Express  
Trusts.

39. Where the disposer has clearly contemplated a succession of beneficial interests in the trust property, or a strict settlement, equity either directs the limitation of life interests with remainders in tail or in fee simple or absolutely, as the case may be, notwithstanding that the words used in declaring the trust legally imply the immediate limitation to the first beneficiaries of an estate in fee simple (*s*) or in tail (*t*), or an absolute interest (*a*); or otherwise directs a strict settlement so far as the lawful methods of conveyancing will admit (*b*).

Object need  
not be *in esse*.  
Limitation  
of interests.

40. In directing a settlement to carry out an executory trust, equity modifies any inapt provisions in the trust as defined by the disposer (*c*).

Modification  
of inapt  
provisions.

41. Where the limitations directed by the disposer, if construed according to their legal effect, would create an illegal perpetuity (*d*), equity, in the case of an executory trust, directs such a limitation of interests as shall most closely approximate to his expressed intention without infringing the rule against perpetuities (*e*).

Limitation  
*cy près* to  
prevent  
illegal  
perpetuity.

1 Jac. & W. 559; *McGuire v. Scully* (1829), Beat. 370, 378; *Stonor v. Curwen* (1832), 5 Sim. 264; *Phillips v. James* (1865), 13 W. R. 934, C. A.; *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543; *Cogan v. Duffield* (1876), 2 Ch. D. 44, C. A.; *Hastie v. Hastie* (1876), 2 Ch. D. 304, C. A.; *Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274, C. A.; *Nash v. Allen* (1889), 42 Ch. D. 54; *Re Ballance, Ballance v. Lanphier* (1889), 42 Ch. D. 62. Where the assistance of the trustees, which is ultimately the assistance of the court of equity having jurisdiction in the matter, is necessary to complete the limitations expressed in the declaration of trust, the fact that the limitations were not completely declared by the disposer is sufficient evidence of his intention that they should be further modelled; but where they have been completely declared by the disposer, there is no authority for interfering and making them different from what they would be at law (*Austen v. Taylor* (1759), 1 Eden, 361, *per* HENLEY, Lord Keeper, at pp. 368, 369).

(*r*) *A.-G. v. Downing (Lady)* (1769), Amb. 550, 571, 572.

(*s*) *White v. Briggs* (1848), 2 Ph. 583.

(*t*) *Jones v. Langton* (1698), 1 Eq. Cas. Abr. 392; *Leonard v. Sussex (Earl)* (1705), 2 Vern. 526; *Bagshaw v. Spencer* (1748), 1 Wil. 238; *Dod v. Dod* (1755), Amb. 274; *Stanley v. Lennard* (1758), 1 Eden, 87, 95; *Bastard v. Proby* (1788), 2 Cox, Eq. Cas. 6; *Thompson v. Fisher* (1870), L. R. 10 Eq. 207. A direction to trustees to settle upon issue in tail male was held not to exclude limitations to daughters (*Trevor v. Trevor* (1847), 1 H. L. Cas. 239).

(*a*) *Stonor v. Curwen*, *supra*; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540.

(*b*) *Hopkins v. Hopkins* (1739), West temp. Hard. 606, *per* Lord HARDWICKE, L.C., at p. 625. As to the similar construction of marriage articles and testamentary directions for a settlement, see title SETTLEMENTS, Vol. XXV., pp. 538 *et seq.* The costs of investing a specified sum in land to be settled is deducted from the amount directed to be so invested (*Gwyther v. Allen* (1842), 1 Haro, 505).

(*c*) *Re Ballance, Ballance v. Lanphier*, *supra*, *per* KAY, J., at p. 65.

(*d*) *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; see title PERPETUITIES, Vol. XXII., pp. 295, 300 *et seq.*

(*e*) *Humberston v. Humberston* (1717), 1 P. Wms. 332; *Lyddon v. Ellison*

## SECT. 2.

**Express Trusts.**

Addition of  
ancillary  
trusts and  
powers.

Trusts, when  
valid.

**42.** In creating the trusts directed by the disposer, equity directs the insertion of ancillary trusts and powers not expressly contemplated by him (*f*).

SUB-SECT. 6.—*Considerations Affecting the Validity of Trusts.*

**43.** A trust in order to be valid must not only be effectually created, but must also conform to the principles of law which regulate the disposition of property.

The question whether a trust is lawful depends on (1) whether it is created in good faith; (2) whether the disposer can by law affect with the trust the property or subject-matter to which it is annexed; and (3) whether the object or person in whose favour it is created can by law be benefited by it. If a trust fails in any one of these particulars it is illegal and void (*g*).

Property  
capable of  
being affected  
with a trust.

**44.** Any property or interest in property which a person can at law or in equity transfer or assign, or dispose of *inter vivos*, or by a testamentary instrument, can be affected by him with a trust by an instrument *inter vivos* or by a testamentary instrument (*h*).

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(1854), 19 Beav. 565; *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332. But if the trust is executed, it is void for remoteness (*Blagrove v. Hancock* (1848), 16 Sim. 371; *Re Richardson, Parry v. Holmes, supra*).

(*f*) *Stamford (Earl) v. Hobart* (1711), 3 Bro. Parl. Cas. 31; *Horne v. Barton* (1815), 19 Ves. 398; *Brewster v. Angell* (1820), 1 Jac. & W. 625; *Elton v. Elton* (No. 2) (1860), 27 Beav. 634; *Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274, C. A. (restraint on anticipation). Powers of sale and exchange are inserted where no contrary intention is indicated (*Elton v. Elton* (No. 2), *supra*; *Wise v. Piper* (1880), 13 Ch. D. 848); and for the purposes of sale the trustees are held to be trustees under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts (*Re Garnett Orme and Hargreave's Contract* (1883), 25 Ch. D. 595).

(*g*) Trusts are valid or void on the same principles as legal estates (*Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 195; and see pp. 25 *et seq.*, 57, 58, *post*). But as to objects in whose favour a legal disposition cannot be made but a valid trust can be created, see p. 25, *post*. The assurance of the property to a trustee who cannot legally hold it does not invalidate the trust (*Sonley v. Clockmakers' Co. (Master etc.)* (1780), 1 Bro. C. C. 80).

(*h*) Trusts and legal estates are governed by the same rules (Bac. Abr. 251, tit. Uses and Trusts (A); *Burgess v. Wheate, A.-G. v. Wheate, supra*). As to the inalienability of real property granted by the Crown or Parliament as a reward for distinguished public services, see title GIFTS, Vol. XV., p. 408. Chattels, or an interest in chattels, can in some cases be disposed of in equity when not assignable at law (*Joseph v. Lyons* (1884), 15 Q. B. D. 280, C. A., *per* BRETT, M.R., at p. 284; *Hallas v. Robinson* (1885), 15 Q. B. D. 288, C. A., *per* BAGGALLAY, L.J., at p. 292 (future goods)); see title PERSONAL PROPERTY, Vol. XXII., p. 410. A life interest with remainders cannot be created in live stock or consumable articles (*Randall v. Russell* (1817), 3 Mer. 190; *Andrew v. Andrew* (1845), 1 Coll. 686, 690; *Twining v. Powell* (1845), 2 Coll. 262, 268; *Phillips v. Beal* (No. 1) (1862), 32 Beav. 25; *Cockayne v. Harrison* (1872), L. R. 13 Eq. 432, *per* Lord ROMILLY, M.R., at p. 434), except where they form part of the stock in trade of a business (*Groves v. Wright* (1856), 2 K. & J. 347; *Phillips v. Beal* (No. 1), *supra*; *Cockayne v. Harrison, supra*; *Myers v. Washbrook*, [1901] 1 K. B. 360). As to trusts of heirlooms and other chattels settled with realty, see title SETTLEMENTS, Vol. XXV., pp. 703 *et seq.*

45. A trust can be created in favour of any person or object to which a gift can in law be given direct (i). A trust can also be created in favour of a lawful object to which a gift cannot be directly given by reason of there being no hand to receive it (k). Thus, a trust for the benefit of animals serviceable to man is legal (l), though a trust for wild animals is not (m). Similarly, a trust to erect a monument, and keep it in repair for a period not exceeding some specified life or lives and twenty-one years afterwards, is a legal trust (n).

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Express  
Trusts.Lawful  
objects of  
a trust.

46. Trusts of the nature of executory devises and corresponding trusts of personal property, including chattels real, are valid within the same limits of perpetuity as the law prescribes with respect to executory devises (o). Equitable remainders and reversions and future interests can be barred and destroyed in the same manner and by the same process as legal estates of the same description (p).

Trusts  
analogous to  
executory  
devises.

47. Where the creation of a trust is made for a fraudulent purpose or otherwise than in good faith, or is procured by misrepresentation, fraud, or other undue means, the trust is voidable in the same manner as a direct assurance which is executed in similar circumstances (q).

Fraudulent  
trusts.

(i) Bac. Abr. 251, tit. Uses and Trusts (A); *Burgess v. Wheate*, A.-G. v. *Wheate* (1759), 1 Eden, 177, 195; and see pp. 9, *ante*, 26, 27, *post*.

(k) *Re Dean, Cooper-Dean v. Stevens* (1889), 41 Ch. D. 552, *per* NORTH, J., at p. 556. A trust is recognised in equity notwithstanding that there is no *cestui que trust* who can enforce it (*ibid.*; and see *Pettingall v. Pettingall* (1842), 11 L. J. (CH.) 176; *Gott v. Nairne* (1876), 3 Ch. D. 278). An advowson may be held in trust for the inhabitants of the parish; see title ECCLESIASTICAL LAW, Vol. XI., pp. 579, 580. As to trusts for charitable and public purposes, see pp. 18, 19, *ante*; title CHARITIES, Vol. IV., pp. 108 *et seq.*, 114 *et seq.*, 141 *et seq.*

(l) *Pettingall v. Pettingall*, *supra*; *Mitford v. Reynolds* (1848), 16 Sim. 105; *London University v. Yarrow* (1857), 1 De G. & J. 72, C. A., *per* Lord CRANWORTH, L.C., at pp. 79, 80; *Hickie v. Ross* (1872), L. R. 14 Eq. 141; *Re Douglas, Obert v. Barrow* (1887), 35 Ch. D. 472, C. A.; *Re Dean, Cooper-Dean v. Stevens*, *supra*; *Armstrong v. Reeves* (1890), 25 L. R. Ir. 325; *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; *Re Cranston, Webb v. Oldfield*, [1898] 1 I. R. 431, C. A.; *Re Howard* (1908), *Times*, 30th October; *Re Jackson, Bell v. Adlam* (1910), *Times*, 11th June; and see title CHARITIES, Vol. IV., p. 116.

(m) *A.-G. v. Whorwood, Whorwood v. University College, Oxford* (1750), 1 Ves. Sen. 534, 536.

(n) *Mellick v. Asylum (President and Guardians), Asylum (President and Guardians) v. Mellick* (1821), Jac. 180, *per* PLUMER, M.R., at pp. 183, 184; *Adnam v. Cole* (1843), 6 Beav. 353; *Trimmer v. Danby* (1856), 2 Jur. (N. S.) 367; *Re Dean, Cooper-Dean v. Stevens*, *supra*, *per* NORTH, J., at pp. 556, 557; and see titles BURIAL AND CREMATION, Vol. III., pp. 433, 434; CHARITIES, Vol. IV., pp. 118, 119.

(o) *Fearne, Contingent Remainders*, 10th ed. (1844), Vol. I., p. 430, note (f); and see *ibid.*, pp. 399 *et seq.*; *Norfolk's (Duke) Case* (1682), 3 Cas. in Ch. 1, H. L., *per* Lord NOTTINGHAM, L.C., at pp. 31 *et seq.*; *A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at p. 16; and see titles PERSONAL PROPERTY, Vol. XXII., pp. 413 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 231 *et seq.*; WILLS, pp. 526, 722, 723, *post*.

(p) *Brydges v. Brydges* (1796), 3 Ves. 120, 127; *Burnaby v. Griffin* (1796), 3 Ves. 266.

(q) See titles CONTRACT, Vol. VII., pp. 358, 359, 364, note (c); EQUITY, Vol. XIII., pp. 13 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES,



## SECT. 2.

**Express Trusts.**

Charitable and public trusts.

Useless trusts.

Immoral and illegal trusts.

Discretionary trusts.

**48.** Trusts for charities and for public purposes are subject to restrictions, the non-observance of which, in any case, renders the trust void or voidable (*r*).

**49.** A trust for a useless purpose is void (*s*).

**50.** A trust is illegal and cannot be enforced in equity if it is created for an object or purpose in favour of which a direct gift or a contract cannot be enforced in law on the ground of being immoral or otherwise contrary to public policy or illegal (*t*).

**51.** A discretionary trust for a variety of objects or purposes, some legal and some illegal, in the disjunctive or alternative according as the trustees may select, is valid so far as respects the legal objects or purposes, and the trustees may exercise their discretionary selection in respect of the objects or purposes which are legal, but they cannot validly do so in respect of those which are illegal (*u*). The alternative discretion in favour of the legal objects must, however, be clearly conferred (*w*). If the trust is expressly for certain objects and purposes, some legal and some illegal, the question whether the trust is wholly valid or wholly void, or is partly valid and partly void, depends upon the particular form of the trust (*x*). If the portion of the property which would have had to be applied to the illegal purpose, supposing it to have been legal, has been prescribed or can be ascertained, the trust, so far as relates to the legal purpose, will be upheld (*y*). Where, therefore, it is in the form of a trust for a legal purpose of so much of the

Vol. XV., pp. 83 *et seq.*, 103 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*

(*r*) See title CHARITIES, Vol IV., pp. 141 *et seq.*

(*s*) *Brown v. Burdett* (1882), 21 Ch. D. 667 (where a house devised upon trust to be practically blocked up for twenty years was held to have been undisposed of during that period).

(*t*) *Hamilton (Duke) v. Waring* (1820), 2 Bli. 196, 209, H. L.; *Benyon v. Nettlefold* (1850), 3 Mac. & G. 94; *Thompson v. Thomas* (1891), 27 L. R. Ir. 457; *Morley v. Rennoldson*, [1895] 1 Ch. 449, C. A.; *Phillips v. Probyn*, [1899] 1 Ch. 811. As to gifts for superstitious uses and purposes, see title CHARITIES, Vol. IV., pp. 120 *et seq.*; as to gifts which are void as being for purposes contrary to public policy, see *ibid.*, pp. 122, 123; as to contracts which are void for illegality, see title CONTRACT, Vol. VII., pp. 390 *et seq.*; as to trusts in restraint of alienation, see pp. 29, 30, 37, 38, *post*; and title PERSONAL PROPERTY, Vol. XXII., p. 411. As to where the disposer cannot take advantage of the illegality of the trust to claim a resulting trust for himself, see *Symes v. Hughes* (1870), L. R. 9 Eq. 475, *per* Lord ROMILLY, M.R., at p. 479; *Groves v. Groves* (1829), 3 Y. & J. 163; and pp. 57, 58, *post*.

(*u*) *Sorresby v. Hollins* (1740), 9 Mod. Rep. 221; *Grimmett v. Grimmett* (1754), Amb. 210; *Faversham Corporation v. Ryder* (1854), 5 De G. M. & G. 350, C. A.; *London University v. Yarrow* (1857), 1 De G. & J. 72, C. A.; *Carter v. Green* (1857), 3 K. & J. 591; *Lewis v. Allenby* (1870), L. R. 10 Eq. 668; *Re Piercy, Whitwham v. Piercy*, [1898] 1 Ch. 565, C. A., overruling *Johnston v. Swann* (1818), 3 Madd. 457, and *Baker v. Sutton* (1836), 1 Keen, 224, so far as inconsistent with *Lewis v. Allenby*, *supra*.

(*w*) *Re Clark, Husband v. Martin* (1885), 54 L. J. (CH.) 1080.

(*x*) *Chapman v. Brown* (1801), 6 Ves. 404, *per* GRANT, M.R., at pp. 410, 411.

(*y*) *Ibid.*, at p. 410; *Mitford v. Reynolds* (1842), 1 Ph. 185; *Re Rigley's Trust* (1866), 15 W. R. 190; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re Vaughan, Vaughan v. Thomas* (1886), 33 Ch. D. 187.



property as is not applied for the illegal purpose, and the legal purpose is charitable, it will attach to the whole of the property in favour of the legal charitable purpose (*a*). The same principle applies if the trust is for a legal purpose, with an illegal purpose as regards a portion of the property attached thereto (*b*). On the other hand, if the portion applicable to the illegal purpose has not been prescribed and cannot be ascertained, so that it is uncertain whether, if the illegal purpose could have been carried out, there would have remained any residue at all for the legal purpose, the whole trust is void (*c*).

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52. The objects of a trust, whether single or distributive or alternative, must be indicated with sufficient precision either specifically or generally (*d*). If they are left entirely to the discretion of the trustees, the trust is void for vagueness and uncertainty (*e*).

Trusts void  
for uncer-  
tainty.

53. The rules of law which render a disposition of property void for remoteness (*f*) apply to equitable remainders where the legal estate is vested in trustees (*g*).

Trusts void  
for per-  
petuity.

#### SUB-SECT. 7.—*Objects of Trusts.*

##### (i.) *In General.*

54. Trusts for public purposes are either (1) charitable (*h*), in which case they are governed by the law relating to charitable

Public trusts.

(*a*) *Fisk v. A.-G.* (1867), L. R. 4 Eq. 521; *Re Williams* (1877), 5 Ch. D. 735; *Re Birkett* (1878), 9 Ch. D. 576.

(*b*) *Hunter v. Bullock* (1872), L. R. 14 Eq. 45; *Dawson v. Small* (1874), L. R. 18 Eq. 114.

(*c*) *Chapman v. Brown* (1801), 6 Ves. 404, 410, 411; *Limbrey v. Gurr* (1819), Madd. & G. 151; *A.-G. v. Hinxman* (1820), 2 Jac. & W. 270; *Oramp v. Playfoot* (1858), 4 K. & J. 479; *Fowler v. Fowler* (1864), 33 Beav. 616; *Re Taylor, Martin v. Freeman* (1888), 58 L. T. 538, 542.

(*d*) *James v. Allen* (1817), 3 Mer. 17; *Baker v. Sutton* (1836), 1 Keen, 224, 233; *Scott v. Brownrigg* (1881), 9 L. R. Ir. 246, 256, 257; and see p. 18, *ante*.

(*e*) *Morice v. Durham (Bishop)* (1805), 10 Ves. 522; *James v. Allen, supra*; *Williams v. Williams, Williams v. Kershaw* (1835), 5 L. J. (Ch.) 84; *Blair v. Duncan*, [1902] A. C. 37; *Langham v. Peterson* (1903), 87 L. T. 744; and see pp. 17, 18, *ante*; title CHARITIES, Vol. IV., pp. 145 *et seq.*, 166. A trust for "such charitable or public purposes" as the trustee may think proper is void for uncertainty (*Blair v. Duncan, supra*). But a trust for such charitable purposes as the trustee may think proper is good (*Chapman v. Brown, supra, per GRANT, M.R.*, at p. 410; *Moggridge v. Thackwell* (1803), 7 Ves. 36). A trust in favour of a Roman Catholic archbishop with a desire that he should apply the property for parochial purposes in his diocese at his discretion is good; and a gift to a provincial of a monastic order for the purposes of a third order, the members of which are not bound by vows, is good, not being for a purpose illegal under the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7) (*Re Van Wart, Ramsay v. Bourne* (1911), *Times*, 17th February); but a trust that the archbishop should apply the property as he might judge most conducive to the good of religion is void for uncertainty (*Dunne v. Byrne*, [1912] A. C. 407, P. C.).

(*f*) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*; *Re Fane, Fane v. Fane*, [1913] 1 Ch. 404, C. A. As to trusts for accumulation of income, see title PERPETUITIES, Vol. XXII., pp. 370 *et seq.*

(*g*) *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, C. A.

(*h*) See title CHARITIES, Vol. IV., pp. 105 *et seq.*, 145 *et seq.*

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trusts (*i*), or (2) for public objects which are not of a charitable character (*k*), in which case, with certain exceptions, they must not infringe the law which restricts the creation of perpetuities (*l*).

Private trusts.

**55.** Trusts for private purposes may be created in any circumstances (*m*), but they most frequently occur in settlements and wills (*n*).

(ii.) *Limited Trusts for Individuals.*

Trusts for  
benefit of  
persons  
*sui juris*.

**56.** A trust of capital or income for the benefit in some special manner of a person who is *sui juris* (*o*) confers on him an absolute beneficial interest in the capital or income, as the case may be (*p*). If the trust in his favour is not limited to his life or some shorter period, it gives him (*q*), or, if he becomes bankrupt, his trustee in bankruptcy (*r*), the right to call for a transfer of the trust property.

Special or  
discretionary  
trusts of  
income.

**57.** A trust to apply the income of property for the benefit of a person or object in a special manner or in such manner as the trustees think fit is an absolute trust for that person or object (*s*).

(*i*) See title CHARITIES, Vol. IV., pp. 141 *et seq.*, 255 *et seq.*, 290 *et seq.*; *Re Charlesworth, Robinson v. Cleveland (Archdeacon)* (1910), 101 L. T. 908.

(*k*) See titles CHARITIES, Vol. IV., pp. 117 *et seq.*, 259; LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., pp. 200, 201, 210 *et seq.* As to the power of trustees of public trusts to act by a majority, see *Wilkinson v. Malin* (1832), 2 Cr. & J. 636; *Skinners' Co. v. Irish Society* (1838), 7 Beav. 593; *Fletcher v. Gibbon* (1856), 23 Beav. 212; *Perry v. Shipway* (1859), 4 De G. & J. 353, C. A.; *Cooper v. Gordon* (1869), L. R. 8 Eq. 249; *Grenville-Murray v. Clarendon (Earl)* (1869), L. R. 9 Eq. 11; *Re Whiteley, London (Bishop) v. Whiteley*, [1910] 1 Ch. 600.

(*l*) See *Re Clifford, Mallam v. McFie* (1911), 28 T. L. R. 57; and titles CHARITIES, Vol. IV., pp. 119, 120; PERPETUITIES, Vol. XXII., pp. 296 *et seq.* Trusts of advowsons, even when not charitable, are not restricted by the law against perpetuities (*A.-G. v. Newcombe* (1807), 14 Ves. 1); see titles CHARITIES, Vol. IV., pp. 113, 124; ECCLESIASTICAL LAW, Vol. XI., pp. 579 *et seq.*; PERPETUITIES, Vol. XXII., p. 297.

(*m*) See pp. 9, 10, *ante*.

(*n*) See titles SETTLEMENTS, Vol. XXV., pp. 521 *et seq.*; WILLS, p. 526, *post*. As to trusts for infants and for their maintenance and advancement, see also title INFANTS AND CHILDREN, Vol. XVII., pp. 85 *et seq.*; *Re Cooper, Cooper v. Cooper*, [1913] 1 Ch. 350; as to trusts for lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 437 *et seq.*

(*o*) As to a lunatic, see *Twopeny v. Peyton* (1840), 10 Sim. 487; *Younghusband v. Gisborne* (1844), 1 Coll. 400, *per* KNIGHT BRUCE, V.-C., at p. 402; title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 411, 437 *et seq.*

(*p*) *Josselyn v. Josselyn* (1837), 9 Sim. 63; *Magrath v. Morehead* (1871), L. R. 12 Eq. 491; *Watkins v. Watkins*, [1896] P. 222, C. A., *per* LINDLEY, L.J., at p. 227.

(*q*) *Josselyn v. Josselyn*, *supra*; *Saunders v. Vautier* (1841), Cr. & Ph. 240, C. A.; *Rocke v. Rocke* (1845), 9 Beav. 66; but see *Gott v. Nairne* (1876), 3 Ch. D. 278.

(*r*) *Green v. Spicer* (1830), 1 Russ. & M. 395; *Rippon v. Norton* (1839), 2 Beav. 63; *Kearsley v. Woodcock* (1843), 3 Hare, 185; *Younghusband v. Gisborne*, *supra*; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 148, 149.

(*s*) *Barlow v. Grant* (1684), 1 Vern. 255; *Cope v. Wilmot* (1771), cited

A trust to apply the whole or part of the income for a special purpose for the benefit of a person is, however, a trust for him of only so much as is necessary for that purpose (*t*); and if the trustees in such a case are given a discretion as to the amount to be applied, they are at liberty to exercise that discretion by limiting the amount (*a*).

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58. Where a trust confers in other respects an absolute estate or interest in property on a *cestui que trust* of full age and sound mind, whether for life or altogether, a provision in restraint of the anticipation or alienation of either the capital or the income of the property, whether by bankruptcy or otherwise, or a provision that it shall not be liable to the claims of creditors, is void (*b*), except where it attaches to the estate or interest of a married woman during coverture (*c*), since it would deprive the interest given of one of its legal incidents (*d*). It makes no difference that a discretion is given to the trustee as to the mode of applying the capital or income for the benefit of the *cestui que trust* (*e*).

Trusts in  
restraint of  
anticipation  
and aliena-  
tion.

On the other hand, property may be given to or in trust for a person until he anticipates or alienates any part of the capital or income or attempts to do so, whether by bankruptcy or otherwise, and then in trust for some other person or object (*f*). If, however, the donee or *cestui que trust* is himself the actual settlor of the

Trusts until  
anticipation  
or alienation.

in *Thompson v. Thompson* (1844), 1 Coll. 381, 396, note (*a*); *Hanson v. Graham* (1801), 6 Ves. 239, 249; *Green v. Spicer* (1830), 1 Russ. & M. 395; *Piercy v. Roberts* (1832), 1 My. & K. 4; *Snowdon v. Dales* (1834), 6 Sim. 524; *Thompson v. Thompson*, *supra*, at pp. 397, 398; *Younghusband v. Gisborne* (1844), 1 Coll. 400; *Re Sanderson's Trust* (1857), 3 K. & J. 497, *per* WOOD, V.-C., at p. 503.

(*t*) *Hanson v. Graham*, *supra*, *per* GRANT, M.R., at p. 249; *Re Sanderson's Trust*, *supra*.

(*a*) *Leake v. Robinson* (1817), 2 Mer. 363, *per* GRANT, M.R., at p. 384; *Re Sanderson's Trust*, *supra*, *per* WOOD, V.-C., at p. 507.

(*b*) *Bradley v. Peixoto* (1797), 3 Ves. 324; *Brandon v. Robinson* (1811), 18 Ves. 429; *Graves v. Dolphin* (1826), 1 Sim. 66; *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176. See also titles GIFTS, Vol. XV., pp. 422 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 288.

(*c*) See pp. 37, 38, *post*; title HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*

(*d*) *Co. Litt.* 222 b *et seq.*; *Brandon v. Robinson*, *supra*, *per* Lord ELDON, L.C., at p. 433; *Ross v. Ross* (1819), 1 Jac. & W. 154, *per* PLUMER, M.R., at p. 156; *Ware v. Cann* (1830), 10 B. & C. 433; *Hood v. Oglander* (1865), 34 Beav. 513; *Re Dugdale, Dugdale v. Dugdale*, *supra*, *per* KAY, J., at pp. 179 *et seq.* A disposition in trust which tends to contravene the law is bad, whether in respect of real or personal estate (*Holmes v. Godson* (1856), 8 De G. M. & G. 152, C. A., *per* TURNER, L.J., at pp. 159 *et seq.*).

(*e*) *Green v. Spicer*, *supra*; *Piercy v. Roberts*, *supra*; *Snowdon v. Dales*, *supra*; *Younghusband v. Gisborne*, *supra*.

(*f*) *Lockyer v. Savage* (1733), 2 Stra. 947; *Ex parte Cooke* (1803), 8 Ves. 353; *Ex parte Hinton* (1808), 14 Ves. 598; *Ex parte Hodgson* (1812), 19 Ves. 206; *Manning v. Chambers* (1847), 1 De G. & Sm. 282; *Rockford v. Hackman* (1852), 9 Hare, 475; *Seymour v. Lucas* (1860), 1 Drew. & Sm. 177; *Billson v. Crofts* (1873), L. R. 15 Eq. 314; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585; *West v. Williams*, [1898] 1 Ch. 488, 497; *Re Laye, Turnbull v. Laye*, [1913] 1 Ch. 298.



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property, the gift over, though it is valid as against an individual creditor (*g*), is void in case of his bankruptcy (*h*).

(iii.) *Trusts for Life and in Remainder.*

Rights where  
real estate is  
to be sold or  
purchased.

**59.** Where a will directs that real property shall be sold, a beneficiary for life (*i*) is entitled to the rents and profits until the sale, provided that it be not unduly postponed (*k*), and where money is to be invested in real estate he is entitled to the income until the investment (*l*).

Income of  
property to  
be converted  
and invested.

Where a testator directs his estate to be invested in securities, it depends upon the language of the will whether the income thereof until investment is to be treated as capital or is to be paid to a beneficiary for life, or whether the beneficiary for life is entitled only to such income as the estate would have produced if properly invested at the testator's death (*m*).

Rights in  
reversionary  
and personal  
property.

**60.** As regards reversionary property and personal property, including chattels real, trustees, except so far as they are expressly authorised or permitted by law or by the instrument creating the trust (*n*), cannot by their acts or conduct alter the rights and

(*g*) *Brooke v. Pearson* (1859), 27 Beav. 181; *Knight v. Browne* (1861), 7 Jur. (N. S.) 849; *Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585.

(*h*) *Re Meaghan, a Bankrupt* (1803), 1 Sch. & Lef. 179; *Higinbotham v. Holme* (1811), 19 Ves. 88; *Wilson v. Greenwood* (1818), 1 Swan. 471, 481, note (a); *Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807. A person cannot by such a disposition defraud his own creditors in the event of his bankruptcy (*Re Murphy, a Bankrupt* (1803), 1 Sch. & Lef. 44, *per Lord REDESDALE, L.C.*, at p. 49; *Re Pearson, Ex parte Stephens, supra, per BACON, C.J.*, at p. 810); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 151.

(*i*) As to the rights of a tenant for life in respect of income and as to the adjustment of burdens between tenant for life and remainderman, see title SETTLEMENTS, Vol. XXV., pp. 607 *et seq.*, 615 *et seq.* As to the duty of trustees to convert trust property, see pp. 128, 129, *post*.

(*k*) *Casamajor v. Strode* (1809), cited in *Walker v. Shore* (1815), 19 Ves. 387, 390, note (1); *Yates v. Yates* (1860), 28 Beav. 637; *Spencer v. Harrison* (1879), 5 C. P. D. 97, 102; *Hope v. D'Hédouville*, [1893] 2 Ch. 361; *Re Searle, Searle v. Baker*, [1900] 2 Ch. 829; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74. It makes no difference that the real property is devised together with personal property to which the rule does not apply (*Re Searle, Searle v. Baker, supra*; *Re Darnley (Earl), Clifton v. Darnley*, [1907] 1 Ch. 159; *Re Oliver, Wilson v. Oliver, supra*).

(*l*) *Sitwell v. Bernard* (1801), 6 Ves. 520; *Kilvington v. Gray* (1825), 2 Sim. & St. 396; *Tucker v. Boswell* (1843), 5 Beav. 607; *Macpherson v. Macpherson* (1852), 16 Jur. 847, H. L.

(*m*) *Gibson v. Bott* (1802), 7 Ves. 89; *Walker v. Shore, supra*; *Angerstein v. Martin* (1823), Turn. & R. 232; *Hewitt v. Morris* (1823), Turn. & R. 241; *La Terriere v. Bulmer* (1827), 2 Sim. 18; *Taylor v. Clark* (1841), 1 Hare, 161, 173; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Wrey v. Smith* (1844), 14 Sim. 202; *Mackie v. Mackie* (1845), 5 Hare, 70. As to investment, see pp. 129 *et seq.*, *post*.

(*n*) *Alcock v. Soper* (1833), 2 My. & K. 699; *Collins v. Collins* (1833), 2 My. & K. 703; *Cockburn v. Peel* (1861), 3 De G. F. & J. 170, C. A., *per KNIGHT BRUCE, L.J.*, at p. 174; *Hume v. Richardson* (1862), 4 De G. F. & J. 29, C. A., *per TURNER, L.J.*, at pp. 32, 33; *Green v. Britten* (1863), 1 De G. J. & Sm. 649, C. A.; *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; *Miller v. Miller* (1872), L. R. 13 Eq. 263; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Macdonald v. Irvine* (1878), 8 Ch. D. 101, C. A.; *Gray v. Siggers* (1880), 15 Ch. D. 74; *Re Sheldon, Nixon v. Sheldon* (1880), 39 Ch. D. 50;



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interests of successive beneficiaries in the capital and income of the trust property (*o*). In the case of trusts of such property created by wills in favour of persons in succession, it is assumed in the absence of direction to the contrary that the testator intended that all the beneficiaries should enjoy the whole property in succession (*p*). The trustees, therefore, must, for the sake of a beneficiary for life, realise any portions of the trust property which consist of reversions or future estates (*q*), and, for the sake of beneficiaries in remainder, must also realise any portions of it which are of a wasting character or of a character not authorised to be retained as investments (*r*), and in each case they must lay out the money so produced in permanent investments (*s*). Similarly, where a testator bequeaths annuities for life payable out of wasting property, it must be sold, and out of the proceeds of sale a permanent fund must be created for payment of the annuities (*t*). The creator of the trust may, however, clearly indicate an intention that the wasting property shall be enjoyed by the beneficiary for life *in specie* (*a*), as, for instance, by its being specifically designated (*b*), or

Wasting  
property.

*Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482; *Re Crowther, Midgley v. Crowther*, [1895] 2 Ch. 56; *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199; and see p. 19, *ante*, and note (*a*), *infra*; title WILLS, pp. 817, 818, *post*.

(*o*) *Walker v. Shore* (1815), 19 Ves. 387, *per* GRANT, M.R., at pp. 391, 392; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312, 737; *Morgan v. Morgan* (1851), 14 Beav. 72; *Wilkinson v. Duncan* (1857), 23 Beav. 469; *Re Llewellyn's Trust* (1861), 29 Beav. 171; *Wright v. Lambert* (1877), 6 Ch. D. 649.

(*p*) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137, 148.

(*q*) *Re Llewellyn's Trust*, *supra*, at p. 174; *Harrington (Countess) v. Atherton* (1864), 2 De G. J. & Sm. 352, C. A.

(*r*) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)*, *supra*; *Alcock v. Slopers* (1833), 2 My. & K. 699, *per* LEACH, M.R., at p. 701; see pp. 128, 129, *post*.

(*s*) *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723, *per* PARKER, V.-C., at p. 726.

(*t*) *Fryer v. Buttar* (1837), 8 Sim. 442; *Wightwick v. Lord* (1857), 6 H. L. Cas. 217.

(*a*) *Lord v. Godfrey* (1819), 4 Madd. 455; *Pickering v. Pickering* (1839), 4 My. & Cr. 289; *Goodenough v. Tremamondo* (1840), 2 Beav. 512; *Vaughan v. Buck* (1841), 1 Ph. 75; *Harvey v. Harvey* (1842), 5 Beav. 134; *Daniel v. Warren* (1843), 2 Y. & C. Ch. Cas. 290; *Oakes v. Strachey* (1843), 13 Sim. 414; *Cockran v. Cockran* (1844), 14 Sim. 248; *Hunt v. Scott* (1847), 1 De G. & Sm. 219; *Hubbard v. Young* (1847), 10 Beav. 203; *Simpson v. Earles* (1847), 11 Jur. 921; *Burton v. Mount* (1848), 2 De G. & Sm. 383; *House v. Way* (1848), 12 Jur. 958; *Milne v. Parker* (1848), 12 Jur. 171; *Howe v. Howe* (1849), 14 Jur. 359; *Harris v. Poyner* (1852), 1 Drew. 174; *Blann v. Bell* (1852), 2 De G. M. & G. 775, C. A.; *Hood v. Clapham* (1854), 19 Beav. 90; *Hind v. Selby* (1856), 22 Beav. 373; *Cranley v. Dixon* (1857), 23 Beav. 512; *Skirving v. Williams* (1857), 24 Beav. 275; *Johnston v. Moore* (1858), 4 Jur. (N. S.) 356; *Simpson v. Lester* (1858), 4 Jur. (N. S.) 1269; *Rowe v. Rowe* (1861), 29 Beav. 276; *Re Pfleger* (1868), L. R. 6 Eq. 426; *Lean v. Lean* (1875), 23 W. R. 484; *Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42, C. A.; *Re Bland, Miller v. Bland*, [1899] 2 Ch. 336; *Re Bentham, Pearce v. Bentham* (1906), 94 L. T. 307; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22; *Re Wilson, Moore v. Wilson*, [1907] 1 Ch. 394; *Re North, Garton v. Cumberland*, [1909] 1 Ch. 625; *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111; *Re Elford, Elford v. Elford*, [1910] 1 Ch. 814; and see note (*n*), p. 30, *ante*.

(*b*) *Bethune v. Kennedy* (1835), 1 My. & Cr. 114; *D'Aglié v. Fryer* (1841),

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by a discretionary power of sale being given to the trustee (c), or by a direction to sell or divide the property after the death of the beneficiary for life (d). In the absence of such clear indication an intention that wasting property shall be converted is presumed (e). But the presumption is much weaker, if it exists at all, in the case of an absolute gift with an executory limitation over (f). The rule as to conversion does not apply in the case of a settlement by deed (g), nor to leasehold property situate abroad where a contrary rule of law prevails (h).

Allowances to  
beneficiaries  
for life and in  
remainder.

61. A beneficiary for life is entitled to an allowance on account of income in respect of any reversionary or future portions of the property which are not immediately realised (i), and in respect of any portions of it on which the income is for any reason not paid in due course (k), or any unproductive portions which ought to be, but which are not, immediately realised (l); and beneficiaries in remainder are entitled to an allowance on account of capital in respect of any portions of the property which are of a wasting character, or which ought under the terms of the trust to be

12 Sim. 1; *Phillips v. Sarjent* (1848), 7 Hare, 33; *Bowden v. Bowden* (1849), 17 Sim. 65; *Re Beaufoy's Estate* (1852), 1 Sm. & G. 20; *Howard v. Kay* (1858), 27 L. J. (CH.) 448; *Grant v. Mussett* (1860), 8 W. R. 330; *Jeffreys v. Conner* (1860), 28 Beav. 328; *Re Money's Trusts* (1862), 2 Drew. & Sm. 94; *Wilday v. Sandys* (1869), L. R. 7 Eq. 455; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779, *per* COZENS-HARDY, J., at p. 782.

(c) *Re Leonard. Theobald v. King* (1880), 29 W. R. 234; *Re Sherry, Sherry v. Sherry*, [1913] 2 Ch. 508.

(d) *Alcock v. Slopier* (1833), 2 My. & K. 699; *Holgate v. Jennings* (1857), 24 Beav. 623.

(e) *Benn v. Dixon* (1840), 10 Sim. 636; *Lichfield v. Baker* (1840), 2 Beav. 481; *Sutherland v. Cooke* (1844), 1 Coll. 498; *Preston v. Melville, Melville v. Preston, Melville v. Preston* (1845), 15 Sim. 35; *Chambers v. Chambers* (1846), 15 Sim. 183; *Johnson v. Johnson* (1846), 2 Coll. 441; *Pickup v. Atkinson* (1846), 4 Hare, 624; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195, *per* Lord BROUGHAM, at pp. 218, 219; *Blann v. Bell* (1852), 2 De G. M. & G. 775, C. A.; *Hood v. Clapham* (1854), 9 Beav. 90; *Jebb v. Tugwell* (1855), 20 Beav. 84; *Craig v. Wheeler* (1860), 29 L. J. (CH.) 374; *Re Shaw's Trusts* (1871), L. R. 12 Eq. 124; *Macdonald v. Irvine* (1877), 8 Ch. D. 101, C. A.; *Re Game, Game v. Young*, [1897] 1 Ch. 881; *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312, C. A. The use of the word "rents" does not rebut the presumption as to leaseholds where there are also freeholds (*Re Game, Game v. Young, supra*; *Re Wareham, Wareham v. Brewin, supra*).

(f) *Re Bland, Miller v. Bland*, [1899] 2 Ch. 336; *Re Hammersley, Heasman v. Hammersley* (1899), 81 L. T. 150.

(g) *Milford v. Peile* (1854), 17 Beav. 602; *Hope v. Hope* (1855), 1 Jur. (N. S.) 770; *Morres v. Hodges* (1860), 27 Beav. 625; *Askew v. Woodhead* (1880), 14 Ch. D. 27, C. A.; *Re Walsh's Trusts* (1881), 7 L. R. Ir. 554; *Re Van Straubenzee, Boustead v. Cooper, supra*.

(h) *Re Moses, Moses v. Valentine*, [1908] 2 Ch. 235; see title CONFLICT OF LAWS, Vol. VI., pp. 197, 212. As to trusts of foreign immovables, see *ibid.*, p. 204.

(i) *Wilkinson v. Duncan* (1857), 23 Beav. 469; *Wright v. Lambert* (1877), 6 Ch. D. 649; *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643; *Rowlls v. Bebb, Re Rowlls, Wallers v. Solicitor for the Treasury*, [1900] 2 Ch. 107, C. A.; but see *Re Pitcairn, Brandeth v. Colvin*, [1896] 2 Ch. 199.

(k) *Turner v. Newport* (1846), 2 Ph. 14; *Beavan v. Beavan* (1869), cited in *Re Chesterfield's (Earl) Trusts, supra*, at p. 649, note (1).

(l) *Yates v. Yates* (1860), 28 Beav. 637, *per* ROMILLY, M.R., at p. 639.



promptly realised and which are not immediately realised (*m*). If the property which either (1) is producing no income, or (2) is producing an abnormally large income, is not capable of immediate realisation or conversion without loss and damage to the trust estate, equity requires that a value shall be set upon it (*n*), and that the tenant for life shall be given or allowed interest at a reasonable rate on such value (*o*), and that the residue either (1) of the capital sum ultimately produced by the property (*p*), or (2) of the income

(*m*) *Dimes v. Scott* (1828), 4 Russ. 195; *Re Carter* (1892), 41 W. R. 140; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233. But where the capital is intact, beneficiaries in remainder cannot recover from the tenant for life, even though himself the trustee, in respect of the larger income received by him from the investment of the trust fund in an unauthorised manner (*Re Hoyles, Row v. Jagg* (No. 2), [1912] 1 Ch. 67). As to the adjustment of income where the instrument of trust contains a discretionary power to postpone conversion but no direction as to the income previous to conversion, see *Re Owen, Slater v. Owen*, [1912] 1 Ch. 519; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 282 *et seq.* As to where conversion is expressly postponed, see *Green v. Britten* (1863), 1 De G. J. & Sm. 649, C. A.; *Re Lambert, Lambert v. Lambert* (1892), 36 Sol. Jo. 327. As to adjustment between beneficiaries for life and in remainder in case of a compulsory sale of the property, see *Re Fullerton's Will*, [1906] 2 Ch. 138; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 123, 124; and in case of a sale under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), see *Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277.

(*n*) *Turner v. Newport* (1846), 2 Ph. 14; *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643. Where a reversionary interest forming part of a residuary estate bequeathed in trust for a beneficiary for life and remaindermen falls into possession at a date subsequent to the testator's death, the sum must be ascertained which, put out at interest at the testator's death and accumulated at compound interest with yearly rests, would produce the amount which has been actually realised; and the sum so ascertained is attributable to capital, and the remainder of the amount to income (*Re Chesterfield's (Earl) Trusts, supra*; *Re Hobson, Walter v. Appach* (1885), 55 L. J. (CH.) 422; *Re Goodenough, Marland v. Williams*, [1895] 2 Ch. 537; *Re Morley, Morley v. Haig*, [1895] 2 Ch. 738; *Rowlls v. Bebb, Re Rowlls, Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107, C. A.). Where sums originally belonging to a testator's residuary estate bequeathed in trust for a beneficiary for life and remaindermen, and not recovered until some time after the expiration of twelve months from the testator's death, were paid away by mistake, and were afterwards restored to the estate, they were held to be divisible between the beneficiary for life and the remaindermen on the principle of ascertaining what was the value of the sums at the end of a year from the testator's death and allowing out of them to the beneficiary for life interest on the amount of that value (*Re Cleveland's (Duke) Estate, Hay v. Wolmer*, [1895] 2 Ch. 542; and see *Delves v. Newington* (1885), 52 L. T. 512).

(*o*) The rate of interest allowed has usually been 4 per cent. (*Turner v. Newport* (1846), 2 Ph. 14, 18; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723, 727; *Brown v. Gellatly* (1867), 2 Ch. App. 751, 758; *Re Chesterfield's (Earl) Trusts, supra*, at pp. 653, 654);  $3\frac{1}{2}$  per cent. was allowed in *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444; and in some cases only 3 per cent. has been allowed (*Re Hengler, Frowde v. Hengler*, [1893] 1 Ch. 586; *Re Cleveland's (Duke) Estate, Hay v. Wolmer, supra*; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4, 13; *Re Chaytor, Chaytor v. Horn, supra*, at p. 241; and see *Re Goodenough, Marland v. Williams, supra*; *Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61, C. A., *per COZENS-HARDY, M.R.*, at pp. 64, 65).

(*p*) See note (*n*), *supra*.

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Casual profits.

Income undisposed of.

Annuities.

which it actually yields (*q*), as the case may be, shall be treated as capital trust property and be dealt with accordingly (*r*).

**62.** A beneficiary for life is generally entitled to casual profits accruing in respect of the trust property (*s*), including damages for tort or breach of contract recovered in legal proceedings (*a*).

**63.** Where income, the trusts of which are not effectually declared, passes under a residuary gift, it must be capitalised if the capital from which it arises does not form part of the residue (*b*), but it is distributable as income if such capital forms part of the residue (*c*).

**64.** Where an annuity for a term of years forms part of a residue bequeathed in trust and cannot be sold, the instalments of it till sale form part of the capital of the trust property and must be invested, the interest of the investments being payable to the tenant for life (*d*). On the other hand, as between the beneficiaries for life and in remainder of trust property which is subject to an annuity, the sums paid and to be paid to the annuitants are apportionable between capital and income (*e*).

(*q*) *Gibson v. Bott* (1802), 7 Ves. 89, 98; *Taylor v. Clark* (1841), 1 Hare, 161; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312, 737; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723; *Brown v. Gellatly* (1867), 2 Ch. App. 751; *Furley v. Hyder* (1873), 42 L. J. (CH.) 626; *Porter v. Baddeley* (1877), 5 Ch. D. 542; *Re Eaton, Daines v. Eaton*, [1894] W. N. 95; *Re Lynch Blossie, Rickards v. Lynch Blossie*, [1899] W. N. 27 (8); *Wentworth v. Wentworth*, [1900] A. C. 163, P. C.; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; but see *Re Pennington, Pennington v. Pennington* (1913), 83 L. J. (CH.) 54, C. A. As to the method adopted where a business was carried on with probability of loss in some years, see *Re Hengler, Frowde v. Hengler*, [1893] 1 Ch. 586.

(*r*) As to the adjustment of income and capital in case of deficient investments, see title **SETTLEMENTS**, Vol. XXV., pp. 621 *et seq.*, and in case of unauthorised investment or employment of trust property, see *ibid.*, pp. 611, 612.

(*s*) *Brigstocke v. Brigstocke* (1878), 8 Ch. D. 357, C. A.; *Re Hunloke's Settled Estates, Fitzroy v. Hunloke*, [1902] 1 Ch. 941; *Re Dealtry, Davenport v. Dealtry*, [1913] W. N. 138. It is otherwise where under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53, he is a trustee of such casual profits for the beneficiaries in remainder (*Re Rodes, Sanders v. Hobson*, [1909] 1 Ch. 815; and see *Re Bladon, Dando v. Porter*, [1912] 1 Ch. 45, C. A.). As to bonuses and profits and new shares allotted in respect of shares or stock, see title **SETTLEMENTS**, Vol. XXV., pp. 608 *et seq.*

(*a*) *Noble v. Cass* (1828), 2 Sim. 343; *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17, C. A. But the terms of the trust may be such as to exclude his right (*Re Pyke, Birnstingl v. Birnstingl*, [1912] 1 Ch. 770).

(*b*) *O'Neill v. Lucas* (1838), 2 Keen, 313; *Re Pope, Sharp v. Marshall*, [1901] 1 Ch. 64 (where unlawful accumulations were directed); *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678 (vested legacies not immediately payable).

(*c*) *Cranley v. Dixon* (1857), 23 Beav. 512; *Re Whitehead, Peacock v. Lucas*, *supra*; *Allhusen v. Whittell* (1867), L. R. 4 Eq. 295 (funds set apart to provide annuities or contingent legacies).

(*d*) *Crawley v. Crawley* (1835), 7 Sim. 427; and see *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678.

(*e*) *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211; *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. In each of these cases the actual apportionment was somewhat different, but in all of them the principle of throwing the whole burden of the annuities upon capital (which was adopted in *Re Bacon, Grissell v.*



**65.** Where a testator's residuary estate bequeathed in trust for a beneficiary for life and remaindermen yields an income of a less average rate than 4 per cent. on the capital, the difference between the interest at 4 per cent payable on pecuniary legacies bequeathed by the will (*f*) and the interest actually produced by the amounts of the estate representing those legacies must be deducted from the capital of the estate as from the testator's death instead of being paid as against the tenant for life out of the income of the rest of the estate (*g*).

SECT. 2.

**Express Trusts.**

Interest on legacies.

**66.** Unless otherwise directed by the instrument creating the trust, the *corpus* of a trust estate is to be resorted to (1) for all costs, charges and expenses of and incidental to the administration and protection thereof (*h*), including the costs of obtaining legal advice (*i*) and, except where the proceedings relate exclusively to income (*k*), of legal proceedings (*l*), and the costs of and incidental to the appointment of new trustees (*m*), and of making or changing investments (*n*), and (2) for satisfying the capital of all charges and incumbrances on the property (*a*), including calls on

Expenses and liabilities.

*Leathes* (1893), 3 R. 459, and *Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30) was disapproved of and was not followed; see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 505, 506.

(*f*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 275.

(*g*) *Massy v. Gahan* (1889), 23 L. R. Ir. 518; see *Allhusen v. Whittell* (1867), L. R. 4 Eq. 295.

(*h*) *Brougham (Lord) v. Poulett (Lord William)* (1855), 19 Beav. 119, 135; *Sanders v. Miller* (1858), 25 Beav. 154; *Re De la Warr's (Earl) Estates* (1881), 16 Ch. D. 587; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A.; *Re Weall, Andrews v. Weall* (1889), 37 W. R. 779, 781. As to expenses of the Public Trustee, see p. 219, *post*.

(*i*) *Poole v. Pass* (1839), 1 Beav. 600, 604, 605.

(*k*) *Re—(a Lunatic not so found by Inquisition)* (1860), 8 W. R. 333; *Re Marner's Trusts* (1866), L. R. 3 Eq. 432; *Re Whitton's Trusts* (1869), L. R. 8 Eq. 352; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374; *Re Evans' Trusts* (1872), 7 Ch. App. 609; *Re T—* (1880), 15 Ch. D. 78, 79. The costs of a petition for payment of income presented in an administration action have been held payable in some cases out of *corpus* (*Scrivener v. Smith* (1869), L. R. 8 Eq. 310; *Longuet v. Hockley* (1870), 22 L. T. 198); and in one case out of income (*Eady v. Watson* (1864), 12 W. R. 682).

(*l*) *Re Elmore's Will* (1860), 9 W. R. 66, 67; *Re Turnley* (1866), 1 Ch. App. 152; *Re Whitton's Trusts*, *supra*; *Re Berkeley's (Earl) Will, Re Gloucester and Berkeley Canal Act*, 1870 (1874), 10 Ch. App. 56; *Re Leslie's Settlement Trusts* (1876), 2 Ch. D. 185, 190; *Stott v. Milne*, *supra*; *More v. More* (1889), 37 W. R. 414; *Hamilton v. Tighe*, [1898] 1 I. R. 123.

(*m*) See p. 68, *post*.

(*n*) But the costs may in an exceptional case be charged on income (*Equitable Reversionary Interest Society v. Fuller* (1861), 1 John. & H. 379, 383).

(*a*) *Burrell v. Egremont (Earl)* (1844), 7 Beav. 205; *Faulkner v. Daniel* (1843), 3 Hare, 199, 217; *Pitt v. Pitt* (1856), 22 Beav. 294; *Allhusen v. Whittell*, *supra*; *Tewart v. Lawson* (1874), L. R. 18 Eq. 490; *Norton v. Johnstone* (1885), 30 Ch. D. 649. Where a mortgage is repayable by instalments, a beneficiary for life who pays the instalments is entitled to be recouped in respect of them out of the *corpus* of the estate (*Re Nepean's Settled Estate*, [1900] 1 I. R. 298). Where a charge is in the form of an annuity, it must be valued, and is payable as to so much as represents interest at 4 per cent. out of income, and as to the residue out of capital (*Bulwer v. Astley* (1844), 1 Ph. 422, C. A.; *Ley v. Ley* (1868), L. R. 6 Eq. 174; *Re Muffett, Jones v. Mason* (1888), 39 Ch. D. 534; *Re Harrison, Townson v. Harrison* (1889), 43 Ch. D. 55; *Re Bacon, Grissell v.*

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shares (*b*). On the other hand, the income is to be resorted to for all incidental current expenses and outgoings (*c*), including the payment of premiums on a policy of assurance forming part of the trust estate (*d*) and losses in a trade or business properly carried on under the trust (*e*), and the expenses of proceedings relating exclusively to income (*f*).

Outgoings in  
respect of  
real and  
leasehold  
property.

**67.** Where real or leasehold property is held in trust for a beneficiary for life and remaindermen, the income is to be resorted to for all yearly outgoings in respect of the property (*g*), including rates and taxes (*h*), and the interest on charges and incumbrances on the property (*i*), and, in the case of leasehold property, the rent and the expense of performing and observing all continuing obligations, covenants, and conditions on the part of the lessee with respect to repairs and insurance and otherwise (*k*). The beneficiary for life is not, however, required to bear the expense of repairs or insurance which is not thrown upon income by the instrument

*Leathes* (1893), 68 L. T. 522; except where it is expressly charged on the income (*Miller v. Huddleston* (1851), 3 Mac. & G. 513; *Playfair v. Cooper*, *Prince v. Cooper* (1853), 17 Beav. 187, 193); see also p. 34, *ante*.

(*b*) *Todd v. Moorhouse* (1874), L. R. 19 Eq. 69.

(*c*) *Shore v. Shore* (1859), 4 Drew. 501.

(*d*) *Re Waugh's Trusts* (1877), 25 W. R. 555; but see *Re Morley*, *Morley v. Haig*, [1895] 2 Ch. 738; *Re Sherry*, *Sherry v. Sherry*, [1913] 2 Ch. 508.

(*e*) *Upton v. Brown* (1884), 26 Ch. D. 588; except where it has been the practice of the particular trade or business to charge losses against capital (*Gow v. Forster* (1884), 26 Ch. D. 672). As to where a trade or business ought to be disposed of and is carried on temporarily until it can be sold advantageously, see *Re Hengler*, *Frowde v. Hengler*, [1893] 1 Ch. 586.

(*f*) See note (*k*), p. 35, *ante*.

(*g*) *Fountaine v. Pellet* (1791), 1 Ves. 337, 342; *Shore v. Shore*, *supra*; *Re Copland's Settlement*, *Johns v. Carden*, [1900] 1 Ch. 326. Compensation to an outgoing tenant under a covenant in his lease has been held to be a current expense (*Mansel v. Norton* (1883), 22 Ch. D. 769, C. A.); but as to such compensation in the case of an agricultural tenant, see title AGRICULTURE, Vol. I., p. 267; see also title SETTLEMENTS, Vol. XXV., p. 615.

(*h*) *Fountaine v. Pellet*, *supra*.

(*i*) *Revel v. Watkinson* (1748), 1 Ves. Sen. 93; *Whitbread v. Smith* (1854), 3 De G. M. & G. 727, 741, C. A.; *Marshall v. Crowther* (1874), 2 Ch. D. 199; *Re Harrison*, *Townson v. Harrison* (1889), 43 Ch. D. 55; *Honywood v. Honywood*, [1902] 1 Ch. 347.

(*k*) *Crowe v. Crisford* (1853), 17 Beav. 507; *Re Fowler*, *Fowler v. Odell* (1881), 16 Ch. D. 723; *Re Redding*, *Thompson v. Redding*, [1897] 1 Ch. 876; *Kingham v. Kingham*, [1897] 1 I. R. 170; *Re Tomlinson*, *Tomlinson v. Andrew*, [1898] 1 Ch. 232; *Re Betty*, *Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers*, *Cooper v. Gjers*, [1899] 2 Ch. 54; *Re Waldron and Bogue's Contract*, [1904] 1 I. R. 240. But the estate of a legal tenant for life is not liable to the remainderman for permissive waste, whether in the case of freeholds (*Re Cartwright*, *Avis v. Newman* (1889), 41 Ch. D. 532) or of leaseholds (*Re Parry and Hopkin*, [1900] 1 Ch. 160; *Re Owen*, *Slater v. Owen*, [1912] 1 Ch. 519); see title SETTLEMENTS, Vol. XXV., pp. 606, 607. The cost of complying with a sanitary notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), and with a dangerous structures notice under the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), is payable out of income as against a beneficiary for life of leasehold trust property, whether the property is sublet at a rack rent or at an improved ground rent (*Re Copland's Settlement*, *Johns v. Carden*, *supra*). As to apportioning between corpus and income the fine and expenses incidental to the renewal of a

creating the trust or required by covenants affecting the property (*l*), or, though himself the sole trustee, to expend income in restoring to a state of repair conformable to the subsisting covenants leasehold property which was out of that state of repair when the instrument creating the trust came into operation (*m*).

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(iv.) *Trusts for Married Women.*

68. In cases where, owing to the Married Women's Property Act, 1882 (*n*), not applying thereto, the legal ownership of any property of a married woman is, or but for the interposition of trustees would be, in her husband (*o*), if a condition is attached to the property that it shall be for her sole and separate use independently of her husband (*p*), equity requires effect to be given to the condition (*q*) and, if the property is not vested in trustees for her, deems the husband himself to be a trustee for that purpose (*r*). The principle is the same whether the property is realty or personalty (*s*). If she is not restrained from anticipation, she can dispose of the property to the same extent and in the same manner as if she were not under coverture (*a*). If, however, the disposition under which she took the property has imposed a

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married  
women.

renewable leasehold, see note (*l*), p. 148, *post*; as to apportioning the fines, fees and expenses of the admission of new trustees to copyholds, see title SETTLEMENTS, Vol. XXV., p. 617; as to the repair of freehold and copyhold property, see pp. 146, 147, *post*.

(*l*) *Crowe v. Crisford* (1853), 17 Beav. 507; *Re Betty*, *Betty v. A.-G.*, [1899] 1 Ch. 821, *per* NORTH, J., at p. 829.

(*m*) *Harris v. Poyner* (1852), 1 Drew. 174; *Re Courtier*, *Coles v. Courtier*, *Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.; and see pp. 146, 147, *post*.

(*n*) 45 & 46 Vict. c. 75; see title HUSBAND AND WIFE, Vol. XVI., pp. 348 *et seq.*

(*o*) See title HUSBAND AND WIFE, Vol. XVI., pp. 322 *et seq.*

(*p*) *Ibid.*, pp. 341 *et seq.*

(*q*) *Rollfe v. Budder* (1725), Bunb. 187; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597, 603 *et seq.*

(*r*) *Rollfe v. Budder*, *supra*; *Bennet v. Davis* (1725), 2 P. Wms. 316; and see title HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.* A man can constitute himself a trustee of property for his wife and make an effectual gift thereof to her by any instrument or language which amounts in equity to a declaration of trust in her favour (*Grant v. Grant* (1865), 34 Beav. 623). An assignment of leaseholds by a man to his wife as her separate estate has been held to be a declaration of trust thereof by him in her favour for her separate use (*Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Fox v. Hawks*, *Hawks v. Fox* (1879), 13 Ch. D. 822). Where a wife purports to dispose of property to which she is not entitled for her separate use, the husband can in equity ratify the disposition by disclaiming all interest in the property (*Rycroft v. Christy* (1840), 3 Beav. 238). Where a man acquires possession of property belonging in equity to his wife, he is presumed, in the absence of evidence of a gift thereof by her to him, to hold it in trust for her (*Alexander v. Barnhill* (1888), 21 L. R. Ir. 511; *Mercier v. Mercier*, [1903] 2 Ch. 98, C. A.; *Wassell v. Leggatt*, [1896] 1 Ch. 554).

(*s*) *Taylor v. Meads*, *supra*.

(*a*) *Peacock v. Monk* (1751), 2 Ves. Sen. 190; *Hulme v. Tenant* (1778), 1 Bro. C. C. 16; *Parkes v. White* (1805), 11 Ves. 209; *Acton v. White* (1823), 1 Sim. & St. 429; *Adams v. Gamble* (1861), 12 I. Ch. R. 102, C. A.; *Taylor v. Meads*, *supra*; *Pride v. Bubb* (1871), 7 Ch. App. 64; *Bishop v. Wall* (1876), 3 Ch. D. 194; *Cooper v. Macdonald* (1877), 7 Ch. D. 288, C. A.; and see title HUSBAND AND WIFE, Vol. XVI., pp. 377, 378. As to gifts by a wife to her husband of income or capital, see title HUSBAND AND



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Trusts for protection in case of marriage.

restraint on her anticipation thereof (*b*), she is incapable of anticipating or in any way alienating while under coverture either the capital or the income of the property, whether trustees are interposed for the purpose of maintaining the restraint or not (*c*).

**69.** Trusts of property for the protection of female beneficiaries in case of their marriage are not allowed to interfere with their absolute enjoyment of the property longer than is necessary for that protection (*d*).

Trusts of life policy.

**70.** A husband may appoint trustees of a policy of assurance effected on his life, and declare trusts thereof in favour of his wife and children (*e*).

(v.) *Trusts for Creditors.*

Trusts for creditors.

**71.** If a debtor conveys property in trust for the benefit of his creditors who are not parties to the conveyance, and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustee to apply the property in satisfying their claims; and inasmuch as the debtor himself is in fact the only *cestui que trust* (*f*), it is revocable by him before the property is so applied, and cannot be enforced by the creditors (*g*).

WIFE, Vol. XVI. pp. 397, 398. As to leases of her property, see title LANDLORD AND TENANT, Vol. XVIII., pp. 353, 354.

(*b*) *Tullett v. Armstrong*, *Scarborough v. Borman* (1840), 4 My. & Cr. 377, 378, 390; *Brown v. Bamford* (1846), 1 Ph. 620; *Field v. Evans* (1846), 15 Sim. 375; *Baker v. Bradley* (1855), 7 De G. M. & G. 597, C. A. A direction to settle property in trust for a woman free from the liabilities of any other person, and with power of disposition by will after her decease, involves a restraint on anticipation during coverture (*Kingham v. Kingham*, [1897] 1 I. R. 170).

(*c*) *Baggett v. Meux* (1846), 1 Ph. 627, C. A. But a married woman may in some cases deprive herself of her interest in property by being party to a fraud (*Sharpe v. Foy* (1868), 4 Ch. App. 35; *Re Lush's Trusts* (1869), 4 Ch. App. 591), or to a breach of trust (see note (*g*), p. 199, *post*); see also title HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*

(*d*) *Re Jordan's Trusts*, [1903] 1 I. R. 119, where female legatees under a will who were unmarried and had attained the ages of seventy-five and seventy respectively were held entitled to payment, without any settlement, of sums bequeathed upon trust for them for their sole and separate use, but not to be payable until a settlement thereof approved by the trustees should have been made.

(*e*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11; see title HUSBAND AND WIFE, Vol. XVI., pp. 401, 402.

(*f*) *Bill v. Cureton* (1835), 2 My. & K. 503, *per* PEPYS, M.R., at p. 511.

(*g*) *Wallwyn v. Coutts* (1815), 3 Mer. 707; *Garrard v. Lauderdale* (Lord) (1830), 3 Sim. 1; *Acton v. Woodgate* (1833), 2 My. & K. 492; *La Touche v. Lucan* (Earl) (1840), 7 Cl. & Fin. 772, H. L.; *Gibbs v. Glamis* (1841), 11 Sim. 584; *Bateman v. Margerison* (1848), 6 Hare, 496; *Mackinnon v. Stewart* (1850), 1 Sim. (N. S.) 76; *Smith v. Hurst* (1852), 10 Hare, 30; *Synnott v. Simpson* (1854), 5 H. L. Cas. 121, *per* Lord CRANWORTH, L.C., at pp. 133, 134; *Henriques v. Bensusan, Bank of England's Claim* (1872), 20 W. R. 350; *Johns v. James* (1878), 8 Ch. D. 744, C. A.; *Re Sanders' Trusts* (1878), 47 L. J. (CH.) 667; *Henderson v. Rothschild & Sons* (1887), 56 L. J. (CH.) 471, C. A.; *Re Ashby, Ex parte Wrexford*, [1892] 1 Q. B. 872; *R. v. Humphris*, [1904] 2 K. B. 89, C. C. R. The debtor in executing such a conveyance is merely directing the mode in which his own property shall be applied for his own benefit (*Garrard v. Lauderdale* (Lord), *supra*, *per* SHADWELL, V.-C., at p. 12), and the conveyance has the same effect as if the debtor had delivered money to an agent to pay his creditors, in



A trust in favour of creditors is not, however, revocable if the creditors are parties to or assent to the conveyance (*h*), or if the fact of its execution is communicated to them (*i*). The trust is also irrevocable and enforceable by the creditors if it is not to take effect until after the death of the debtor (*k*), or if it is followed by a further trust in favour of other beneficiaries (*l*).

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**72.** The question whether, if the property is more than sufficient for payment of the creditors, the surplus belongs to them or, under a resulting trust, to the debtor (*m*), depends on the intention of the parties as indicated by the language of the deed (*n*).

Destination  
of surplus.

which case he might recall the money before the agent had made any payment or communication to them (*Acton v. Woodgate* (1833), 2 My. & K. 492, *per* LEACH, M.R., at p. 495; *Synnott v. Simpson* (1854), 5 H. L. Cas. 121, 133; and compare *Hughes v. Stubbs* (1842), 1 Hare, 476; *Lawrence v. Campbell* (1859), 7 W. R. 170). The question whether the trusts of the conveyance can be revoked, altered, or modified depends upon the circumstances of each particular case (*Smith v. Hurst* (1852), 10 Hare, 30, *per* TURNER, V.-C., at p. 47). A conveyance upon trust to make good breaches of trust committed by the disposer in respect of certain trust estates was held to be irrevocable, being a trust for particular persons, not for general creditors (*New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, C. A.) As to when a conveyance ostensibly in trust for the benefit of creditors will be set aside as fraudulent, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 80. As to the effect of lapse of time on a trust for creditors, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 167 *et seq.* As to assignments for benefit of creditors generally, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 327 *et seq.*; Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. 5, c. 34), ss. 28 *et seq.*

(*h*) *Field v. Donoughmore (Lord)* (1841), 1 Dr. & War. 227; *Mackinnon v. Stewart* (1850), 1 Sim. (N. S.) 76; *Nicholson v. Tutin* (1855), 2 K. & J. 18; *Siggers v. Evans* (1855), 5 E. & B. 367; *Montefiore v. Browne* (1858), 7 H. L. Cas. 241; *Wild v. Banning* (1866), L. R. 2 Eq. 577. It is not necessary that they should actually execute the deed if they otherwise express their assent to it (*Field v. Donoughmore (Lord)*, *supra*, *per* SUGDEN, L.C., at p. 228; *Gould v. Robertson* (1851), 4 De G. & Sm. 509; *Re Baber's Trusts* (1870), L. R. 10 Eq. 554). But a creditor will take no benefit under the deed if he deviates from or disturbs the arrangement made by it (*Field v. Donoughmore (Lord)*, *supra*, *per* SUGDEN, L.C., at p. 229), nor if he is guilty of undue delay in taking advantage of it (*ibid.*; *Gould v. Robertson*, *supra*; but see *Nicholson v. Tutin*, *supra*).

(*i*) *Acton v. Woodgate*, *supra*, *per* LEACH, M.R., at p. 495; *Browne v. Cavendish*, *Cavendish v. Browne* (1844), 1 Jo. & Lat. 606, *per* SUGDEN, L.C., at pp. 635, 636; *Harland v. Binks* (1850), 15 Q. B. 713; *Synnott v. Simpson*, *supra*, *per* Lord CRANWORTH, L.C., at pp. 138, 139; *Henderson v. Rothschild* (1886), 33 Ch. D. 459, *per* BACON, V.-C., at p. 469. The communication may have induced the creditors to refrain from steps which they would have otherwise taken to enforce their claims (*Acton v. Woodgate*, *supra*, at p. 495). Where, however, a person on going abroad conveyed property upon trust for its general management, including payment of his debts thereout, the communication to his creditors of the existence of the deed was held not to constitute them beneficiaries under it (*Cornthwaite v. Frith* (1851), 4 De G. & Sm. 552).

(*k*) *Synnott v. Simpson*, *supra*, *per* Lord CRANWORTH, L.C., at p. 139; *Re Fitzgerald's Settlement*, *Fitzgerald v. White* (1887), 37 Ch. D. 18, C. A.

(*l*) *Godfrey v. Poole* (1888), 13 App. Cas. 497, P. C.; *Priestley v. Ellis*, [1897] 1 Ch. 489.

(*m*) See p. 50, *post*.

(*n*) *Green v. Wynn* (1869), 4 Ch. App. 204, *per* Lord HATHERLEY, L.C., at p. 207; *Smith v. Cooke*, *Storey v. Cooke*, [1891] A. C. 297, *per* Lord HALSBURY, L.C., at p. 299, and *per* Lord HERSCHEL, at pp. 300 *et seq.*

## SECT. 2.

**Express Trusts.**Conversion  
of realty.Rules of  
construction.Contingent  
estates in  
remainder.

**73.** A trust for sale of real property for the benefit of creditors converts it into personalty for all purposes (o).

SUB-SECT. 8.—*Estate of Beneficiaries.*(i.) *Nature of Estate.*

**74.** The declaration or creation of an executed trust (p) and the equitable estate or interest created thereby are construed and take effect according to the same rules of interpretation as a legal assurance or limitation and the legal estate or interest created thereby (q), unless the language shows a clear intention on the part of the disposer that it should be construed differently (r). A trust is, however, construed so as to carry out the expressed or implied intention of the disposer (s), and therefore, under a trust of real property, a limitation of an equitable estate in fee or otherwise may be created by words which in law would be insufficient to create the intended estate (t).

In particular, the common law doctrine as to contingent remainders founded on feudal rules that if at the determination of a prior freehold estate there is no person who answers the description of a remainderman next entitled to take the contingent remainder fails (a), was never held to apply to equitable or trust estates; and it has always been held that, if at the determination of a prior equitable or trust estate of freehold there is no person capable of taking, a person afterwards coming into existence within the limits

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(o) *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299.

(p) See p. 7, ante.

(q) *Stanley v. Lennard* (1754), 1 Eden, 87, per HENLEY, Lord Keeper, at pp. 94, 95; *Wright v. Pearson* (1758), 1 Eden, 119, per HENLEY, Lord Keeper, at p. 125; *Austen v. Taylor* (1759), 1 Eden, 361, 366; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Jervoise v. Northumberland (Duke)* (1820), 1 Jac. & W. 559; *Holliday v. Overton* (1852), 15 Beav. 480; *Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274; *Meyler v. Meyler* (1883), 11 L. R. Ir. 522; *Re Whiston's Settlement*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Bennett's Estate*, [1898] 1 I. R. 185; and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 373 *et seq.*; EQUITY, Vol. XIII., pp. 68, 69, 90, 93 *et seq.*; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 283, 284. Courts of equity have given to *cestuis que trust* the same right with respect to alienation as if their estate was a use executed (*Hopkins, alias Dare v. Hopkins* (1739), 1 Atk. 581, per Lord HARDWICKE, L.C., at p. 591).

(r) *Greaves v. Simpson* (1864), 10 Jur. (N. S.) 609; and see title EQUITY, Vol. XIII., p. 95, note (c); and, as to conversion of land into money and money into land, see *ibid.*, pp. 104 *et seq.*; and pp. 52, 128, *post*. An interest in the proceeds of land held in trust for sale is an interest in land as against a mortgagee (*Kirkland v. Peattfield*, [1903] 1 K. B. 756; *Re Hazeldean's Trusts*, [1908] 1 Ch. 34, C. A.; *Re Fox, Brooks v. Marston*, [1913] 2 Ch. 75).

(s) *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, per CLARKE, M.R., at p. 195; *Standing v. Bowring* (1885), 31 Ch. D. 282, C. A., per LINDLEY, L.J., at p. 289.

(t) *Re Bennett's Estate*, *supra*, at p. 194; *Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487; *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752, per BUCKLEY, J., at p. 764; *Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191; *Re Thursby's Settlement*, *Grant v. Littledale*, [1910] 2 Ch. 181, C. A., per FARWELL, L.J., at pp. 188, 189.

(a) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 222 *et seq.*

of the rule as to remoteness (*b*) and answering to the terms of the settlement can take the equitable estate (*c*).

75. Trust estates do not depend upon the legal estate for existence (*d*).

76. The equitable estate or interest of a beneficiary under a trust is construed in the same way and devolves in the same manner as a legal estate or interest (*e*).

(ii.) *Dealings with Estate.*

77. A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest thereunder as a legal owner has over his legal estate or interest in property (*f*), and he can exercise it by similar instruments and with similar formalities (*g*).

78. Notice to the trustee of a disposition of an equitable estate or interest is not essential to the validity of the disposition (*h*).

In the case of real property and chattels real the absence of such notice does not postpone the disposition to a subsequent disposition of the equitable estate or interest of which notice is given to the

SECT. 2.

Express  
Trusts.

Non-depend-  
ent on legal  
estate.

Construction  
and  
devolution  
of equitable  
estates.

Power of  
alienation.

Notice to the  
trustee.

In case of real  
property.

(*b*) See title PERPETUITIES, Vol. XXII., pp. 295, 300 *et seq.*

(*c*) *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, C. A., *per* JESSEL, M.R., at p. 229.

(*d*) *A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at p. 22. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate or of one another; and the legal estate is nothing but the shadow which always follows the trust estate in the eye of a court of equity (*ibid.*).

(*e*) Statute of Frauds (29 Car. 2, c. 3), s. 10; *Norfolk's (Duke) Case* (1682), 3 Cas. in Ch. 1, 7, H. L.; *Bale v. Coleman* (1711), 1 P. Wms. 142; *Banks v. Sutton* (1733), 2 P. Wms. 700, *per* JEKYLL, M.R., at p. 713; *Cowper v. Cowper (Earl)* (1734), 2 P. Wms. 720, 736; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 195; and see p. 24, *ante*; and titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 4 *et seq.*, 7, 14; EQUITY, Vol. XIII., pp. 68, 93 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 283, 284. As to extending or taking in execution, or obtaining a charging order on, equitable interests in property or funds, see title EXECUTION, Vol. XIV., pp. 49, 67, 68, 102, 103.

(*f*) *Hopkins v. Hopkins* (1739), West temp. Hard. 606, *per* Lord HARDWICKE, L.C., at p. 621; *Brydges v. Brydges, Philips v. Brydges* (1796), 3 Ves. 120, *per* ARDEN, M.R., at p. 127; and see titles EQUITY, Vol. XIII., pp. 93 *et seq.*; PERSONAL PROPERTY, Vol. XXII., pp. 404 *et seq.*, 413 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 286 *et seq.*

(*g*) *Wagstaff v. Wagstaff* (1724), 2 P. Wms. 258; *Adlington v. Cann* (1744), 3 Atk. 141, *per* Lord HARDWICKE, L.C., at p. 151; *Jones v. Clough* (1751), 2 Ves. Sen. 365, *per* STRANGE, M.R., at p. 366; *Donaldson v. Donaldson* (1854), Kay, 711, *per* WOOD, V.-C., at p. 720; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 373 *et seq.* A person beneficially interested in trust property can only alienate his interest therein by an instrument in writing *inter vivos* signed by him or by his will (Statute of Frauds (29 Car. 2, c. 3), s. 9). The refusal by a beneficiary for life to receive the income of the trust property during a certain period does not preclude him from retracting his refusal and claiming to receive it afterwards (*Re Young, Fraser v. Young*, [1913] 1 Ch. 272).

(*h*) *Donaldson v. Donaldson*, *supra*, at p. 719; *Re Lowes' Settlement* (1861), 30 Beav. 95, 97; *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365, C. A. As to notice to trustees generally, see titles CHOSSES IN ACTION, Vol. IV., pp. 379 *et seq.*; MORTGAGE, Vol. XXI., pp. 339 *et seq.*



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trustee (*i*). An equitable purchaser for value, however, who acquired his title without notice of a prior equitable title, may obtain priority by getting in the legal estate, even though when he gets it in he has notice of the prior equitable title (*j*), unless he gets in the legal estate from a trustee who commits a breach of trust in conveying it to him (*k*). Such a purchaser has similar precedence if, without having actually acquired the legal estate, he has the better title or right to call for it (*l*).

In the case  
of personal  
property.

79. On the other hand, in the case of personal property, a disposition of an equitable estate or interest of which notice is not given to the trustee is postponed to a subsequent disposition thereof for valuable consideration, whether by way of assignment or charge, of which prior notice is given to the trustee (*m*), unless the person entitled under the later disposition had when he acquired his title notice of the prior disposition (*n*). In case of the bankruptcy of the disposing beneficiary, the relative priority of the title of his trustee in bankruptcy and of a person claiming under a disposition from him for valuable consideration depends in like manner on whether notice to the trustee is first given of the bankruptcy or of the disposition (*o*). Moreover, the person claiming under a disposition of an equitable

(*i*) *Jones v. Jones* (1838), 8 Sim. 633; *Wiltshire v. Rabbits* (1844), 14 Sim. 76; *Wilmot v. Pike* (1845), 5 Hare, 14; *Lee v. Howlett* (1856), 2 K. & J. 531, 535, 536; *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, C. A., per STIRLING, L.J., at pp. 254, 255. As to equitable interests ranking according to priority of time, see title EQUITY, Vol. XIII., pp. 79 *et seq.*

(*j*) *Barnes v. Bailey*, [1894] 1 Ch. 25, 36, 37, C. A. (where the legal estate was got in *pendente lite*); *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, *supra*, at p. 256; see titles EQUITY, Vol. XIII., pp. 81 *et seq.*; MORTGAGE, Vol. XXI., pp. 327 *et seq.*

(*k*) *Saunders v. Dehew* (1692), 2 Vern. 271; see titles EQUITY, Vol. XIII., p. 83; MORTGAGE, Vol. XXI., p. 328.

(*l*) *Wilkes v. Bodington* (1707), 2 Vern. 599, 600; as when the owner of the legal estate has joined in the disposition to him or declared himself a trustee for him (*Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, *supra*, at pp. 262, 263).

(*m*) *Dearle v. Hall*, *Loveridge v. Cooper* (1828), 3 Russ. 30, 38; *Foster v. Cockerell* (1835), 3 Cl. & Fin. 456, H. L.; *Meux v. Bell* (1841), 1 Hare, 73, per WIGRAM, V.-C., at pp. 83 *et seq.*; *Stocks v. Dobson* (1853), 4 De G. M. & G. 11, C. A., per TURNER, L.J., at p. 17; *Lee v. Howlett*, *supra*; *Browne v. Savage* (1859), 4 Drew. 635, per KINDERSLEY, V.-C., at p. 639; *Re Freshfield's Trust* (1879), 11 Ch. D. 198; *Arden v. Arden* (1885), 29 Ch. D. 702; *Mutual Life Assurance Society v. Langley* (1886), 32 Ch. D. 460, C. A.; *Ward v. Duncombe*, [1893] A. C. 369, per Lord HERSHELL, L.C., at pp. 376 *et seq.*; *Re Dallas*, [1904] 2 Ch. 385, C. A.; see title CHANCES IN ACTION, Vol. IV., pp. 379 *et seq.* A person claiming under a subsequent voluntary disposition does not obtain priority by being the first to give notice to the trustees (*Justice v. Wynne* (1860), 12 I. Ch. R. 289, C. A., per BRADY, L.C., at pp. 304, 305). As to the duty of a trustee to give information respecting dispositions of equitable interests of the trust property of which he has notice, see pp. 127, 128, *post*. As to where the disposition is made or the property is taken under it in another country, see title CONFLICT OF LAWS, Vol. VI., pp. 217, 218.

(*n*) *Timson v. Ramsbottom* (1837), 2 Keen, 35, per Lord LANGDALE, M.R., at p. 50; *Warburton v. Hill*, *Stent v. Wickens* (1854), Kay, 470, 475, 476; *Re Holmes (A. D.)* (1885), 29 Ch. D. 786, C. A.

(*o*) *Stuart v. Cockerell* (1869), L. R. 8 Eq. 607; *Palmer v. Locke* (1881), 18 Ch. D. 381, C. A.; *Re Stone's Will*, [1893] W. N. 50.



estate or interest in personal property has no remedy against a trustee who defeats the disposition by some dealing with the property before he has received notice of the disposition (*p*).

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80. Notice to one of several trustees is sufficient during his continuance as a trustee (*q*). Where, however, notice is not given to all, notice to any trustee is only effectual so long as he remains trustee, so that, when there is no longer a trustee to whom notice has been given, it becomes necessary, in order to secure protection or priority, to renew the notice to one or more of the succeeding trustees (*r*). If, however, notice is given to all the trustees for the time being, the priority acquired thereby is not lost by any subsequent changes in the trusteeship, so that it is not in that case necessary to renew the notice to succeeding trustees (*s*). The notice may be by parol (*t*), but for the sake of safety it should be in writing (*a*). It must be clear and distinct (*b*), and, if it states particulars, must do so correctly, so far

Notice where  
there are  
several  
trustees.

(*p*) *Donaldson v. Donaldson* (1854), Kay, 711, *per* Wood, V.-C., at p. 719.

(*q*) *Smith v. Smith* (1833), 2 Cr. & M. 231; *Meux v. Bell* (1841), 1 Hare, 73, *per* WIGRAM, V.-C., at p. 87; *Browne v. Savage* (1859), 4 Drew. 635, *per* KINDERSLEY, V.-C., at p. 640; *Willes v. Greenhill* (1861), 4 De G. F. & J. 147; *Phipps v. Lovegrove*, *Prosser v. Phipps* (1873), L. R. 16 Eq. 80; *Re Wyatt, White v. Ellis*, [1892] 1 Ch. 188, C. A.; *Ward v. Duncombe*, [1893] A. C. 369, *per* Lord HERSCHELL, L.C., at pp. 379 *et seq.*; see title CHOSSES IN ACTION, Vol. IV., pp. 383, 384. If the disposition is made to a trustee, his notice of it is sufficient; but if one of the trustees, being also a beneficiary, is himself the disposer, his notice of the disposition will not suffice without notice also to one or more of his co-trustees, since it is to his interest to conceal the fact of the disposition (*Browne v. Savage*, *supra*; *Willes v. Greenhill* (No. 1) (1860), 29 Beav. 376; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865; *Re Dallas*, [1904] 2 Ch. 385, C. A., *per* BUCKLEY, J., at p. 400, and *per* VAUGHAN WILLIAMS, L.J., at pp. 411, 412). A person taking a disposition of an equitable interest in trust property should therefore inquire of all the trustees whether they have notice of a prior disposition of the interest (*Smith v. Smith*, *supra*, *per* Lord LYNCHURST, C.B., at pp. 233, 234; *Re Wyatt, White v. Ellis*, *supra*, *per* STIRLING, J., at p. 197).

(*r*) *Timson v. Ramsbottom* (1837), 2 Keen, 35; *Re Wyatt, White v. Ellis*, *supra*, at pp. 206, 207; *Ward v. Duncombe*, *supra*, at p. 382; *Re Phillips' Trusts*, [1903] 1 Ch. 183. Notice given before the property is actually vested in the trustee is ineffectual (*Johnstone v. Cox* (1881), 19 Ch. D. 17, C. A.; *Re Dallas*, *supra*).

(*s*) *Ward v. Duncombe*, *supra*, *per* Lord MACNAGHTEN, at p. 395; *Re Wasdale, Brittin v. Partridge*, [1899] 1 Ch. 163; *Freeman v. Laing*, [1899] 2 Ch. 355, *per* BYRNE, J., at p. 358; *Re Phillips' Trusts*, *supra*, *per* KEKEWICH, J., at p. 187. This principle does not, however, apply where there is only one trustee for the time being and he is himself the disposer; see note (*q*), *supra*. New trustees are not under any obligation to inquire of old trustees whether they have received notice of any dispositions of equitable interests in the trust property (*Phipps v. Lovegrove*, *Prosser v. Phipps*, *supra*, *per* JAMES, L.J., at pp. 90, 91).

(*t*) *Smith v. Smith*, *supra*; *Meux v. Bell*, *supra*, *per* WIGRAM, V.-C., at pp. 87 *et seq.*; *Browne v. Savage*, *supra*, *per* KINDERSLEY, V.-C., at p. 640; *Re Tichener* (1865), 35 Beav. 317.

(*a*) *Lloyd v. Banks* (1868), 3 Ch. App. 488, *per* Lord CAIRNS, L.C., at p. 490; see title CHOSSES IN ACTION, Vol. IV., p. 381.

(*b*) *Re Tichener*, *supra*; *Lloyd v. Banks*, *supra*, at p. 490; *Saffron Walden*

## SECT. 2.

**Express Trusts.**

Precautions where there is no trustee.

as respects all material points (*c*). It must be given to the trustee himself (*d*), but it is immaterial by whom it is given or in what way the trustee receives it (*e*).

Fund in court.

**81.** Where there is for the time being no trustee of the property, it is sufficient if the best precautions of which the circumstances admit are taken to render the fact of the disposition known to all whom it may concern (*f*).

**82.** In the case of a fund in court, the obtaining of a stop order thereon takes the place of giving notice to the trustee as respects the conferring of priority (*g*).

SUB-SECT. 9.—*Enforcement of Trusts.*

Trust completely constituted.

**83.** Where a trust has been completely constituted it is enforced whether there has been consideration for it or not (*h*).

Incomplete trusts.

**84.** Where a trust is not completely constituted, or, in other words, anything remains to be done to perfect it (*i*), a court of equity compels its completion and execution where it has been created for valuable consideration (*k*), but not where it is purely voluntary and without consideration (*l*).

*Second Benefit Building Society v. Rayner* (1880), 14 Ch. D. 406, C. A., per JAMES, L.J., at pp. 411, 412.

(*c*) *Re Bright's Trusts* (1856), 21 Beav. 430, 434; *Woodburn v. Grant* (1856), 22 Beav. 483. A mistake in an immaterial point does not vitiate the notice (*Whittingstall v. King* (1882), 46 L. T. 520).

(*d*) *Saffron Walden Second Benefit Building Society v. Rayner* (1880), 14 Ch. D. 406, C. A. Notice to the solicitors of the trustee is insufficient (*ibid.*; *Re Dallas*, [1904] 2 Ch. 385, C. A., per BUCKLEY, J., at pp. 398, 399).

(*e*) *Lloyd v. Banks* (1868), 3 Ch. App. 488; *Re Dallas*, *supra*, per BUCKLEY, J., at p. 399; see title CHOSSES IN ACTION, Vol. IV., p. 381.

(*f*) *Etty v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Re Blackesley's Trusts* (1883), 23 Ch. D. 549.

(*g*) *Greening v. Beckford* (1832), 5 Sim. 195; *Elder v. Maclean* (1857), 3 Jur. (N. S.) 283; *Bartlett v. Bartlett* (1857), 1 De G. & J. 127, C. A., per TURNER, L.J., at p. 141; *Stuart v. Cockerell* (1869), L. R. 8 Eq. 607; *Palmer v. Locke* (1881), 18 Ch. D. 381, C. A.; *Re Holmes (A. D.)* (1885), 29 Ch. D. 786, C. A.; *Mutual Life Assurance Society v. Langley* (1886), 32 Ch. D. 460, C. A.; *Mack v. Postle*, [1894] 2 Ch. 449; *Montefiore v. Guedalla*, [1903] 2 Ch. 26, C. A.; see title EXECUTION, Vol. XIV., p. 110.

(*h*) *Jefferys v. Jefferys* (1841), Cr. & Ph. 138; *Bentley v. Mackay* (1851), 15 Beav. 12; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176, C. A.; *Milroy v. Lord* (1862), 4 De G. F. & J. 264, C. A.; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Henry v. Armstrong* (1881), 18 Ch. D. 668; *Paul v. Paul* (1882), 20 Ch. D. 742, C. A.; *Mallott v. Wilson*, [1903] 2 Ch. 494; and see the cases cited in note (*g*), p. 46, *post*. As to the complete constitution of a trust, see p. 20, *ante*.

(*i*) *Bridge v. Bridge* (1852), 16 Beav. 315; *Bizzev v. Flight* (1876), 3 Ch. D. 269; *Re Lucan (Earl)*, *Hardinge v. Cobden* (1890), 45 Ch. D. 470.

(*k*) *Donaldson v. Donaldson* (1854), Kay, 711; *Lee v. Lee* (1876), 4 Ch. D. 175; *Pullan v. Koe*, [1913] 1 Ch. 9 (covenant to settle enforced). There is valuable consideration where a party gives up something (*Hewison v. Negus* (1853), 17 Jur. 445, 567, C. A.; *Teasdale v. Braithwaite* (1877), 5 Ch. D. 630, C. A.; *Re Foster and Lister* (1877), 6 Ch. D. 87, per JESSEL, M.R., at

(*l*) For note (*l*) see p. 45, *post*.

Incomplete trusts, which as regards some of the *cestuis que trust* are for valuable consideration and as regards others are voluntary, will not be enforced in favour of the volunteers (*a*), except (1) where the interest of the volunteers is bound up with the interest of the other *cestuis que trust* (*b*); (2) in favour of the children of a marriage which constituted the consideration for the trusts, the children being in fact held not to be volunteers (*c*); and (3) in favour of the children of the former marriage of a woman whose subsequent marriage constituted the consideration for the trusts, where their interests are especially provided for under the trusts (*d*).

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## Express Trusts.

Partly for valuable consideration and partly voluntary.

pp. 89, 96; *Schreiber v. Dinkel* (1886), 54 L. T. 911). An assignment of leaseholds to which liability is attached is for valuable consideration by reason of the relief of the assignor from the liability (*Price v. Jenkins* (1877), 5 Ch. D. 619, C. A.; *Harris v. Tubb* (1889), 42 Ch. D. 79; but, as regards Ireland, see *Gardiner v. Gardiner* (1861), 12 I. C. L. R. 565; *Hamilton v. Molloy* (1880), 5 L. R. Ir. 339, per SULLIVAN, M.R., at pp. 345 *et seq.*). As to valuable consideration generally, see title CONTRACT, Vol. VII., pp. 383 *et seq.*

(*l*) *Colman v. Sarrel* (1789), 1 Ves. 50, 55; *Ellison v. Ellison* (1802), 6 Ves. 656, per Lord ELDON, L.C., at p. 662; *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 84, 99; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 149; *Jefferys v. Jefferys* (1841), Cr. & Ph. 138; *Ward v. Audland* (1845), 8 Beav. 201; *Beniley v. Mackay* (1851), 15 Beav. 12; *Bridge v. Bridge* (1852), 16 Beav. 315; *Pownall v. Anderson* (1856), 4 W. R. 407; *Dening v. Ware* (1856), 22 Beav. 184, per ROMILLY, M.R., at p. 190; *Wilkinson v. Wilkinson* (1857), 4 Jur. (N. S.) 47; *Walrond v. Walrond* (1858), John. 18; *Milroy v. Lord* (1862), 4 De G. F. & J. 264, C. A.; *Lister v. Hodgson* (1867), L. R. 4 Eq. 30; *Stone v. Stone* (1869), 5 Ch. App. 74; *Marler v. Tommas* (1873), L. R. 17 Eq. 8; *Harding v. Harding* (1886), 17 Q. B. D. 442, per WILLS, J., at p. 444; *Re Lucan (Earl), Hardinge v. Cobden* (1890), 45 Ch. D. 470. A voluntary covenant to surrender copyholds, though contained in a deed in which freeholds are effectually conveyed, is not enforced unless words of immediate trust are added (*Jefferys v. Jefferys, supra*; see title COPYHOLDS, Vol. VIII., p. 106, note (*l*)). The assignment by deed of an expectancy only operates as an agreement to assign it when realised, and the creation of a trust therein, therefore, if voluntary, is not enforced (*Meek v. Kettlewell* (1843), 1 Ph. 342; *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697).

(*a*) *Sutton v. Chetwynd* (1817), 3 Mer. 249 (affirmed in the House of Lords (1824); see Turn. & R. 296); *Cormick v. Trapaud* (1818), 6 Dow, 60, H. L.; *Johnson v. Legard* (1822), Turn. & R. 281, C. A., per Lord ELDON, L.C., at p. 293; *Price v. Jenkins* (1876), 4 Ch. D. 483, per HALL, V.-C., at pp. 490, 493; *Gale v. Gale* (1877), 6 Ch. D. 144; *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228, 242, C. A.; *Re Cameron and Wells* (1887), 37 Ch. D. 32; *De Mestre v. West*, [1891] A. C. 264, P. C.; *Re Plumpton's Marriage Settlement, Underhill v. Plumpton*, [1910] 1 Ch. 609.

(*b*) *Jenkins v. Keymis* (1664), 1 Lev. 150 (in Court of Exchequer); S. C. (1668), 1 Lev. 237 (in Chancery); *Newstead v. Searles* (1738), 1 Atk. 264; *Clayton v. Winton (Earl)* (1812), 3 Madd. 302, note (*a*); *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; *Mackie v. Herbertson* (1884), 9 App. Cas. 303; *De Mestre v. West, supra*, per Lord SELBORNE, at p. 270.

(*c*) *Gale v. Gale, supra*; *Re Cameron and Wells, supra*; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341, C. A., per LINDLEY, L.J., at p. 348.

(*d*) *Newstead v. Searles, supra*; *Ithell v. Beane* (1749), 1 Ves. Sen. 215, per Lord HARDWICKE, L.C., at p. 216; *Gale v. Gale, supra*; but see *A.-G. v. Jacobs Smith, supra*. The decision in *Clarke v. Wright* (1861), 6 H. & N. 849, Ex. Ch., in favour of a former illegitimate child of the woman and the propriety of the exception in such a case, apart from circumstances which may bring it within the first exception (see the text, *supra*), are open to question (*De Mestre v. West, supra*; *A.-G. v. Jacobs Smith, supra*).



## SECT. 2.

**Express Trusts.**

Valuable consideration in favour of third party.

Binding whether voluntary or for consideration.

Avoidance in certain circumstances.

Change of circumstances.

Rectification on account of error.

**85.** Where an incomplete trust is declared between a disposing party and another for valuable consideration in favour of a third person, performance of the trust can be enforced at the suit of the other party to the declaration, but not at the suit of the third person (*e*).

SUB-SECT. 10.—*Revocation, Avoidance, and Rectification of Trusts.*

**86.** Where a trust for a lawful object is duly executed, or, in other words, an express trust is completely constituted (*f*), it is generally binding and irrevocable whether it was constituted or declared for valuable consideration or voluntarily, unless a power of revocation is expressly reserved (*g*).

A disposition of property in trust stands, however, on the same footing as a direct transfer or gift of property in respect of its liability in certain circumstances to be set aside, if voluntary, on the bankruptcy of the disposer (*h*), or, whether voluntary or not, as a fraud upon his creditors or other persons having a prior equitable claim upon the property (*i*).

**87.** A trust created to provide for particular circumstances may become void if the circumstances cease to exist (*h*).

**88.** Where by mistake an instrument creating a trust of property does not express the intention of the disposer, it will be cancelled or rectified according as the true intention of the disposer requires (*l*).

(*e*) *Colyear v. Mulgrave (Countess)* (1836), 2 Keen, 81. As to the general rights and liabilities of third parties in connexion with a contract, see title CONTRACT, Vol. VII., pp. 342 *et seq.*

(*f*) See pp. 7, 20, *ante*.

(*g*) *Ellison v. Ellison* (1802), 6 Ves. 656; *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 84, 99; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140, 149; *Fortescue v. Barnett* (1834), 3 My. & K. 36; *Bill v. Cureton* (1835), 2 My. & K. 503, 511; *Collinson v. Patrick* (1838), 2 Keen, 123; *Reed v. O'Brien* (1843), 7 Beav. 32; *Ward v. Audland* (1845), 8 Beav. 201; *Beniley v. Mackay* (1851), 15 Beav. 12; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176, C. A.; *Drosier v. Brereton* (1851), 15 Beav. 221; *Smith v. Hurst* (1852), 10 Hare, 30, *per* TURNER, V.-C., at p. 47; *Bridge v. Bridge* (1852), 16 Beav. 315, *per* ROMILLY, M.R., at pp. 321, 322; *Parnell v. Hingston* (1856), 3 Sm. & G. 337; *Justice v. Wynne* (1860), 12 I. Ch. R. 289, C. A.; *Dilrow v. Bone* (1862), 3 Giff. 538; *Jones v. Lock* (1865), 1 Ch. App. 25, *per* Lord CRANWORTH, L.C., at p. 28; *Gee v. Liddell* (No. 1) (1866), 35 Beav. 621; *Kelly v. Walsh* (1878), 1 L. R. Ir. 275; *Paul v. Paul* (1882), 20 Ch. D. 742, C. A.; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, C. A., *per* COTTON, L.J., at pp. 102, 103; *Standing v. Bowring* (1885), 31 Ch. D. 282; *New, Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, C. A.; and see p. 44, *ante*. As to setting aside a voluntary instrument executed by mistake, see titles EQUITY, Vol. XIII., pp. 32 *et seq.*; MISTAKE, Vol. XXI., pp. 19, 20. As to the alteration or revocation of trusts for creditors, see pp. 38, 39, *ante*.

(*h*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*

(*i*) *Ibid.*, pp. 279 *et seq.*; titles FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 78 *et seq.*; GIFTS, Vol. XV., pp. 419, 420.

(*k*) As to trusts created by a separation deed, see title HUSBAND AND WIFE, Vol. XVI., pp. 425 *et seq.*, 452.

(*l*) *Thompson v. Whitmore* (1860), 1 John. & H. 268, *per* WOOD, V.-C., at p. 273; *Lister v. Hodgson* (1867), L. R. 4 Eq. 30; *Weir v. Van Tromp* (1900), 16 T. L. R. 531; see titles EQUITY, Vol. XIII., pp. 22 *et seq.*;



89. A trust may by the instrument of trust be made revocable in the manner therein prescribed (*m*).

SECT. 2.

Express  
Trusts.SECT. 3.—*Constructive and Implied Trusts.*Revocation  
of trust.SUB-SECT. 1.—*Constructive Trusts.*

Definition.

90. A constructive trust, in its strict sense (*a*), is a trust attached by law to property which is not expressly subject to a trust, but which a person holding other property in trust for some other person or object, or occupying in respect of other property a fiduciary position towards some other person or object, has acquired by means of his ownership of or dealings with such trust or fiduciary property (*b*). The person who holds property on a constructive trust occupies a fiduciary position in respect of it, and is sometimes called a constructive trustee or a trustee *de son tort* (*c*).

91. Where a lease is renewable by custom or contract (*d*), and a person holding it in whole or in part as a trustee or agent, or in a fiduciary capacity for another person or object, obtains a renewal of the lease, he holds the renewed lease in whole or in part in trust

Renewable  
leaseholds.

MISTAKE, Vol. XXI., pp. 12, 19, 23, 28. The instrument may be reformed after the death of the disposer, if it is proved beyond all doubt that it did not express his intentions (*Lister v. Hodgson* (1867), L. R. 4 Eq. 30, *per* Lord ROMILLY, M.R., at p. 32; *Weir v. Van Tromp* (1900), 16 T. L. R. 531).

(*m*) *Lane v. Debenham* (1853), 11 Hare, 188, *per* WOOD, V.-C., at p. 192. As to revocation of trusts for creditors, see pp. 38, 39, *post*. The revocation of a trust or use by a writing not being a will is chargeable with a stamp duty of 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., Revocation); and see title REVENUE, Vol. XXIV., pp. 724 *et seq.*

(*a*) The term "constructive trust" is commonly used as synonymous with the term "implied trust" (as to which see pp. 58 *et seq.*, *post*), and also includes resulting trusts (as to which see pp. 49 *et seq.*, *post*). For the purposes of this section of this title the term is used as defined in the text.

(*b*) *Espinasse v. Lowe* (1764), 7 Bro. Parl. Cas. 345, 355; see p. 7, *ante*. As to constructive and resulting trusts, see, further, title EQUITY, Vol. XIII., pp. 155 *et seq.*

(*c*) The expression "constructive trustee" or "trustee *de son tort*" is more strictly applicable to a person who holds property which is subject to an express trust without having duly become trustee thereof or acquired a fiduciary position in respect thereof (*Barnes v. Addy* (1874), 9 Ch. App. 244, *per* Lord SELBORNE, L.C., at p. 251; *Soar v. Ashwell*, [1893] 2 Q. B. 390, C. A., *per* KAY, L.J., at p. 405; and see pp. 6, *ante*, 87 *et seq.*, *post*).

(*d*) The principle does not apply when a person without fraud takes a new lease or acquires the reversion on a lease which he holds on trust or in a fiduciary capacity, where such lease is not renewable by contract or custom (*Randall v. Russell* (1817), 3 Mer. 190; *Longton v. Wilsby* (1897), 76 L. T. 770; *Bevan v. Webb*, [1905] 1 Ch. 620). Where a person partly interested in an old lease takes a new lease to himself on the surrender or at the expiration of the lease, he is not a constructive trustee of the new lease unless, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested, as, for instance, as tenant for life in respect of settled leaseholds, or as partner in respect of a partnership lease, or as mortgagee in respect of a mortgaged lease (*Re Biss*, *Biss v. Biss*, [1903] 2 Ch. 40, C. A., distinguishing *Ex parte Grace* (1799), 1 Bos. & P. 376, and considering *Palmer v. Young* (1684), 1 Vern. 276, more correctly reported, [1903] 2 Ch. 65, n., and *Rawe v. Chichester* (1773), Amb. 715, 719); see also *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298; *Hunter v. Allen*, [1907] 1 I. R. 212; and note (*e*), p. 48, *post*.

SECT. 3.  
**Constructive and Implied Trusts.**

Accretions to trust property.

Profits from trust property.

for that person or object (e). If instead of renewing the lease he purchases the reversion from the person from whom renewal could have been claimed, he holds the reversion on the same trust as the lease (f).

**92.** Where an accretion of any kind comes to property held in trust or in a fiduciary capacity, the accretion cannot be retained by the holder of the property, but forms part of the capital of the trust property for the benefit of the person or object beneficially interested in it (g).

**93.** A person holding a fiduciary position in relation to property cannot deal with the property for his own benefit (h). Nor can he in dealing with a third person with respect to the property obtain

(e) *Plowman v. Plowman* (1693), 2 Vern. 289; *Keech v. Sandford* (1726), Cas. temp. King, 61; *Rakestraw v. Brewer* (1729), 2 P. Wms. 511; *Blewett v. Millett* (1774), 7 Bro. Parl. Cas. 367; *Griffin v. Griffin* (1804), 1 Sch. & Lef. 352; *James v. Dean* (1808), 15 Ves. 236; *Fitzgibbon v. Scanlan* (1813), 1 Dow, 261, 269, H. L.; *Hardman v. Johnson* (1815), 3 Mer. 347; *M'Nulty v. Hamill* (1815), Beat. 544; *Randall v. Russell* (1817), 3 Mer. 190; *Maunsell v. O'Brien* (1835), 1 Jo. Ex. Ir. 176; *Mill v. Hill* (1852), 3 H. L. Cas. 828; *Clegg v. Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Archbold v. Scully* (1861), 9 H. L. Cas. 360; *Re Anderson's Estate* (1869), 18 W. R. 248; *Isaac v. Wall* (1877), 6 Ch. D. 706; *Re Morgan, Pillgrem v. Pillgrem* (1881), 18 Ch. D. 93, C. A.; *Re Lulham, Brinton v. Lulham* (1885), 53 L. T. 9, C. A.; *Griffith v. Owen*, [1907] 1 Ch. 195. The fact that the lessor expressly refused to renew for the benefit of the *cestui que trust* makes no difference (*Keech v. Sandford*, *supra*; *Fitzgibbon v. Scanlan*, *supra*, per Lord ELDON, L.C., at p. 269), and it is immaterial that the new lease contains additional property and is at an increased rent (*Re Morgan, Pillgrem v. Pillgrem*, *supra*; but see *Acheson v. Fair* (1843), 2 Con. & Law. 208). If the creator of the trust himself takes a renewed lease, he holds it for the trust (*Re Lulham, Brinton v. Lulham*, *supra*). As to the renewal of a lease of partnership premises, see note (d), p. 47, *ante*; title PARTNERSHIP, Vol. XXII., pp. 48, 82; as to renewal by a tenant for life, see pp. 61, 62, *post*; as to renewal by a mortgagee, see title MORTGAGE, Vol. XXI., p. 127.

(f) *Re Ranelagh's (Lord) Will* (1884), 26 Ch. D. 590; *Phillips v. Phillips* (1885), 29 Ch. D. 673, C. A.; see also *Griffith v. Owen*, *supra*. But it is otherwise where he purchases the reversion from a person to whom the lessor has lawfully assigned it discharged from the legal liability to renew the lease (*Randall v. Russell*, *supra*; *Bevan v. Webb*, [1905] 1 Ch. 620). Where this is not the case he may have a lien on the trust estate for the purchase-money which he has paid (*Isaac v. Wall*, *supra*). On the same principle it was held that where two sisters entitled to a mortgage as tenants in common in equal shares purchased from the mortgagor the equity of redemption, and, though each paid half the purchase-money, took the conveyance of it to themselves as joint tenants, they were in equity entitled to the property in equal shares as tenants in common (*Edwards v. Fashion* (1712), Prec. Ch. 332).

(g) *Re Curteis' Trusts* (1872), L. R. 14 Eq. 217; *Aberdeen Town Council v. Aberdeen University* (1877), 2 App. Cas. 544; *Re Payne's Settlement*, *Kibble v. Payne* (1886), 54 L. T. 840. The confirmation by Act of Parliament of the title of a tenant for life of an encroachment was held to enure also for the benefit of the remaindermen (*Yem v. Edwards* (1857), 1 De G. & J. 598, C. A.). Where, however, a person is a trustee of property only in respect of a specific sum charged thereon or payable thereout, and is absolute owner of the rest, he is beneficially entitled to the whole of any increment thereof or accretion thereto (*Re Campbell, Campbell v. Campbell*, [1893] 3 Ch. 468).

(h) *Dobson v. Land* (1850), 8 Hare, 216, per WIGRAM, V.-C., at p. 221; see p. 121, *post*.



a personal advantage to himself by a secret agreement with that person (*i*). Similarly, where profits are made by a person by means of dealings with trust property or property in respect of which he stands in a fiduciary position, or by means of his occupying a fiduciary position, they form part of the capital or income of the property, as the case may be, and are held in trust for the person or object beneficially interested in such capital or income (*k*).

SECT. 3.  
Constructive and Implied Trusts.

SUB-SECT. 2.—*Resulting Trusts.*

(i.) *In General.*

**94.** A resulting trust is a constructive or implied trust arising by operation of law (*l*) in the following cases, namely:—(1) where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or in part (*m*); (2) where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails (*n*); and (3) where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to

Resulting trusts.

(*i*) *Fawcett v. Whitehouse* (1829), 1 Russ. & M. 132; *Beck v. Kantorowicz*, *Kantorowicz v. Carter*, *Kalb v. Kantorowicz* (1857), 3 K. & J. 230; *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918, C. A.; *Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360.

(*k*) *Carter v. Horne* (1728), 1 Eq. Cas. Abr. 7; *Fawcett v. Whitehouse*, *supra*; *York and North Midland Rail. Co. v. Hudson* (1853), 16 Beav. 485; *Bentley v. Craven* (1853), 18 Beav. 75; *Sugden v. Crossland* (1856), 3 Sm. & G. 192, 194 (where money paid to a trustee to induce him to retire was ordered to be added to the capital of the trust fund); *Great Luxembourg Rail. Co. v. Magnay (Sir Wm.)* (No. 2) (1858), 25 Beav. 586, *per* ROMILLY, M.R., at p. 592; *Kimber v. Barber* (1872), 8 Ch. App. 56; *Parker v. McKenna* (1874), 10 Ch. App. 96; *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A., *per* JAMES, L.J., at p. 323; *Re Thorpe, Vipont v. Radcliffe*, *supra*; *Re Smith, Smith v. Thompson*, [1896] 1 Ch. 71. But where the profit obtained, though it ultimately comes out of the trust estate, is in reality remuneration for services rendered under a proper and independent agreement, it does not form part of the trust property (*Re Lewis, Lewis v. Lewis*, [1910] W. N. 217). A partner who, in the course of negotiating for a lease to the partnership firm, receives a large sum of money from the lessors, is a trustee of it for the benefit of the firm (*Fawcett v. Whitehouse*, *supra*). As to the relation of promoters and directors of a company to the company, see pp. 59, 60, *post*; title COMPANIES, Vol. V., pp. 221, 222, 226. A director who purchases property independently of the company and afterwards sells it to the company at a profit is not a trustee for the company of the profit (*Burland v. Earle*, [1902] A. C. 83, P. C.). As to the liability to account for secret profits where a trustee becomes bankrupt, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 260.

(*l*) *Norfolk (Duke) v. Browne* (1698), Prec. Ch. 80; *Lloyd v. Spillet* (1741), 2 Atk. 148, *per* Lord HARDWICKE, L.C., at p. 150; Statute of Frauds (29 Car. 2, c. 3), s. 8. As to resulting trusts in the case of charities, see title CHARITIES, Vol. IV., pp. 180, 181.

(*m*) *Lloyd v. Spillet*, *supra*; see pp. 50 *et seq.*, *post*.

(*n*) See p. 54, *post*.

SECT. 3.  
**Construc-  
 tive and  
 Implied  
 Trusts.**

have been intended and is held to be equitable (*o*). In all these cases, except where the failure of a declared trust arises from the illegality of the object, and the trustee relies on the maxim *in pari delicto potior est conditio possidentis* (*p*), the beneficial interest in the property, so far as not applicable to any sufficiently expressed or indicated beneficiary or object, results or reverts to the disposer or purchaser of the property or, in the case of his previous death, to his representatives (*q*).

(ii.) *Trust not Exhaustive.*

Beneficial  
 destination of  
 the property  
 not  
 exhausted.

**95.** Where property is assured to a trustee upon trusts, and the trusts do not, either as declared by the instrument of assurance or in the event, legally exhaust the beneficial destination of the property, the remaining beneficial interest therein results to the settlor and forms part of his real or personal estate according to the nature of the property (*r*). This principle, however, does not apply (1) where a contrary intention is indicated in the instrument of assurance or is otherwise sufficiently proved (*s*); or (2) where the trust for which the property has been assured fails owing to its being for a purpose which is illegal in itself; and which has been partly carried out, in which case the court gives no assistance to the disposer in asserting his right under a resulting trust, on the principle that *in pari delicto potior est conditio possidentis* (*t*). If, however,

(*o*) *Lloyd v. Spillet* (1741), 2 Atk. 148; see pp. 54 *et seq.*, *post*.

(*p*) See the text, *infra*; and pp. 57, 58, *post*.

(*q*) *Lloyd v. Spillet*, *supra*. There is a similar principle at common law as to resulting uses of land (2 Bl. Com. 335; Sanders, Uses and Trusts, 4th ed., Vol. I., pp. 99 *et seq.*); see titles GIFTS, Vol. XV., p. 417; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 279, 280.

(*r*) *Carrick v. Errington* (1726), 2 P. Wms. 361; *Birch v. Blaggrave* (1755), Amb. 264; *Hewitt v. Wright* (1780), 1 Bro. C. C. 86; *Leslie v. Devonshire (Duke)* (1787), 2 Bro. C. C. 187; *Cook v. Hutchinson* (1836), 1 Keen, 42; *Clarke v. Franklin* (1858), 4 K. & J. 257; *Re Wilcock, Wilcock v. Johnson* (1890), 62 L. T. 317. Where, on a marriage, personal property of the wife is settled so as to give a life interest therein to the husband after her death so long as he remains a widower, he ceases on his remarriage to be entitled to the life interest and there is a resulting trust thereof for the wife's estate (*Re Wyatt, Gowan v. Wyatt* (1889), 60 L. T. 920). Where property is settled in contemplation of a marriage which is never in fact solemnised, there is a resulting trust of it in favour of the party who settled it (*Thomas v. Brennan* (1846), 15 L. J. (CH.) 420; *Mitford v. Reynolds* (1848), 16 Sim. 130; *Essery v. Cowlard* (1884), 26 Ch. D. 191); but where a father settles money and covenants to settle further property on his daughter on her marriage, and the trusts declared do not extend to the event (which happens) of her having no issue and surviving her husband, there is a resulting trust in favour of the daughter and not of the settlor (*Doyle v. Crean*, [1905] 1 I. R. 252; see *Ward v. Dyas* (1835), L. & G. temp. Sugd. 177).

(*s*) *Cook v. Hutchinson*, *supra*; *Biddulph v. Williams* (1875), 1 Ch. D. 203. The presumption of a resulting trust may be rebutted even by parol evidence (*Cook v. Hutchinson*, *supra*, per Lord LANGDALE, M.R., at p. 50).

(*t*) *Brackenbury v. Brackenbury* (1820), 2 Jac. & W. 391; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *Re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616, C. A. This principle, however, does not apply to a trust for an object which, though not unlawful in itself, is incapable by law of taking under the trust (*Russell v. Jackson* (1852), 10 Hare, 204, 214).



nothing has been done to carry the illegal purpose into effect, the disposer is entitled to have the property reconveyed (*u*).

**96.** Where a testator by his will devises real property in trust and does not exhaustively indicate, in a manner which can legally take effect (*x*), the persons or objects to be benefited by it, or where there is a failure of the persons or objects indicated, there is a resulting trust of the remaining beneficial interest in the real property for the testator's heir-at-law (*a*), if there is no indication of a contrary intention on the part of the testator (*b*). The principle applies where the destination of the rents and profits of real property during a limited period either has not been indicated by the testator or fails to take effect (*c*).

If a testator devises real property upon trust for sale and does not exhaustively indicate the application of the proceeds of sale, the beneficial interest in these proceeds and in the funds which represent them, so far as the destination thereof is not indicated, results to the heir-at-law (*d*), even though the testator expressly directs that no part of the proceeds shall lapse to or result for the benefit of the heir-at-law (*e*), or directs that the proceeds shall form part of his personal estate (*f*). Where a testator directs a sum of money to be raised out of his real property, but does not indicate the purpose

SECT. 3.  
Constructive and  
Implied  
Trusts.

Rights of  
heir-at-law  
under devise  
of realty  
upon trust.

(*u*) *Symes v. Hughes* (1870), L. R. 9 Eq. 475; *Taylor v. Bowers* (1876), 1 Q. B. D. 291, C. A.; *Barclay v. Pearson*, [1893] 2 Ch. 154. This principle was doubted in *Kearley v. Thomson* (1890), 24 Q. B. D. 742, 746, C. A.; see *Hermann v. Charlesworth*, [1905] 2 K. B. 123, 134, C. A.; titles CONTRACT, Vol. VII., p. 409; GAMING AND WAGERING, Vol. XV., p. 273.

(*x*) But see pp. 57, 58, *post*.

(*a*) *Hobart v. Suffolk (Countess)* (1710), 2 Vern. 644; *Hill v. London (Bishop)* (1739), 1 Atk. 618; *Lloyd v. Spillet* (1741), 2 Atk. 148, *per* Lord HARDWICKE, L.C., at p. 750; *Sherrard v. Harborough (Lord)* (1753), Amb. 165; *Habergham v. Vincent* (1793), 2 Ves. 204; *Maugham v. Mason* (1813), 1 Ves. & B. 410; *Southouse v. Bate* (1814), 2 Ves. & B. 396; *Tregonwell v. Sydenham* (1815), 3 Dow, 194, 210, H. L.; *Dunnage v. White* (1820), 1 Jac. & W. 583; *Taylor v. Taylor* (1853), 3 De G. M. & G. 190, C. A.; *Barrs v. Fewkes* (1864), 2 Hem. & M. 60; *Buckle v. Bristow* (1864), 10 Jur. (N. S.) 1095; *Longley v. Longley* (1871), L. R. 13 Eq. 133; *Wade-Gery v. Handley* (1876), 1 Ch. D. 653, 663. The heir-at-law is not to be disinherited except by express words (*Dunnage v. White*, *supra*, *per* PLUMER, M.R., at p. 585; *Taylor v. Taylor*, *supra*, *per* Lord CRANWORTH, L.C., at p. 197).

(*b*) See pp. 52, 53, *post*.

(*c*) *Re Sanderson's Trust* (1857), 3 K. & J. 497.

(*d*) *Randall v. Bookey* (1701), 2 Vern. 425; *London (City) v. Garway* (1707), 2 Vern. 571; *Starkey v. Brooks* (1718), 1 P. Wms. 390; *Stonehouse v. Evelyn* (1734), 3 P. Wms. 252; *Gravenor v. Hallum* (1767), Amb. 643; *Ackroyd v. Smithson* (1780), 1 Bro. C. C. Appendix, 503; *Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Spink v. Lewis* (1791), 3 Bro. C. C. 355; *Wright v. Wright* (1809), 16 Ves. 188; *Hill v. Cock* (1813), 1 Ves. & B. 173; *Maugham v. Mason*, *supra*; *Gibbs v. Rumsey* (1813), 2 Ves. & B. 294, 296; *Smith v. Claxton* (1819), 4 Madd. 484; *Jessopp v. Watson* (1833), 1 My. & K. 665; *Watson v. Hayes* (1839), 5 My. & Cr. 125; *Bective (Countess) v. Hodgson* (1864), 10 H. L. Cas. 656, *per* Lord WESTBURY, L.C., at p. 667; *Re Cameron, Nixon v. Cameron* (1884), 26 Ch. D. 19, 29, C. A.; *Re West, George v. Grose*, [1900] 1 Ch. 84.

(*e*) *Fitch v. Weber* (1848), 6 Hare, 145.

(*f*) *Taylor v. Taylor*, *supra*, overruling *Phillips v. Phillips* (1832), 1 My. & K. 649.

SECT. 3.  
Constructive and  
Implied  
Trusts.

Rights of  
next of kin.

to which it is to be applied, there is a resulting trust of it for his heir-at-law (*g*), even where the testator directs it to be paid to his executor, if it is not required for payment of his debts (*h*).

97. Where a testator by his will bequeaths personal property in trust and does not exhaustively indicate, in a manner which can legally take effect (*i*), the persons or objects to be benefited by it, or where there is a failure of the persons or objects indicated, there is a resulting trust of the remaining beneficial interest in the property for the testator's next of kin (*k*), if there is no indication of a contrary intention on the part of the testator (*l*).

Effect of  
conversion.

98. If the effect of the settlor's or testator's disposition of the real property has been to convert it in equity into personalty (*m*), the settlor or heir-at-law takes the beneficial interest under the resulting trust as personalty (*n*), unless the purposes for which the conversion was directed wholly fail, in which case the conversion is regarded in equity as not taking place (*o*).

On the other hand, if the effect of the testator's disposition of the personal property has been to convert it in equity into realty (*p*), the next of kin take as realty the beneficial interest under the resulting trust for them (*q*).

Rights of  
residuary or  
other devisee  
or legatee.

99. The terms of a testamentary disposition may, however, be such that where a trust fails or is not exhausted in carrying out the

(*g*) *Embllyn v. Freeman* (1720), Prec. Ch. 541; *Cruse v. Barley* (1727), 3 P. Wms. 20.

(*h*) *Arnold v. Chapman* (1748), 1 Ves. Sen. 108; *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128; *Collins v. Wakeman* (1795), 2 Ves. 683.

(*i*) But see pp. 57, 58, *post*.

(*k*) *Cloyne (Bishop) v. Young* (1750), 2 Ves. Sen. 91; *North and Guildford (Lord) v. Purdon* (1752), 2 Ves. Sen. 495; *Ackroyd v. Smithson* (1780), 1 Bro. C. C. Appendix, 503; *Robinson v. Taylor* (1789), 2 Bro. C. C. 589; *Spink v. Lewis* (1791), 3 Bro. C. C. 355; *Seley v. Wood* (1804), 10 Ves. 71; *Morice v. Durham (Bishop)* (1805), 10 Ves. 522; *Southouse v. Bate* (1814), 2 Ves. & B. 396; *Lynn v. Beaver* (1823), Turn. & R. 63, 66; *Jessopp v. Watson* (1833), 1 My. & K. 665; *Mullen v. Bowman* (1844), 1 Coll. 197; *Ellicock v. Mapp* (1851), 3 H. L. Cas. 492; *Bective (Countess) v. Hodgson* (1864), 10 H. L. Cas. 656, *per* Lord WESTBURY, L.C., at p. 667; *Buckle v. Bristow* (1864), 10 Jur. (N. S.) 1095; *Wade-Gery v. Handley* (1876), 1 Ch. D. 653, 663; *Re West, George v. Grose*, [1900] 1 Ch. 84; and see title PERPETUITIES, Vol. XXII., p. 373.

(*l*) See the text, *infra*; and p. 53, *post*.

(*m*) See title EQUITY, Vol. XIII., pp. 104 *et seq.* As to where the direction to sell or the trust of the proceeds of sale is void for remoteness, see title PERPETUITIES, Vol. XXII., p. 351.

(*n*) *Wright v. Wright* (1809), 16 Ves. 188; *Clarke v. Franklin* (1858), 4 K. & J. 257; *Bective (Countess) v. Hodgson*, *supra*, *per* Lord WESTBURY, L.C., at p. 667; *Steed v. Preece* (1874), L. R. 18 Eq. 192, *per* JESSEL, M.R., at p. 197. It makes no difference whether conversion has or has not actually taken place (*Bective (Countess) v. Hodgson*, *supra*, at p. 667; *Re Richerson, Scales v. Heyhoe*, [1892] 1 Ch. 379).

(*o*) *Clarke v. Franklin*, *supra*; *Curteis v. Wormald* (1878), 10 Ch. D. 172, C. A.; *Re Richerson, Scales v. Heyhoe*, *supra*, *per* CHITTY, J., at p. 382. The principle applies even though the conversion has actually been effected (*Bective (Countess) v. Hodgson*, *supra*).

(*p*) See title EQUITY, Vol. XIII., pp. 104 *et seq.*

(*q*) *Curteis v. Wormald*, *supra*, overruling *Reynolds v. Godlee* (1859), 8 W. R. 147; see also *Cogan v. Stephens* (1835), 5 L. J. (CH.) 17; *Hereford v. Ravenhill* (1839), 1 Beav. 481.

designated object, the beneficial interest under the trust, or the unexhausted part thereof, results or lapses to a residuary or other devisee or legatee under the will instead of to the testator's heir or next of kin, as the case may be (r).

SECT. 3.  
Constructive and Implied Trusts.

—  
Rights of the Crown.

**100.** Where a testator, having devised or bequeathed real or personal property upon a trust which fails to take complete effect under his will, dies without an heir or next of kin, the beneficial interest which is not disposed of by the will goes to the Crown, in the real property by escheat (s) and in the personal property as *bona vacantia* (t). In the case of the personal property, however, the language of the will and the circumstances of the case may sustain the title of the executor as against the Crown to residue which is not disposed of effectually (a).

**101.** Where funds are held in trust for a society or a particular purpose, and the society is dissolved or the purpose comes to an end, there is generally a resulting trust of the remaining funds for the contributors to the society or purpose, or for their personal representatives if they are dead (b). In certain cases, however, the Crown may claim these funds as *bona vacantia* (c); and, where a trust for

Dissolution of a society or termination of a purpose.

(r) *Mallabar v. Mallabar* (1735), *Cas. temp. Talb.* 78; *Durour v. Motteux* (1749), 1 Ves. Sen. 320; *Gravenor v. Hallum* (1767), Amb. 643, *per Lord CAMDEN*, L.C., at p. 645; *Wright v. Row* (1779), 1 Bro. C. C. 61; *Cambridge v. Rous* (1802), 8 Ves. 12; *Ellis v. Selby* (1836), 1 My. & Cr. 286, C. A.; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Holmes v. Prescott* (1864), 10 Jur. (N.S.) 507; *Re Eddel's Trusts* (1871), L. R. 11 Eq. 559; *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715; *Re Cartwright, Horner v. Halley* (1911), *Times*, 4th February.

(s) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 23 *et seq.* In the case of a testator who died before the 14th August, 1884, the beneficial interest in the real property would in such a case have been taken by the trustee (*Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177; *Taylor v. Haygarth* (1844), 14 Sim. 8; *Davall v. New River Co.* (1849), 3 De G. & Sm. 394; *Beale v. Symonds* (1852), 16 Beav. 406; *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258, 268, C. A.). Where a person executes a mortgage of land in fee simple and dies intestate and without heirs, the equity of redemption, after satisfying his debts, belongs to the mortgagee, and neither the Crown nor the mesne lord has any claim upon it (*Beale v. Symonds, supra*).

(t) *Middleton v. Spicer* (1783), 1 Bro. C. C. 201; *Taylor v. Haygarth, supra*; *Read v. Steadman* (1859), 26 Beav. 495; *Dacre v. Patrickson* (1860), 1 Drew. & Sm. 182; see also title DESCENT AND DISTRIBUTION, Vol. XI., pp. 28 *et seq.*

(a) *Re Bacon's Will, Camp v. Coe* (1886), 31 Ch. D. 460; *A.-G. v. Jefferys*, [1908] A. C. 411; see also titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 28 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 285.

(b) *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176; *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Re Abbott Fund Trusts, Smith v. Abbott*, [1900] 2 Ch. 326; *Hedderwick's Trustees v. Hedderwick's Executor*, [1910] S. C. 333; compare *Parkes v. Royal Botanic Society of London* (1908), 24 T. L. R. 508; and see *Re Lead Co.'s Workmen's Fund Society, Lowes v. Smelting Down Lead with Pit and Sea Coal (Governor & Co.)*, [1904] 2 Ch. 196. As to whether under a deed of assignment in trust for creditors there is a resulting trust for the debtor of any surplus of the property remaining after they have been paid in full, see p. 39, *ante*.

(c) *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A.; *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325; *Re Bond, Panes v. A.-G.*, [1901]



SECT. 3.  
Constructive and  
Implied  
Trusts.

Failure of  
purpose.

a charity fails, a court of equity orders that the trust property be applied *cy près*, and if necessary directs that a scheme be settled for the purpose (*d*).

(iii.) *Failure of Particular Purpose.*

**102.** Where property is purchased in the name or transferred into the possession of a person ostensibly for his own use, but really to effect or assist a purpose which is never carried out, there is a resulting trust of it for the purchaser or transferor, and he can make good his claim to it (*e*), even if the purchase or transfer was made for the fraudulent purpose of evading the law (*f*).

(iv.) *Property put into the Name of Another for Legal Purpose.*

Property  
purchased in  
the name of  
or transferred  
to another.

**103.** Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, unless there is some further intimation or indication of an intention at the time to benefit the other person (*g*), the property is, as a rule,

1 Ch. 15; *Braithwaite v. A.-G.*, [1909] 1 Ch. 510; see also title DESCENT AND DISTRIBUTION, Vol. XI., pp. 28 *et seq.* Where persons raise a common fund to provide for their respective widows, and they, and the widows to be provided for, all die, an unapplied balance in the fund belongs to the Crown as *bona vacantia* (*Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A.).

(*d*) *Moggridge v. Thackwell* (1792), 3 Bro. C. C. 517; *Mills v. Farmer* (1815), 1 Mer. 55; *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; *Re Shum's Trust, Prichard v. Richardson*, [1904] W. N. 146; *Re Andrew's Trust, Carter v. Andrew*, [1905] 2 Ch. 48 (where friends of a deceased clergyman subscribed to raise a fund for the education of his infant children, which was in fact paid for partly out of the fund and partly out of their father's estate, and it was held that a portion of the fund which remained unapplied after they were grown up and their education was completed was divisible equally among the children, and that there was no resulting trust thereof for the subscribers); and see title CHARITIES, Vol. IV., pp. 183, 190 *et seq.*

(*e*) *Ward v. Lant* (1702), Prec. Ch. 182; *Birch v. Blagrave* (1755), Amb. 264; *Platamone v. Staple* (1815), Coop. G. 250; *Cecil v. Butcher* (1821), 2 Jac. & W. 565, *per* PLUMER, M.R., at p. 573; *Childers v. Childers* (1857), 1 De G. & J. 482, C. A.

(*f*) *Symes v. Hughes* (1870), L. R. 9 Eq. 475; *Taylor v. Bowers* (1876), 1 Q. B. D. 291, C. A. As to cases where the illegal purpose has been in part carried out, see pp. 57, 58, *post*.

(*g*) *Crop v. Norton* (1740), 2 Atk. 74; *Maddison v. Andrew* (1747), 1 Ves. Sen. 57, 61; *Rider v. Kidder* (1805), 10 Ves. 360; *George v. Howard and the Bank of England* (1819), 7 Price, 646; *Currant v. Jago* (1844), 1 Coll. 261; *Deacon v. Colquhoun* (1853), 2 Drew. 21; *Wheeler v. Smith* (1859), 1 Giff. 300; *Garriick v. Taylor* (1860), Beav. 79; *Beecher v. Major* (1865), 2 Drew. & Sm. 431; *Forrest v. Forrest* (1865), 11 Jur. (N. S.) 317; *Marshal v. Crutwell* (1875), L. R. 20 Eq. 328, *per* JESSEL, M.R., at p. 329; *Tumbridge v. Care* (1871), 19 W. R. 1047; *Standing v. Bowring* (1885), 31 Ch. D. 282, C. A. The resulting trust may be rebutted as to part of the property or part of the interest therein and hold good as to the rest (*Benbow v. Townsend* (1833), 1 My. & K. 506, *per* LEACH, M.R., at p. 510). In *Young v. Peachy* (1742), 2 Atk. 254, where a father obtained an absolute conveyance of property from his daughter for a nominal consideration in order to apply it to a particular purpose, and then used it for another purpose, the daughter was held to be entitled to relief on the ground of fraud, but not on the ground of the existence of a trust.



deemed in equity to be held on a resulting trust for the purchaser or transferor (*h*).

**104.** The principle of implying a resulting trust applies where several persons purchase property in the name of one (*i*). Where, however, two or more persons purchase property in their joint names or transfer property into their joint names, and contribute the purchase-money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of the purchase or transfer, or unless there are circumstances from which such an intention can be inferred (*k*). If they contributed the purchase-money or property in unequal shares, there is a tenancy in common between them in equity (*l*), though even in this case the equitable tenancy in common may be rebutted by evidence or circumstances (*m*).

**105.** Where a father or other person *in loco parentis* purchases property in the name of a child or transfers property into the name of a child, the transaction does not create a resulting trust for the purchaser or transferor, but is an advancement or gift to the child (*n*),

SECT. 3.  
Construc-  
tive and  
Implied  
Trusts.

Joint trans-  
actions.

Advancement  
or gift to a  
child.

(*h*) *Anon.* (1682), 2 Vent. 361; *Gascoigne v. Thwing* (1686), 1 Vern. 366; *Ambrose v. Ambrose* (1716), 1 P. Wms. 321; *Ryall v. Ryall* (1740), 1 Atk. 59; *Lloyd v. Spillet* (1741), 2 Atk. 148; *Cottingham v. Fletcher* (1741), 2 Atk. 156; *Young v. Peachy* (1742), 2 Atk. 254; *Withers v. Withers* (1752), Amb. 151; *Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92; *Finch v. Finch* (1808), 15 Ves. 43, *per* Lord ELDON, L.C., at p. 50; *Murless v. Franklin* (1818), 1 Swan. 13, *per* Lord ELDON, L.C., at pp. 17, 18; *Field v. Lonsdale* (1850), 13 Beav. 78; *Pfleger v. Browne* (1860), 28 Beav. 391; *Davies v. Otty* (No. 2) (1865), 35 Beav. 208; *Haigh v. Kaye* (1872), 7 Ch. App. 469; *Todd v. Moorhouse* (1874), L. R. 19 Eq. 69; *Rudkin v. Dolman* (1876), 35 L. T. 791; *Re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282; see also title GIFTS, Vol. XI., p. 414.

(*i*) *Wray v. Steele* (1814), 2 Ves. & B. 388.

(*k*) *Edwards v. Fashion* (1712), Prec. Ch. 332; *Carter v. Horne* (1728), 1 Eq. Cas. Abr. 7; *Aveling v. Knipe* (1815), 19 Ves. 441; *Harris v. Fergusson* (1848), 16 Sim. 308; *Robinson v. Preston* (1858), 4 K. & J. 505; *Harrison v. Barton* (1860), 1 John. & H. 287; *Re Hughes's Trusts* (1871), 24 L. T. 415. But where a mortgage is taken by two or more persons in equal shares, there is a tenancy in common in equity (*Petty v. Styward* (1631), 1 Rep. Ch. 31 [57]; *Robinson v. Preston*, *supra*, *per* WOOD, V.-C., at p. 511; see title MORTGAGE, Vol. XXI., p. 117). As to co-ownership of property generally, see titles PERSONAL PROPERTY, Vol. XXII., pp. 403, 404; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 199 *et seq.*

(*l*) *Robinson v. Preston*, *supra*, at p. 510.

(*m*) *Harris v. Fergusson*, *supra*.

(*n*) *Grey (Lord) v. Grey* (1677), 2 Swan. Appendix, 594; *Elliot v. Elliot* (1677), 2 Cas. in Ch. 231; *Mumma v. Mumma* (1687), 2 Vern. 19; *Baylis v. Newton* (1687), 2 Vern. 28; *Taylor v. Taylor* (1737), 1 Atk. 386; *Stileman v. Ashdown* (1742), 2 Atk. 477, *per* Lord HARDWICKE, L.C., at p. 480; *Dyer v. Dyer*, *supra*; *Finch v. Finch*, *supra*; *Dummer v. Pitcher* (1833), 2 My. & K. 262, *per* Lord BROUGHAM, L.C., at p. 272; *Sidmouth v. Sidmouth* (1840), 2 Beav. 447; *Re Cane's Trusts* (1867), 36 L. J. (CH.) 744; *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10; *Stock v. McAvoy* (1872), L. R. 15 Eq. 55, *per* WICKENS, V.-C., at p. 58; *Bennet v. Bennet* (1879), 10 Ch. D. 474; *Re Richardson, Weston v. Richardson* (1882), 47 L. T. 514. The principle extends to the case of a transfer into the names of a married daughter and her husband, even where the name of the transferor is joined with theirs (*Batstone v. Salter* (1875), 10 Ch. App. 431). The

SECT. 3.  
Constructive and  
Implied  
Trusts.

unless there is evidence of a contrary intention at the time of the transaction (o), or the circumstances are such as to raise a presumption against the advancement or gift (p). The rule is the same where the purchase or transfer is made in the joint names of a child or a stranger (a), or in the name of an illegitimate child towards whom the father has placed himself *in loco parentis* (b). A mere moral obligation to provide for the other person is not, however, sufficient to rebut the resulting trust (c).

Addition to  
settlement  
funds.

**106.** If a man puts an additional fund into the names of the trustees of his marriage settlement, who hold funds in trust for himself and his wife and children, it is deemed to be intended as an accretion to the settled funds and not to be held on a resulting trust for him (d).

presumption of a gift or advancement by a mother is not so strong as in the case of a father, but it is in each case a question of evidence (*Re De Visme* (1863), 2 De G. J. & Sm. 17, C. A.; *Down v. Ellis* (1865), 35 Beav. 578; *Sayre v. Hughes* (1868), L. R. 5 Eq. 376; *Bennet v. Bennet* (1879), 10 Ch. D. 474, 479, 480). As to a grandfather, see *Ebrand v. Dancer* (1680), 2 Cas. in Ch. 26; *Soar v. Foster* (1858), 4 K. & J. 152, 157; as to a grandmother, see *Loyd v. Read* (1720), 1 P. Wms. 607; as to an aunt and her niece, see *Re Howes*, *Howes v. Platt* (1905), 21 T. L. R. 501.

(o) *Blake v. Blake* (1721), 7 Bro. Parl. Cas. 241; *Birch v. Blagrave* (1783), Amb. 264; *Murless v. Franklin* (1818), 1 Swan. 13, *per* Lord ELDON, L.C., at pp. 17, 19; *Prankerd v. Prankerd* (1820), 1 Sim. & St. 1; *Sidmouth v. Sidmouth* (1840), 2 Beav. 447; *Collinson v. Collinson* (1853), 3 De G. M. & G. 409; *Williams v. Williams* (1863), 32 Beav. 370; *Tucker v. Burrow* (1865), 2 Hem. & M. 515. The fact that the purchase could not have been taken wholly in the name of the purchaser is not sufficient to rebut the presumption (*Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92, 98). Subsequent acts or expressions on the part of the parent will not convert the advancement or gift into a trust for himself (*Murless v. Franklin*, *supra*; *Crabb v. Crabb* (1834), 1 My. & K. 511, C. A., *per* Lord BROUGHAM, L.C., at p. 519; *Sidmouth v. Sidmouth*, *supra*). But subsequent acts or declarations of the child may establish a trust in favour of the parent (*Pole v. Pole* (1748), 1 Ves. Sen. 76; *Sidmouth v. Sidmouth*, *supra*; *Jeans v. Cooke* (1854), 24 Beav. 513, 521). As to where a father effects a policy of assurance on the life of his son, see *Freme v. Brade* (1858), 2 De G. & J. 582, C. A.; *Worthington v. Curtis* (1875), 1 Ch. D. 419, C. A.; *Hadden v. Bryden* (1899), 1 F. (Ct. of Sess.) 710; *A.-G. v. Murray*, [1904] 1 K. B. 165, 172, C. A.; see also titles GIFTS, Vol. XV., p. 416; INSURANCE, Vol. XVII., p. 562.

(p) *Elliot v. Elliot* (1677), 2 Cas. in Ch. 231; *Pole v. Pole*, *supra*; *Prankerd v. Prankerd*, *supra*; *Kilpin v. Kilpin*, *Kilpin v. Lamb* (1834), 1 My. & K. 520; *Garrett v. Wilkinson* (1848), 2 De G. & Sm. 244. The fact that the child is acting as the parent's solicitor raises a contrary presumption (*Garrett v. Wilkinson*, *supra*). But the fact of the child having been already advanced or provided for does not necessarily rebut the advancement or gift (*Kilpin v. Kilpin*, *Kilpin v. Lamb*, *supra*, *per* Lord BROUGHAM, L.C., at p. 542; *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10). As to the presumption in favour of or against either resulting trust or advancement, see also titles EVIDENCE, Vol. XIII., p. 568; INFANTS AND CHILDREN, Vol. XVII., pp. 118, 119.

(a) *Lamplugh v. Lamplugh* (1709), 1 P. Wms. 111; *Crabb v. Crabb*, *supra*; *Kilpin v. Kilpin*, *Kilpin v. Lamb*, *supra*, at p. 542.

(b) *Beckford v. Beckford* (1774), Lofft, 490; *Kilpin v. Kilpin*, *Kilpin v. Lamb*, *supra*, at p. 542; *Petty v. Petty* (1853), 17 Jur. 646; *Soar v. Foster*, *per* WOOD, V.-C., at pp. 157 *et seq.*

(c) *Soar v. Foster*, *supra*, *per* WOOD, V.-C., at p. 161.

(d) *Re Curteis' Trusts* (1872), L. R. 14 Eq. 217.



**107.** If a husband purchases property in the sole name of his wife or transfers property into her sole name, he is presumed to do so as an absolute advancement or gift to her (*e*); and a purchase or transfer of property in or into the joint names of himself and his wife, or of himself and his wife and a third person, is presumed to be for the benefit of his wife if she survives him, though if he survives her the property reverts to him (*f*). On the other hand, where a wife hands over to her husband property belonging to her for her separate use, without any intention of making a gift of it to him, he is a trustee of it for her (*g*). The above rules as between husband and wife do not apply where there is evidence of a contrary intention (*h*).

SECT. 3.  
Construc-  
tive and  
Implied  
Trusts.

Transactions  
between  
husband and  
wife.

**108.** It would seem that a voluntary conveyance of real property is deemed, in the absence of evidence to the contrary, to pass the beneficial interest in the property conveyed (*i*).

Voluntary  
conveyance.

(*v.*) *Property put into the Name of Another for Fraudulent or Illegal Purpose.*

**109.** Where property is fraudulently purchased in or transferred into the name of another for a purpose which is prohibited by law, and that purpose is partially carried out (*k*), the principle that *in pari delicto potior est conditio possidentis* (*l*) applies, and the court

Resulting  
trust, when  
not enforced.

(*e*) *Re Eykyn's Trusts* (1877), 6 Ch. D. 115, *per* MALINS, V.-C., at p. 118; see *Kingdon v. Bridges* (1688), 2 Vern. 67; *Rider v. Kidder* (1805), 10 Ves. 360, *per* Lord ELDON, L.C., at p. 367; *Soar v. Foster* (1858), 4 K. & J. 152, 158, 160; and see title HUSBAND AND WIFE, Vol. XVI., pp. 394 *et seq.* The principle applies where the name of a third person is added (*Re Eykyn's Trusts*, *supra*, at p. 119).

(*f*) *Christ's Hospital v. Budgin* (1712), 2 Vern. 683; *Dummer v. Pitcher* (1833), 2 My. & K. 262; *Drew v. Martin* (1864), 2 Hem. & M. 130; *Re Eykyn's Trusts*, *supra*, at pp. 118, 119; *Re Young, Trye v. Sullivan* (1885), 28 Ch. D. 705; *Morrison v. M'Ferran*, [1901] 11 R. 360.

(*g*) *Green v. Carlill* (1877), 4 Ch. D. 882; *Re Flamank, Wood v. Cock* (1889), 40 Ch. D. 461; *Mercier v. Mercier*, [1903] 2 Ch. 98, C. A.; and see p. 61, *post*. While they are living together, the husband is not liable to account for the income of the property which he uses, with the wife's acquiescence, since he is presumed to have applied it for their joint benefit (*Re Flamank, Wood v. Cock, supra*); and see title HUSBAND AND WIFE, Vol. XVI., pp. 392 *et seq.*

(*h*) *Marshal v. Crutwell* (1875), L. R. 20 Eq. 328 (where it was held that if a man in failing health puts money into the joint account of himself and his wife at a bank for the sake of convenience in administering their household affairs, the balance at his death forms part of his estate).

(*i*) *Lloyd v. Spillet* (1741), 2 Atk. 148, 150; *Young v. Peachy* (1742), 2 Atk. 254, *per* Lord HARDWICKE, L.C., at p. 256; *Fowkes v. Pascoe* (1875), 10 Ch. App. 343, *per* JAMES, L.J., at p. 348. A contrary opinion has been expressed in other cases; see *Elliot v. Elliot* (1677), 2 Cas. in Ch. 231; *Norfolk (Duke) v. Browne* (1698), Prec. Ch. 80. The latter view is adopted in Lewin on Trusts, 12th ed., p. 164; Williams, Law of Real Property, 21st ed., p. 183; see also title GIFTS, Vol. XV., p. 417. No resulting trust for the lessor is raised by a gratuitous lease (*Pilkington v. Bayley* (1778), 7 Bro. Parl. Cas. 383). As to the implication of a resulting use, where a conveyance is made without any consideration or declaration of use, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 280, note (*t*).

(*k*) As to where the purpose is never even partially carried out, see pp. 50, 51, *ante*.

(*l*) *Munt v. Stokes* (1792), 4 Term Rep. 561, *per* BULLER, J., at p. 564; *Haigh v. Kaye* (1872), 7 Ch. App. 469, *per* JAMES, L.J., at p. 473.

SECT. 3.  
Constructive and Implied Trusts.

does not assist the purchaser or transferor to enforce his claim to the beneficial interest in it under a resulting trust or interfere with the possession of the nominee or transferee (*m*).

SUB-SECT. 3.—*Trusts Implied from Other Relationships.*

Contractual or other relationship.

**110.** Where under a contractual or other relationship subsisting between parties one of them holds or deals with the property of the other in a fiduciary capacity, he is regarded in equity as doing so on an implied trust from the other party, but subject in each case to the conditions which the relationship implies or involves (*n*).

Agent.

**111.** A contract of agency does not in itself make the agent a trustee (*o*); but he may, under a power of attorney or otherwise, hold and deal with the property of his principal in such circumstances and in such a manner as to constitute him a trustee for his principal (*p*).

(*m*) *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; *Roberts v. Roberts* (1818), Dan. 143; S. C., *sub nom. Doe d. Roberts v. Roberts* (1819), 2 B. & Ald. 367; *Brackenbury v. Brackenbury* (1820), 2 Jac. & W. 391, C. A., *per* Lord ELDON, L.C., at p. 394; *Cecil v. Butcher* (1821), 2 Jac. & W. 565, *per* PLUMER, M.R., at pp. 573, 576, 577; *Phillpotts v. Phillpotts* (1850), 10 C. B. 85; *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275; see *Re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616, C. A.; and note (*t*), p. 26, *ante*. If the trustee seeks the direction of a court of equity as to the application of the property, the court directs that it shall revert to the estate of the disposer (*Phillips v. Probyn*, [1899] 1 Ch. 811). The last principle does not apply where the object of a trust is lawful in itself but is incapable in law of taking under the disposition (*Russell v. Jackson* (1852), 10 Hare, 204, 214); see pp. 50 *et seq.*, *ante*.

(*n*) *Terry v. Wachter* (1846), 15 Sim. 447; *Shaw v. Foster* (1872), L. R. 5 H. L. 321, *per* Lord O'HAGAN, at p. 349; *Knox v. Gye* (1872), L. R. 5 H. L. 656, *per* Lord WESTBURY, at pp. 675, 676; *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, *per* JESSEL, M.R., at pp. 475, 476. Wherever persons agree concerning a particular subject, that, in a court of equity, as against the party himself and any claiming under him, voluntarily or with notice, raises a trust (*Legard v. Hodges* (1792), 1 Ves. 477, *per* Lord THURLOW, L.C., at p. 478; *Berwick v. Matthews* (1892), 66 L. T. 564). As to when implied trusts of this nature are excepted out of the operation of the Statutes of Limitation, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 142, 161, 164, 170. Trustees and persons acting in a fiduciary position, when ordered by a court of equity to pay money in their possession or under their control, are liable to imprisonment for default in payment (Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3); *Marris v. Ingram* (1879), 13 Ch. D. 338; *Re Strong* (1886), 32 Ch. D. 342, C. A., *per* FRY, L.J., at p. 347); see title COMTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 299, 300.

(*o*) *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, C. A.; *Piddocke v. Burt*, [1894] 1 Ch. 343, *per* CHITTY, J., at p. 346; *Henry v. Hammond*, [1913] 2 K. B. 515; and see title AGENCY, Vol. I., pp. 181, 182, 184, 188.

(*p*) *Henchman v. East India Co.* (1797), 8 Bro. Parl. Cas. 85; *Foley v. Hill* (1848), 2 H. L. Cas. 28, *per* Lord COTTENHAM, L.C., at pp. 35, 36; *Burdick v. Garrick* (1870), 5 Ch. App. 233, *per* Lord HATHERLEY, L.C., at p. 240; *Gray v. Bateman* (1872), 21 W. R. 137; *North American Land and Timber Co., Ltd. v. Watkins*, [1904] 1 Ch. 242, affirmed, [1904] 2 Ch. 233, C. A.; *Reid-Newfoundland Co. v. Anglo-American Telegraph Co., Ltd.*, [1912] A. C. 555, P. C.



**112.** An auctioneer holds on trust for the vendor deposit money paid to him in respect of a sale (*q*).

**113.** The deposit of money with a banker is ordinarily not a transaction which creates a fiduciary relation between the parties, but is simply a loan (*r*). Special circumstances may, however, create an implied trust in the case of a banker or other person with whom the money or property of another is deposited (*s*).

**114.** A broker or consignee, though not ordinarily in the position of a trustee (*t*), may receive property under conditions which create an implied trust of it for the owner (*a*).

**115.** A company or corporation is in a certain sense a trustee of its corporate property for its nominal members (*b*). It is not, however, ordinarily affected with trusts or equitable interests upon or subject to which its nominal members hold their shares or interests therein (*c*); and an insurance company is not a trustee of money due under its policies (*d*).

On the other hand, an implied trust for the company and its members, involving inability to make personal profit out of transactions affecting the company (*e*), is attached by law to the position of a promoter of a company (*f*) or a director of a

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Constructive and Implied Trusts.

Auctioneer.  
Banker or other deposittee.  
Broker or consignee.

Company or corporation.

Directors and promoters.

(*q*) *Crowther v. Elgood* (1887), 34 Ch. D. 691, C. A.; see title AUCTION AND AUCTIONEERS, Vol. I., pp. 514 *et seq.*

(*r*) *Pott v. Clegg* (1847), 16 M. & W. 321; *Foley v. Hill* (1848), 2 H. L. Cas. 28; *Burdick v. Garrick* (1870), 5 Ch. App. 233, *per* Lord HATHERLEY, L.C., at p. 240; *Re Sutton's Trusts* (1879), 12 Ch. D. 175; *Wilson v. Bury* (Lord) (1880), 5 Q. B. D. 518, C. A., *per* BRETT, L.J., at p. 531; and see title BANKERS AND BANKING, Vol. I., pp. 583, 584, 588.

(*s*) *Re Tidd, Tidd v. Overell*, [1893] 3 Ch. 154; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243; and see p. 90, *post*.

(*t*) *King v. Hutton*, [1900] 2 Q. B. 504, C. A.; *Lloyds Bank v. Swiss Bankverein, Union of London and Smiths Bank v. Same* (1913), 108 L. T. 143, C. A.; and see title SALE OF GOODS, Vol. XXV., pp. 138 *et seq.*

(*a*) *Fitzgerald v. Stewart* (1831), 2 Russ. & M. 457; see p. 90, *post*.

(*b*) *Bligh v. Brent* (1836), 2 Y. & C. (EX.) 268, *per* Lord ABINGER, C.B., at p. 280. But a misapplication of the corporate property is not dealt with in a court of equity as a breach of trust (*Colchester Corporation v. Lowten* (1813), 1 Ves. & B. 226, *per* Lord ELDON, L.C., at pp. 244 *et seq.*); and the ordinary rights and duties as between a trustee and his *cestuis que trust* do not subsist between a company or corporation and its members (*Salomon v. Salomon & Co., Salomon & Co. v. Salomon*, [1897] A. C. 22, *per* Lord HERSCHELL, at pp. 43, 44). The money of a company or corporation is a trust fund because it is applicable only to its special purposes; but the company or corporation is the *cestui que trust*, and its individual members do not hold that position (*Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474, *per* JESSEL, M.R., at p. 479). A company is not trustee of dividends declared; see title COMPANIES, Vol. V., p. 276.

(*c*) *Lumsden v. Buchanan* (1865), 4 Macq. 950, H. L.; *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Binney v. Ince Hall Coal and Cannel Co.* (1866), 35 L. J. (CH.) 363, 368; *Simpson v. Molsons' Bank*, [1895] A. C. 270, P. C.; and see title COMPANIES, Vol. V., pp. 150, 151, 193, 197, 198.

(*d*) *Matthew v. Northern Assurance Co.* (1878), 9 Ch. D. 80; see title INSURANCE, Vol. XVII., p. 565.

(*e*) See pp. 48, 49, *ante*, p. 121, *post*.

(*f*) *Hichens v. Congreve* (1828), 1 Russ. & M. 150; *Hay's Case* (1875), 10

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**Construc-  
 tive and  
 Implied  
 Trusts.**

company (*g*). Although directors stand in a fiduciary position to the company, they do not, however, stand in such a position to a stranger with whom the company has dealings (*h*). Again, if a breach of trust is committed by a company acting through its board of directors, no action in respect thereof can be maintained against the directors personally (*i*).

Executor.

**116.** In a loose sense a legal personal representative is a trustee for the creditors and beneficiaries claiming under the deceased, since he holds the real and personal estate of the deceased for their benefit and not for his own (*k*); and he is guilty of a breach of trust if he misapplies it (*l*). An executor is not, however, as such, strictly a trustee for a legatee, whether the legatee is an adult (*m*) or an infant (*n*), nor for the next of kin of the testator (*o*), notwithstanding the terms of the Executors Act, 1830 (*p*). He does not become a trustee by signing a residuary account (*q*), or by merely assenting

Ch. App. 593; *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A., per LINDLEY, M.R., at p. 422; *Gluckstein v. Barnes*, [1900] A. C. 240; and see title COMPANIES, Vol. V., pp. 49, 50; but see *Omnium Electric Palaces, Ltd. v. Barnes*, [1914] 1 Ch. 332, C. A.

(*g*) *York and North Midland Rail. Co. v. Hudson* (1853), 16 Beav. 485; *Gaskell v. Chambers* (No. 3) (1858), 26 Beav. 360; *Re Wood's (A. M.) Ships' Woodite Protection Co., Ltd.* (1890), 62 L. T. 760, per STIRLING, J., at p. 762; and see title COMPANIES, Vol. V., pp. 221, 222, 226 *et seq.*, 708. As to the position of directors of a limited company which undertakes the administration of a trust estate, see *Bath v. Standard Land Co., Ltd.*, [1911] 1 Ch. 618, C. A., per FLETCHER MOULTON, L.J., at pp. 636 *et seq.* The fact that a director holds his qualification shares as a trustee for another person or company does not render him a trustee of his director's fees for that person or company (*Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.). Neither a secretary nor an auditor is a trustee; see title LIMITATION OF ACTIONS, Vol. XIX., p. 167, note (*g*).

(*h*) *Bath v. Standard Land Co., Ltd.*, *supra*, per COZENS-HARDY, M.R., at p. 625; nor even as a rule to individual shareholders; see title COMPANIES, Vol. V., p. 226; compare *Allen v. Hyatt* (1914), 30 T. L. R. 444, P. C.

(*i*) *Ibid.*, at pp. 625, 626. There is an essential distinction between a director and a trustee (*Smith v. Anderson* (1880), 15 Ch. D. 247, C. A., per JAMES, L.J., at p. 275).

(*k*) *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609, 617; *Re Davis (Jane), Re Davis (T. H.), Evans v. Moore*, [1891] 3 Ch. 119, C. A., per LINDLEY, L.J., at p. 124; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (1).

(*l*) *Fordham v. Wallis* (1853), 10 Hare, 217, per TURNER, V.-C., at p. 226; *Re Marsden, Bowden v. Layland, Gibbs v. Layland* (1884), 26 Ch. D. 783, per KAY, J., at pp. 789, 790.

(*m*) *Re Barker, Buxton v. Campbell*, [1892] 2 Ch. 491; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25, 30; see *Dacre v. Patrickson* (1860), 1 Drew. & Sm. 182, 185.

(*n*) *Re Davis (Jane), Re Davis (T. H.), Evans v. Moore, supra*. An executor may, however, be trustee for an infant legatee for certain statutory purposes; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273; INFANTS AND CHILDREN, Vol. XVII., p. 88. As to guardians and curators, see title INFANTS AND CHILDREN, Vol. XVII., pp. 121 *et seq.*

(*o*) *Re Lacy, Royal General Theatrical Fund Association v. Kydd*, [1899] 2 Ch. 149.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 40; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284.

(*q*) *Re Rowe, Jacobs v. Hind* (1889), 58 L. J. (CH.) 703, C. A.; see *Tyson v. Jackson* (1861), 30 Beav. 384; *Brewster v. Prior* (1886), 55 L. T. 771; *Attenborough v. Solomon*, [1913] A. C. 76, 81.

to an absolute legacy (*a*). If, however, property is bequeathed to him on trust, he becomes a trustee of it (*b*) when he has either proved the will (*c*) and has paid all the debts (*d*), or, in the case of a legacy, has assented to it (*e*) or has severed it from the rest of the estate (*f*), or has executed a declaration of trust (*g*). The personal representative is also by statute declared to be a trustee of the real estate which devolves upon him for the persons beneficially entitled thereto (*h*).

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Constructive and Implied Trusts.

**117.** Where a husband is in possession of property belonging in equity to his wife for her separate use, he is a trustee of it for her (*i*). Husband.

**118.** Though in a broad sense a tenant for life or other limited owner of property is not a trustee for the remainderman (*k*), yet, if he becomes possessed of some capital benefit by reason and in respect of his limited ownership thereof, he holds it in trust for himself and the remaindermen according to their respective interests in the property (*l*). If he renews a renewable lease he does so for Limited owner.

(*a*) *Re Rowe, Jacobs v. Hind* (1889), 38 L. J. (CH.) 703, C. A.

(*b*) *Salter v. Cavanagh* (1838), 1 Dr. & Wal. 668; *Patrick v. Simpson* (1889), 24 Q. B. D. 128; *Hartford v. Power* (1868), 2 I. R. Eq. 204. As to the effect of the Statutes of Limitation, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265; LIMITATION OF ACTIONS, Vol. XIX., p. 167.

(*c*) *Mucklow v. Fuller* (1821), Jac. 198.

(*d*) *Charlton v. Durham (Earl)* (1869), 4 Ch. App. 433, 439; *Re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176; *Re Gompertz's (F. T.) Estate, Parker v. Gompertz* (1910), 55 Sol. Jo. 76.

(*e*) *Dix v. Burford* (1854), 19 Beav. 409; *Clegg v. Rowland* (1866), L. R. 3 Eq. 368, 372; *Attenborough v. Solomon, supra*, at pp. 83, 84; see *Byrchall v. Bradford* (1822), Madd. & G. 235, 240, 241.

(*f*) *Ex parte Dover* (1834), 5 Sim. 500; *Phillipo v. Munnings* (1837), 2 My. & Cr. 309; *O'Reilly v. Walsh* (1872), 6 I. R. Eq. 555.

(*g*) *Re Rowe, Jacobs v. Hind, supra*; see also the cases cited in note (*q*), p. 60, *ante*.

(*h*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (1); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 4, 5; *Re Peel, Woodcock v. Holdroyd*, [1899] W. N. 208; *Re Cowley*, [1901] 1 Ch. 38. As to the trusteeship of personal estate created by the Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), see *Re Lacy, Royal General Theatrical Fund Association v. Kydd*, [1899] 2 Ch. 149, *per* STIRLING, J., at pp. 158 *et seq.*

(*i*) *Bennet v. Davis* (1725), 2 P. Wms. 316; *Dixon v. Dixon* (1878), 9 Ch. D. 587, 593; *Alexander v. Barnhill* (1888), 21 L. R. Ir. 511; *Wassell v. Leggatt*, [1896] 1 Ch. 554; *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358, *per* NORTH, J., at p. 362; *Mercier v. Mercier*, [1903] 2 Ch. 98, C. A.; and see pp. 37, 57, *ante*; and title HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.*, 412 *et seq.* Before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a gift to a married woman for her separate use necessarily carried an express trust upon the face of it; and any person who got into his possession the subject of it with notice of the trust became a trustee (*Hartford v. Power* (1868), 2 I. R. Eq. 204, *per* CHATTERTON, V.-C., at p. 216).

(*k*) *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317, *per* STIRLING, J., at p. 325; see *Sebright v. Thornton*, [1885] W. N. 176; see, further, title SETTLEMENTS, Vol. XXV., pp. 635, 636.

(*l*) *Owen v. Williams* (1773), Amb. 734; *Pole v. Pole* (1865), 2 Drew. & Sm. 420; *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509; compare title SETTLEMENTS, Vol. XXV., pp. 601, 602. Compare the rule that a person who obtains possession of property in the character of tenant for life and subsequently acquires the fee under the Statutes of Limitation is estopped from denying the title of the remainderman; see title ESTOPPEL, Vol. XIII., p. 374.



SECT. 3.  
**Construc-  
 tive and  
 Implied  
 Trusts.**

Payment off  
 of charge on  
 estates.

Exercise of  
 powers under  
 Settled Land  
 Acts.

Mortgagor  
 and  
 mortgagee.

their benefit (*m*). If he unduly cuts down timber or works mines, or otherwise commits waste on the property, he is liable to make good for the benefit of the remaindermen the loss which the property has sustained thereby (*a*). If he receives a bonus from a railway company in consideration of not opposing their Bill in Parliament, he holds it on a similar trust (*b*).

A tenant for life of real estate, who pays off a charge thereon without taking an assignment of it to himself, is presumed to have intended to constitute himself a creditor against the estate for the sum so paid. On the other hand, if a tenant in tail or absolute owner pays off a charge on the estate, he is presumed to have intended to exonerate the estate therefrom and is not deemed a creditor in respect thereof. In each case the presumption may be rebutted (*c*).

A tenant for life under a settlement within the meaning of the Settled Land Act, 1882 (*d*), and the amending Acts (*e*) is, in relation to the exercise by him of any power under those Acts, deemed to be in the position, and to have the duties and liabilities, of a trustee for all parties entitled under the settlement (*f*).

**119.** During the continuance of a mortgage there is no actual and present relationship of trustee and *cestui que trust* between mortgagor and mortgagee (*g*), and a mortgagor's equity of redemption differs materially in many respects from a trust estate (*h*). The relation, however, is or may become for some purposes a trust relation (*i*). A mortgagor may create a mortgage in such a form as to make himself trustee of property for the purposes of the security (*k*); but in that case the trust remains dormant until the

(*m*) *Taster v. Marriott* (1768), Amb. 668; *Rawe v. Chichester* (1773), Amb. 715; *Pickering v. Vowles* (1783), 1 Bro. C. C. 197; *Parker v. Brooke* (1804), 9 Ves. 583; *Eyre v. Dolphin* (1813), 2 Ball & B. 290; *Giddings v. Giddings* (1827), 3 Russ. 241; *Cridland v. Luxton* (1831), 9 L. J. (O. S.) (CH.) 99; *Waters v. Bailey* (1843), 2 Y. & C. Ch. Cas. 219; *Trumper v. Trumper* (1873), 8 Ch. App. 870; titles EQUITY, Vol. XIII., p. 155; SETTLEMENTS, Vol. XXV., p. 700; and see *Griffith v. Owen*, [1907] 1 Ch. 195.

(*a*) *Whitfield v. Bewit* (1724), 2 P. Wms. 240; *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Powlett v. Bolton (Duchess)* (1797), 3 Ves. 374; *Wickham v. Wickham* (1815), 19 Ves. 419; *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509; and see titles EQUITY, Vol. XIII., p. 90; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 175; SETTLEMENTS, Vol. XXV., pp. 600 *et seq.*

(*b*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 73; *Pole v. Pole* (1865), 2 Drew. & Sm. 420; compare title SETTLEMENTS, Vol. XXV., pp. 607 *et seq.*

(*c*) *Jones v. Morgan* (1783), 1 Bro. C. C. 206; see titles EQUITY, Vol. XIII., pp. 146 *et seq.*; MORTGAGE, Vol. XXI., pp. 318 *et seq.*

(*d*) 45 & 46 Vict. c. 38.

(*e*) See title SETTLEMENTS, Vol. XXV., pp. 624 *et seq.*

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53; see title SETTLEMENTS, Vol. XXV., pp. 635, 636, 674, note (*u*).

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50; *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642, *per* NORTH, J., at pp. 649, 650.

(*h*) *Tucker v. Thurstan* (1810), 17 Ves. 131, *per* Lord ELDON, L.C., at p. 133; *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* CLARKE, M.R., at p. 206.

(*i*) *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 189, H. L., *per* Lord ELDON, L.C., at pp. 190, 191; see title MORTGAGE, Vol. XXI., pp. 254, 260, 310.

(*k*) *Holroyd v. Marshall* (1861), 10 H. L. Cas. 191, *per* Lord WEST-



mortgagee calls it into operation (*l*). Under the ordinary form of mortgage a mortgagee is in some senses and in some circumstances a trustee for the mortgagor and for subsequent incumbrancers (*m*). A mortgagee who has entered into possession of the mortgaged property is trustee of the rents and profits thereof for himself and subsequent incumbrancers and for the mortgagor (*n*). If he has not interfered with the property, he is not strictly a trustee till the mortgage money is tendered to him (*o*). A mortgagee who sells the property is, however, constructive trustee of the surplus proceeds of sale, if any, after payment of the money owing to him on his security (*p*); and a mortgagee of the legal estate, who has been paid off, holds that legal estate, until he reconveys it, in trust for the mortgagor (*q*).

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120. Partnership does not in itself create a fiduciary relation between the partners or make one of them a trustee for the other or for his representatives (*r*). The relation may, however, arise on Partner.

BURY, L.C., at p. 211; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, *per* Lord MACNAGHTEN, at p. 541; *Re Crowe's Mortgage* (1871), L. R. 13 Eq. 26 (covenant to surrender copyholds). A mortgagor is a sort of trustee for the mortgagee (*Burgh v. Francis* (1673), Cas. temp. Finch, 28, 29).

(*l*) *Tailby v. Official Receiver*, *supra*, at p. 541.

(*m*) *Dobson v. Land* (1850), 8 Hare, 216, *per* WIGRAM, V.-C., at p. 220. But he is not such a trustee to all intents and purposes, nor is he subject to the rules of law by which persons filling a fiduciary character are wholly restrained from any dealings with the property for their own benefit (*Nesbitt v. Tredennick* (1808), 1 Ball & B. 29; *Dobson v. Land*, *supra*, at p. 221; *Shaw v. Bunny* (1865), 2 De G. J. & Sm. 468, C. A.; and see title MORTGAGE, Vol. XXI., pp. 72, 253, 254, 259, 260). He does not become an actual trustee by the fact of his security being in the form of a trust for sale (*Kirkwood v. Thompson* (1865), 2 Hem. & M. 392; *Locking v. Parker* (1872), 8 Ch. App. 30; and see title MORTGAGE, Vol. XXI., p. 72).

(*n*) *Bucks (Duke) v. Gayer* (1684), 1 Vern. 258; *Chapman v. Tanner* (1684), 1 Vern. 267; *Coppring v. Cooke*, *Cooke v. Knight* (1684), 1 Vern. 270; *Parker v. Calcraft*, *Dunn v. Same* (1821), Madd. & G. 11; *White v. City of London Brewery Co.* (1889), 42 Ch. D. 237, C. A.; *Kavanagh v. Workingman's Benefit Building Society*, [1896] 1 I. R. 56, C. A. He is not at liberty to prejudice by his conduct the rights of a subsequent incumbrancer of whose mortgage he has notice (*Bentham v. Haincourt* (1691), Prec. Ch. 30).

(*o*) *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 191.

(*p*) *Banner v. Berridge* (1881), 18 Ch. D. 254, *per* KAY, J., at p. 269; *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642, *per* NORTH, J., at p. 650; *West London Bank v. Reliance Permanent Building Society* (1885), 29 Ch. D. 954, 962, C. A.; *Charles v. Jones* (1887), 35 Ch. D. 544, 549; and see title MORTGAGE, Vol. XXI., pp. 259, 260. As to the circumstances which may render him an express trustee, see *ibid.*, p. 260; and title LIMITATION OF ACTIONS, Vol. XIX., p. 165. He is not trustee as regards the exercise of the power of sale; see title MORTGAGE, Vol. XXI., p. 253.

(*q*) *Teevan v. Smith* (1882), 20 Ch. D. 724, 730, C. A.; *Sands to Thompson* (1883), 22 Ch. D. 612, 618; *London and County Banking Co. v. Goddard*, *supra*, at p. 650; and see title MORTGAGE, Vol. XXI., p. 310.

(*r*) *Knox v. Gye* (1872), L. R. 5 H. L. 656, *per* Lord WESTBURY, at p. 675, *dissentiente* Lord HATHERLEY, L.C., at pp. 678 *et seq.*; *Piddocke v. Burt*, [1894] 1 Ch. 343. A partner appointed salesman to the firm is not a trustee of his salary as salesman (*Re Lewis, Lewis v. Lewis*, [1910] W. N. 217; compare *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.); but a partner who in the course of negotiating for a lease to the

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Constructive and Implied Trusts.

Settlor.

the death of one of them or be created by other special circumstances (s).

**121.** A person who, after having made a settlement or other disposition of property which is complete in law, obtains possession of the property himself, holds it in trust for the purposes of the settlement or disposition and must account for it in equity accordingly (t).

Solicitor.

**122.** A solicitor is not ordinarily in the position of a trustee for his client, even though money or property of his client passes through his hands (a), though he may constitute himself a trustee by his transactions or conduct (b).

Vendor.

**123.** A person who has contracted to sell real property to the purchaser is in a sense a trustee of it for the purchaser (c); but, until the completion of the purchase, he has a lien upon it for the payment of the purchase-money (d). He has also a substantial and paramount personal interest in the property, and a right to protect that interest, and an active right to assert that interest if anything is done in derogation of it (e).

partnership firm receives a large sum of money from the lessors is a trustee of it for the benefit of the firm (*Fawcett v. Whitehouse* (1829), 1 Russ. & M. 132). As to the renewal of leases by partners, see pp. 47, 48, *ante*.

(s) *Lake v. Gibson* (1729), 1 Eq. Cas. Abr. 290, *per* JEKYLL, M.R., at p. 291; *Brown v. De Tastet* (1821), Jac. 284; *Burton v. Woolkey* (1822), Madd. & G. 367; *Fawcett v. Whitehouse*, *supra*; *Twyford v. Trail* (1834), 7 Sim. 92; *Buckley v. Barber* (1851), 6 Exch. 164, *per* PARKE, B., at p. 179; *Bentley v. Craven* (1853), 18 Beav. 75; *Knox v. Gye* (1872), L. R. 5 H. L. 656, *per* Lord WESTBURY, at pp. 675, 676; *Cassels v. Stewart* (1881), 6 App. Cas. 64, *per* Lord PENZANCE, at p. 77, and *per* Lord BLACKBURN, at p. 79; and see title PARTNERSHIP, Vol. XXII., pp. 4, 56, 100, 101. As to the liability of co-partners for a breach of trust counselled by one of them, see note (h), p. 91, *post*, and title PARTNERSHIP, Vol. XXII., pp. 31, 34, 35.

(t) *Fortescue v. Barnett* (1834), 3 My. & K. 36; *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Nanney v. Morgan* (1887), 37 Ch. D. 346, C. A.; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82, C. A.

(a) *Fyler v. Fyler* (1841), 3 Beav. 550; *Re Hindmarsh* (1860), 1 Drew. & Sm. 129; *Watson v. Woodman* (1875), L. R. 20 Eq. 721; as to his liability as an officer of the court, see title SOLICITORS, Vol. XXVI., pp. 837 *et seq.*

(b) *Bulkley v. Wilford* (1834), 2 Cl. & Fin. 102, 177, H. L.; *Burdick v. Garrick* (1870), 5 Ch. App. 233; *Harpham v. Shacklock* (1881), 19 Ch. D. 207, C. A.; *Re Vernon, Ewens & Co.* (1886), 33 Ch. D. 402, C. A. As to when the solicitor to a trustee becomes himself liable as a trustee to the *cestui que trust*, see pp. 90, 91, *post*.

(c) *Rose v. Watson* (1864), 10 H. L. Cas. 672; *Shaw v. Foster* (1872), L. R. 5 H. L. 321; *Knox v. Gye*, *supra*, *per* Lord WESTBURY, at p. 675; *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *Clarke v. Ramuz*, [1891] 2 Q. B. 456, C. A.; and see title SALE OF LAND, Vol. XXV., pp. 364 *et seq.*, 368. The equitable right of the purchaser under the implied trust only subsists as against the vendor and cannot be asserted against a third party (*Tasker v. Small* (1837), 3 My. & Cr. 63, *per* Lord COTTENHAM, L.C., at pp. 70, 71; *Pollerfen v. Moore* (1746), 3 Atk. 272).

(d) See title SALE OF LAND, Vol. XXV., p. 368. No such relation arises between vendor and vendee of personal chattels (*Pooley v. Budd* (1851), 14 Beav. 34, *per* ROMILLY, M.R., at p. 44; but see *Stewart v. Lupton* (1874), 22 W. R. 855).

(e) *Shaw v. Foster*, *supra*, *per* Lord CAIRNS, at p. 338; and see title SALE OF LAND, Vol. XXV., p. 365.

## Part II.—Trustees.

## SECT. 1.—Qualification.

## SECT. 1.

## Qualification.

Who may be trustees.

**124.** Any person who is capable in law of holding property in his own right may hold the office of trustee in respect of such property (*f*). A corporation, whether aggregate or sole, may be a trustee (*g*), but cannot without a licence in mortmain hold real property in trust which it could not without such licence hold for its own benefit (*h*). The office may be held by a woman, whether unmarried (*i*) or married (*k*), or by an infant (*l*), or an alien (*m*).

**125.** A person may hold a legal estate in property as trustee of that estate for himself and other beneficiaries (*n*). He may not, however, at the same time be sole trustee and sole *cestui que trust* of commensurate legal and equitable estates in property (*o*), though

Beneficiaries, how far capable.

(*f*) Willis, Duties and Responsibilities of Trustees (1827), ch. 2, pp. 30 *et seq.*; 1 Sanders, Uses and Trusts, 5th ed. (1844), pp. 388 *et seq.* As to how far the Sovereign can be a trustee, see title CONSTITUTIONAL LAW, Vol. VI., pp. 494, 495. As to trustees of literary and scientific institutions, see title LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., pp. 198, 200, 201.

(*g*) *Green v. Rutherford* (1750), 1 Ves. Sen. 462; *A.-G. v. Foundling Hospital (Governors)* (1793), 2 Ves. 42, 46, 50; *A.-G. v. Aspinall* (1837), 2 My. & Cr. 613; *Assets Realization Co. v. Trustees, Executors, and Securities Assurance Corporation* (1895), 65 L. J. (CH.) 74; *Re Thompson's Settlement Trusts, Thompson v. Alexander*, [1905] 1 Ch. 229; *Re Munster and Leinster Bank*, [1907] 1 I. R. 237, 244, 251; and see pp. 73, 81, 86, *post*; title CORPORATIONS, Vol. VIII., pp. 366, 367. Under the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), a corporate body can be a trustee jointly with other corporate bodies or with individuals (*Re Thompson's Settlement Trusts, Thompson v. Alexander, supra*; *Re Munster and Leinster Bank, supra*); see title CORPORATIONS, Vol. VIII., p. 366.

(*h*) *Sonley v. Clock-makers Co. (Master, etc.)* (1780), 1 Bro. C. C. 80; see titles CHARITIES, Vol. IV., pp. 255 *et seq.*; CORPORATIONS, Vol. VIII., p. 367.

(*i*) *Head v. Gould*, [1898] 2 Ch. 250, 272. Unmarried women are frequently appointed trustees by the court (*Re Peake's Settled Estates*, [1894] 3 Ch. 520; *Re Dickinson's Trusts*, [1902] W. N. 104).

(*k*) *Lake v. De Lambert* (1799), 4 Ves. 572; *Drummond v. Tracy* (1860), John. 608; *Avery v. Griffin* (1868), L. R. 6 Eq. 606; and see p. 186, *post*; title HUSBAND AND WIFE, Vol. XVI., p. 439.

(*l*) *Re Tallaire*, [1885] W. N. 191; see title INFANTS AND CHILDREN, Vol. XVII., pp. 51, 83, 84. As to the drawbacks attending the trustee-ship of an infant, see *ibid.*, pp. 51, 52; and see p. 79, *post*.

(*m*) *Meinertzhagen v. Davis* (1844), 1 Coll. 335. Aliens can now hold real property in this country (Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2); see title ALIENS, Vol. I., p. 309.

(*n*) *Burges v. Lamb* (1809), 16 Ves. 174; *Ex parte Clutton* (1853), 17 Jur. 988; *Forster v. Abraham* (1874), L. R. 17 Eq. 351; *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.; *Head v. Gould, supra*, at p. 272. As to the effect on the doctrine of conversion (see note (*r*), p. 40, *ante*) of the trustees and beneficiaries being the same persons, see *Re Newbould, Anderton v. Newbould*, [1913] W. N. 211, *per* EVE J.; reversed on the facts, *sub nom. Re Newbould, Carter v. Newbould* (1913), 110 L. T. 6, C. A. A tenant for life may be also a trustee of the settlement under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and amending Acts (*Re Jackson's Settled Estate*, [1902] 1 Ch. 258; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.; *Re Johnson's Settled Estates*, [1913] W. N. 222).

(*o*) *Habergham v. Vincent* (1793), 2 Ves. 204, *per* Lord LOUGH-



SECT. 1.  
Qualifica-  
tion.  
—

he may be the legal owner of property and at the same time the equitable owner of a smaller equitable estate or interest in the same property, where that smaller estate or interest does not, in equity, merge in the larger legal estate (*p*).

SECT. 2.—*Commencement of Office.*

SUB-SECT. 1.—*Modes of Commencement.*

Trustees, how  
constituted.

**126.** A person is legally constituted a trustee who (1) is originally designated as such by the instrument creating the trust (*q*), or is duly appointed as such under a power for the purpose contained in that instrument (*r*), or under a statutory power for the purpose (*s*), or by a court of competent jurisdiction (*t*), or, in the case of a charitable trust, by the Charity Commissioners or under a legally established scheme (*a*); and (2) accepts the trust either expressly or by acting in the execution of it (*b*). A person who is not legally constituted trustee becomes in equity a constructive trustee (*c*) (1) where trust property becomes in law, for want of a legally constituted trustee, vested in him (*d*); or (2) where he has acquired trust property in circumstances which, in equity, are deemed to require him to hold it upon the trust to which it was subject when he acquired it (*e*); or (3) where he intermeddles with and acts as trustee in relation to trust property, in which case he is also called a trustee *de son tort* (*f*).

SUB-SECT. 2.—*Original Trustees.*

Appointment  
by creator  
of trust.

**127.** An original trustee is generally appointed by the creator of the trust either expressly (*g*) or by language which implies that he is to fill that character (*h*).

BOROUGH, L.C., at p. 210; *Brydges v. Brydges*, *Philips v. Brydges* (1796), 3 Ves. 120, *per* ARDEN, M.R., at pp. 126, 127; *Selby v. Alston* (1797), 3 Ves. 339, 341; *Re Douglas*, *Wood v. Douglas* (1884), 28 Ch. D. 327, *per* PEARSON, J., at p. 331. A man cannot be trustee for himself (*Goodright d. Aston v. Wells* (1781), 2 Doug. (K. B.) 771, *per* Lord MANSFIELD, C.J., at p. 778). Equitable estates in common will merge in a joint legal estate acquired by the tenants in common (*Re Selous*, *Thomson v. Selous*, [1901] 1 Ch. 921). As to merger, see titles EQUITY, Vol. XIII., p. 146; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 332 *et seq.*

(*p*) *Robinson v. Cuming* (1739), 1 Atk. 473; *Brydges v. Brydges*, *Philips v. Brydges*, *supra*, at pp. 126, 127. An equitable estate tail does not merge in a legal fee simple (*Merest v. James* (1821), Madd. & G. 118).

(*q*) See the text, *infra*. As to trustees of charities, see title CHARITIES, Vol. IV., pp. 255 *et seq.*; as to the Official Trustee of Charity Lands, see *ibid.*, pp. 279, 280; as to the Official Trustees of Charitable Funds, see *ibid.*, pp. 280, 281; as to incorporated church trustees of a parish, see title ECCLESIASTICAL LAW, Vol. XI., pp. 474, 475.

(*r*) See pp. 67 *et seq.*, *post*.

(*s*) See pp. 73 *et seq.*, *post*.

(*t*) See pp. 76 *et seq.*, *post*. As to trustees in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 108 *et seq.*

(*a*) See title CHARITIES, Vol. IV., pp. 259—268.

(*b*) See pp. 82, 83, *post*.

(*c*) See pp. 87 *et seq.*, *post*.

(*d*) See pp. 67, 68, *post*.

(*e*) See pp. 88 *et seq.*, *post*.

(*f*) See p. 91, *post*.

(*g*) *Milroy v. Lord* (1862), 4 De G. F. & J. 264, C. A., *per* TURNER, L.J., at p. 274; *Re Waidanis*, *Rivers v. Waidanis*, [1908] 1 Ch. 123.

(*h*) See pp. 12 *et seq.*, *ante*.



128. Trusts do not fail by a failure of trustees (*i*). Where no trustee is effectually appointed by the creator of the trust (*k*), or all the trustees appointed by him die or refuse to accept the trust (*l*) before the trust takes effect, the person in whom the trust property is vested by reason of such failure of appointment, death, or refusal is deemed in equity to be the trustee of the property for the purposes of the trust (*m*). In such event, however, if there is any procedure for the appointment of new trustees which is applicable to the case, it can be resorted to for the appointment of an original trustee (*n*), and if such procedure is not applicable or is not resorted to, a court of equity will supply an original trustee (*o*).

SECT. 2.  
Commence-  
ment of  
Office.  
Failure of  
trustees.

SUB-SECT. 3.—*New Trustees.*

(i.) *In General.*

129. A new trustee is appointed either (1) under a power for that purpose conferred by the trust disposition (*p*); or (2) under the power for the purpose conferred by statute (*q*); or (3) by a court

Appointment  
of new  
trustees.

(*i*) *Ellison v. Ellison* (1802), 6 Ves. 656, *per* Lord ELDON, L.C., at p. 663; *Brown v. Higgs* (1803), 8 Ves. 561, *per* Lord ELDON, L.C., at p. 570.

(*k*) *Bennet v. Davis* (1725), 2 P. Wms. 316; *Sonley v. Clockmakers Co. (Master, etc.)* (1780), 1 Bro. C. C. 80; *A.-G. v. Stephens* (1834), 3 My. & K. 347; and see p. 20, *ante*.

(*l*) See pp. 87, 88, *post*.

(*m*) *Locton v. Locton* (1637), Freem. (CH.) 136; *Pits v. Pelham* (1670), 1 Lev. 304, H. L. (where a testator directed that his land should be sold, and his heir-at-law was deemed in equity trustee thereof for a purchaser); *Mallott v. Wilson*, [1903] 2 Ch. 494, 502, 503 (where, in the case of a trust created *inter vivos*, the disposer himself was held a trustee for the purposes thereof); and see p. 88, *post*.

(*n*) See pp. 69, 70, *post*.

(*o*) *Moggridge v. Thackwell* (1803), 7 Ves. 36, *per* Lord ELDON, L.C., at pp. 84, 85; *A.-G. v. Stephens* (1834), 3 My. & K. 347, 352; *Tempest v. Camoys (Lord)* (1866), 35 Beav. 201; *Dodkin v. Brunt* (1868), L. R. 6 Eq. 580; *Jones v. Jones* (1874), 31 L. T. 535. The individuals named as trustees by the creator of a trust are only the nominal instruments to execute his intention that the trust shall be performed. If they fail either by death or by being under disability to act or refusing to act, or if no trustees are appointed at all, and the defect cannot otherwise be supplied, the office is in the first instance assumed by a court of equity of competent jurisdiction, which will take care that trustees are appointed to execute the trust (*A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at pp. 24, 30, 31; *Brydges v. Brydges, Philips v. Brydges* (1796), 3 Ves. 120, *per* ARDEN, M.R., at p. 127; *Brown v. Higgs, supra, per* Lord ELDON, L.C., at p. 570; *Siggers v. Evans* (1855), 5 E. & B. 367, *per* CROMPTON, J., at p. 374; *Dodkin v. Brunt, supra*. As to appointing trustees of life assurance policies effected under the Married Women's Property Acts, 1870 (33 & 34 Vict. c. 93) and 1882 (45 & 46 Vict. c. 75), see title HUSBAND AND WIFE, Vol. XVI., pp. 399 *et seq.*; and as to appointing a trustee of the property of an industrial or provident society on its dissolution, see title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 37.

(*p*) *Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A., *per* JESSEL, M.R., at p. 578. The power may be exercised even when the trust is being administered by the court (*ibid.*, at p. 578).

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10; see pp. 73 *et seq.*, *post*.

SECT. 2.  
Commence-  
ment of  
Office.

When  
appointment  
complete.  
Stamp duty.

Costs.

Terms and  
mode of  
appointment.

of equity (*r*) or, in the case of charitable trusts, by the Charity Commissioners (*s*).

**130.** An appointment of new trustees is complete before the trust estate is transferred to them (*t*).

**131.** A stamp duty of 10s. is chargeable on the appointment of a new trustee (*a*); a stamp duty of 10s. is also chargeable on a conveyance or transfer of property made for effectuating the appointment (*b*) of a trustee, or the retirement of a trustee (*c*) where no new trustee is appointed (*d*).

**132.** The costs of and incidental to the appointment of a new trustee are payable out of the capital of the trust property (*e*).

(ii.) *Appointment under Trust Disposition Independently of Statute.*

(a) *In General.*

**133.** An appointment of a new trustee under a power for that purpose contained in the trust disposition must be in accordance in all material respects with the terms of the power (*f*). It should in strictness be made by direct operative words (*g*); but it may be effected by a recital or statement in a deed to which the appointor is a party, to the effect that he has appointed a certain person as a new trustee (*h*) or that such person is the present trustee (*i*). Where several persons have a power of appointing a new trustee they may, in the absence of any direction to the contrary, exercise the power by separate instruments (*k*).

(*r*) See pp. 76 *et seq.*, *post*.

(*s*) See p. 81, *post*. As to the appointment of new trustees of charitable trusts, see title CHARITIES, Vol. IV., pp. 259 *et seq.*

(*t*) *Noble v. Meymott* (1851), 14 Beav. 471, *per* ROMILLY, M.R., at p. 478.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., title "Appointment."

(*b*) *Ibid.*, s. 62.

(*c*) See pp. 112, 113, *post*.

(*d*) Finance Act, 1902 (2 Edw. 7, c. 7), s. 9.

(*e*) *Re Fulham (a Lunatic)* (1850), 15 Jur. 69; *Ex parte Davies* (1852), 16 Jur. 882; *Brougham (Lord) v. Poulett (Lord William)* (1854), 19 Beav. 119; *Re Fellows' Settlement* (1856), 2 Jur. (N.S.) 62; *Carter v. Sebright* (1859), 26 Beav. 374, *per* ROMILLY, M.R., at pp. 376, 377; *Harvey v. Olliver* (1887), 57 L. T. 239, *per* KAY, J., at pp. 240, 241. As to the incidence of the fines and expenses of the admission of the new trustees to copyholds, where there is no fund for defraying them, see *Carter v. Sebright*, *supra*; as to payment of expenses generally, see pp. 35, 36, *ante*.

(*f*) *Lancashire v. Lancashire* (1848), 2 Ph. 657, C. A. In the case of a public trust the non-compliance with a direction in the instrument of trust that new trustees shall be appointed by the surviving trustees, whenever they are reduced to a certain number, does not vitiate the title of the trustees appointed by a smaller number of surviving trustees. (*A.-G. v. Cumming* (1843), 2 Y. & C. Ch. Cas. 139).

(*g*) *Miller v. Priddon* (1852), 1 De G. M. & G. 335, C. A. For forms of appointment, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 47 *et seq.*

(*h*) *Miller v. Priddon*, *supra*.

(*i*) *Re Farnell's Settled Estates* (1886), 33 Ch. D. 599.

(*k*) *Warburton v. Sandys* (1845), 14 Sim. 622, *per* SHADWELL, V.-C., at p. 631.

(b) *Cases in which Appointment may be Made.*

**134.** Where the power of appointment is vested in the subsisting trustees they should, before exercising it, communicate with the *cestuis que trust* who are *sui juris*, and as far as possible comply with their reasonable wishes on the subject (*l*).

**135.** The court does not interfere with the appointment of new trustees by the persons in whom the power of appointment is vested (*m*). After proceedings have been instituted in court for administering the trust they can still exercise the power, unless by the order made in the administration proceedings the power is withdrawn from them and not merely suspended (*n*); but their nominee must be approved by the court (*o*).

**136.** Where the power authorises the appointment of one or more person or persons or of any person or persons to be a trustee or trustees in the place of a trustee or trustees the place of a trustee may be filled up by the appointment of more than one new trustee (*p*). On the other hand, the original number of trustees need not be maintained on an appointment of new trustees (*q*), unless the language of the trust disposition expressly or impliedly so directs (*r*).

**137.** A power of appointment of new trustees authorises the appointment of a trustee in the place of a named original trustee who dies before the trust takes effect (*a*), or who disclaims the trust

SECT. 2.  
Commence-  
ment of  
Office.

Beneficiaries  
to be con-  
sulted.

Interference  
of the court.

Number to be  
appointed.

Death or  
disclaimer  
before trust  
takes effect.

(*l*) *O'Reilly v. Alderson* (1849), 8 Hare, 101, *per* WIGRAM, V.-C., at pp. 102 *et seq.*; but see note (*f*), p. 74, *post*.

(*m*) *Re Hodson's Settlement* (1851), 9 Hare, 118; *Thomas v. Williams* (1883), 24 Ch. D. 558; *Re Higginbottom*, [1892] 3 Ch. 132; even though the appointment is undesirable (*Re Coode*, *Coode v. Foster* (1913), 108 L. T. 94).

(*n*) *Middleton v. Reay* (1849), 7 Hare, 106; *Re Sales, Sales v. Sales*, [1911] W. N. 194.

(*o*) *Webb v. Shaftesbury (Earl)*, *Shaftesbury (Earl) v. Arrowsmith* (1802), 7 Ves. 480; *Cafe v. Bent* (1843), 3 Hare, 245; *Graham v. Graham* (1853), 16 Beav. 550; *Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A., *per* JESSEL, M.R., at p. 578; *Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134, C. A.; *Thomas v. Williams, supra*, at pp. 567, 568; *Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333. Their proper course after judgment has been obtained is to submit in chambers the names of the persons whom they propose to appoint (*Re Hall, Hall v. Hall* (1885), 54 L. J. (CH.) 527). If these persons are deemed improper by the court, they have the right to propose others (*Re Gadd, Eastwood v. Clark, supra*, at p. 137). But a judicial trustee is an officer of the court and has no paramount power of appointing his successor (*Re Johnston, Mills v. Johnston*, [1911] W. N. 234).

(*p*) *Meinertzhagen v. Davis* (1844), 1 Coll. 335; *Hillman v. Westwood* (1854), 24 L. J. (CH.) 57; and see p. 75, *post*.

(*q*) *Emmet v. Clark* (1861), 3 Giff. 32, *per* STUART, V.-C., at p. 35; and see p. 75, *post*.

(*r*) *Lonsdale (Earl) v. Beckett* (1850), 4 De G. & Sm. 73; compare *Cohen v. Bayley-Worthington*, [1908] A. C. 97.

(*a*) As, for instance, where a trustee named in a will predeceases the testator (*Re Hadley's Will, Ex parte Hadley* (1851), 5 De G. & Sm. 67; *Nicholson v. Wright* (1857), 26 L. J. (CH.) 312; S. C., *sub nom. Nicholson v. Smith* (1857), 3 Jur. (N. S.) 313).



SECT. 2.  
Commence-  
ment of  
Office.

Refusal to  
act.

Bankruptcy  
and  
incapacity.

Persons  
designated.

without having ever acted therein (*b*), unless a contrary intention is indicated by the language of the instrument which contains the power (*c*).

A power to appoint a trustee in the place of one who desires to be discharged from or declines or refuses to act in the trust authorises an appointment in the place of one who has never acted in and who disclaims the trust (*d*), or of one who under the Trustee Act, 1893 (*e*), pays the trust fund into court (*f*).

**138.** An appointment of a new trustee in the place of one who becomes bankrupt is authorised by a power to appoint a new trustee in the place of a trustee who becomes unfit to act (*g*), but not by a power to appoint in the place of one who is incapable of acting (*h*). A power in the latter form refers exclusively to personal incapacity (*i*), and therefore authorises an appointment in the place of a lunatic trustee (*k*). Absence abroad does not constitute unfitness or incapacity on the part of a trustee (*l*); and a direction that a trustee shall cease to fill the post on departing from the United Kingdom from any cause and in any circumstances does not apply to a mere temporary absence (*m*). If, however, the power extends to appointing a new trustee in the place of one going to reside abroad or being abroad, and that event happens, the power should be exercised, and a *cestui que trust* may call upon the donee of the power to exercise it (*n*).

(*c*) *Who may Appoint.*

**139.** The power of appointment is vested in the person or persons (if any) named or designated in the instrument creating the trust (*o*).

Where an executory trust disposition contemplates a future appointment of trustees without prescribing by whom it is to be

(*b*) *Noble v. Meymott* (1851), 14 Beav. 471, *per* ROMILLY, M.R., at p. 477.

(*c*) *Winter v. Rudge* (1847), 15 Sim. 596.

(*d*) *Noble v. Meymott*, *supra*, *per* ROMILLY, M.R., at p. 477.

(*e*) 56 & 57 Vict. c. 53, s. 42; see pp. 175 *et seq.*, *post*.

(*f*) *Re Williams' Settlement* (1858), 4 K. & J. 87.

(*g*) *Re Roche* (1842), 1 Con. & Law. 306; *Re Wheeler and De Rochow*, [1896] 1 Ch. 315.

(*h*) *Turner v. Maule* (1850), 15 Jur. 761; *Re Watts's Settlement* (1851), 9 Hare, 106.

(*i*) *Turner v. Maule*, *supra*; *Re Watts's Settlement*, *supra*; *Re Bignold's Settlement Trusts* (1872), 7 Ch. App. 223.

(*k*) *Re East (a Person of Unsound Mind not so found by Inquisition)*, *Re Bellwood's Will Trusts* (1873), 8 Ch. App. 735.

(*l*) *Withington v. Withington* (1848), 16 Sim. 104; *O'Reilly v. Alderson* (1849), 8 Hare, 101; *Re Harrison's Trusts* (1852), 22 L. J. (CH.) 69; *Re Bignold's Settlement Trusts*, *supra*; and see p. 72, *post*. But the contrary has been held where a trustee had for many years a foreign domicile (*Mennard v. Welford* (1853), 1 Sm. & G. 426; and see pp. 73 *et seq.*, *post*).

(*m*) *Re Moravian Society* (1858), 26 Beav. 101; *Re Walker, Summers v. Barrow*, [1901] 1 Ch. 259.

(*n*) *O'Reilly v. Alderson*, *supra*; *Re Stamford (Earl)*, *Payne v. Stamford*, [1896] 1 Ch. 288.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (1).

made it cannot be made by the tenant for life for the time being of the trust property (*p*).

SECT. 2.  
Commence-  
ment of  
Office.  
Beneficiaries.

**140.** Where a power of appointing new trustees is conferred on a person by name who is beneficially interested in the trust property he can exercise it although he has incumbered or alienated his beneficial interest (*q*).

A power to named beneficiaries to appoint new trustees with the consent or concurrence of the surviving or continuing trustees or trustee for the time being is exercisable by them at their sole discretion when there is no trustee living or continuing to act (*r*).

**141.** Where the power to appoint is vested in the trustees who are for the time being surviving, even though it is given to the original trustees by name, it is annexed to their office (*s*). It can, therefore, be exercised by a single continuing trustee during the life of another of the original trustees who has disclaimed the trust (*t*).

Surviving  
trustees.

Where an express power of appointment is vested in the surviving or continuing trustees it cannot be exercised by a trustee who declines to act (*u*), or who is retiring from the trust (*w*), but is exercisable independently of him by the other trustees who are actually continuing in the trust (*a*). Where, however, the power is vested in the surviving or continuing or other trustee or trustees it is exercisable by a retiring trustee (*b*).

Retiring  
trustee.

**142.** Where an express power of appointment is vested in the acting trustees or trustee for the time being or the executors or administrators of the last acting trustee, the representatives of the last surviving trustee, having the trust property vested in them, and being capable in law of executing the trust, are acting trustees who can exercise the power (*c*). Similarly, where the power is vested in a

Acting trustee  
or repre-  
sentatives of  
last trustee.

(*p*) *Brasier v. Hudson* (1837), 9 Sim. 1, 11, 16.

(*q*) *Hardaker v. Moorhouse* (1884), 26 Ch. D. 417; see *Raikes v. Raikes* (1863), 32 Beav. 403; title POWERS, Vol. XXIII., p. 65.

(*r*) *Morris v. Preston* (1802), 7 Ves. 547, 551 *et seq.*; *Re Roche* (1842), 1 Con. & Law. 306.

(*s*) *Cafe v. Bent* (1845), 5 Hare, 24, *per* WIGRAM, V.-C., at p. 37; compare *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139, 144; *Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475.

(*t*) *Cafe v. Bent*, *supra*.

(*u*) *Nicholson v. Wright* (1857), 26 L. J. (CH.) 312; *Travis v. Illingworth* (1865), 2 Drew. & Sm. 344.

(*w*) *Stones v. Rowton* (1853), 17 Beav. 308. A declining or retiring trustee may be, and frequently is, expressly or impliedly empowered to appoint or join in the appointment in like manner as if he were a continuing trustee (*Re Hadley's Will, Ex parte Hadley* (1851), 5 De G. & Sm. 67; *Emmet v. Clark* (1861), 3 Giff. 32; *Re Glenny and Hartley* (1884), 25 Ch. D. 611). As to the statutory power, compare note (*f*), p. 74, *post*.

(*a*) *Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333; *Re Coates to Parsons* (1886), 34 Ch. D. 370.

(*b*) *Camoy's (Lord) v. Best* (1854), 19 Beav. 414.

(*c*) *Re Cunningham and Frayling*, [1891] 2 Ch. 567. Where the power was vested in the acting executors or administrators of the last surviving trustee, of whom, after his death, there was no legal personal representative, administration to his estate was granted to the guardian of infant *cestuis que trust*, limited to the appointment of the guardian and another person

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named person, his executors or administrators or assigns, it is validly exercised after his death by his acting executors without the concurrence of another who has renounced probate of his will (*d*).

As regards trusts which have come into operation since 1881, a power of appointment capable of being exercised by a sole or last surviving or continuing trustee may, unless the instrument creating the trust contains a direction to the contrary, be exercised by the personal representatives of such trustee (*e*).

Trustee  
abroad.

**143.** On the death of one trustee, a power to a subsisting trustee to appoint a new trustee in the place of a trustee dying, or going to reside abroad, may be exercised by the surviving trustee, notwithstanding that he is himself residing abroad (*f*).

Committee  
of lunatic.

**144.** Where the person in whom a power of appointing new trustees is vested or whose consent to such an appointment is required is a lunatic or of unsound mind, the committee or *quasi*-committee of his estate may, under an order of a judge in lunacy, in the name and on behalf of such person exercise a power of appointment of new trustees vested in him or give any consent required from him to the exercise of such a power (*g*). The person or persons who after and in consequence of such exercise of the power are the trustee or trustees have the same rights and powers as he or they would have had if the order had been made by the High Court (*h*). In any such case, where it seems to be for the benefit of the lunatic or person of unsound mind, the judge may make any order respecting the property subject to the trust which might have been made by the High Court on the appointment, under the Trustee Act, 1893 (*i*), of a new trustee or new trustees (*j*).

(*d*) *Who may be Appointed.*

Donee of  
power.

**145.** The person in whom the power of appointment is vested cannot appoint himself as a new trustee if the appointment directs the appointment of some "other" person or persons, or if the power is vested in him by virtue of his fiduciary position in relation to the trust (*k*). On the other hand, the legal personal representative of a trustee, when invested with a power of appointing new

as new trustees and to the obtaining of a transfer of the trust funds to them (*In the Goods of Jackson* (1881), 7 L. R. Ir. 318).

(*d*) *Granville (Earl) v. M'Neile* (1849), 7 Hare, 156.

(*e*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8. As to the effect of this provision, see, further, p. 82, *post*.

(*f*) *O'Reilly v. Alderson* (1849), 8 Hare, 101.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 128; *Re Blake (a Person of Unsound Mind)*, [1887] W. N. 173, C. A.; *Re Shortridge (a Person of Unsound Mind)*, [1895] 1 Ch. 278, C. A., where the order of the Court of Lunacy authorised the new trustees to call for a transfer of stock subject to the trust into their names, and to receive the dividends thereon until transfer, and to hold the stock when transferred upon the subsisting trust; see now the Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 129.

(*i*) 56 & 57 Vict. c. 53.

(*j*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 129; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 455, 456.

(*k*) *Re Skeats' Settlement, Skeats v. Evans* (1889), 42 Ch. D. 522; *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297; and see note (*k*), p. 74, *post*.



trustees in which the word “other” does not occur, may exercise it by appointing himself (*l*).

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**146.** A beneficiary for life invested with the power of appointment may appoint his own solicitor as a new trustee, if the appointment is in other respects unobjectionable (*m*). The appointment as trustees of two solicitors in partnership together would not be necessarily bad, though obviously inexpedient (*n*).

Solicitor.

**147.** Unless expressly forbidden by the terms of the power, the appointment of an alien or person out of the jurisdiction is valid (*o*).

Alien or  
person out of  
jurisdiction.

**148.** Where the terms of the power admit of it, a corporation may be appointed a new trustee (*p*).

Corporation.

(iii.) *Appointment under Statute.*

**149.** A new trustee may be appointed under general powers given by statute (*q*). These powers, however, only apply if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and subject to the terms and provisions of that instrument (*r*).

Appointment  
under  
statute.

**150.** Where a trustee, either original or substituted, and whether

When  
appointment  
may be made.

(*l*) *In the Goods of Jackson* (1881), 7 L. R. Ir. 318; *Montefiore v. Guedalla* [1903] 2 Ch. 723; and see *Tempest v. Camoys* (Lord) (1888), 58 L. T. 221, per CHITTY, J., at p. 224. Where the appointment is vested in the acting trustee with the consent of the tenant for life, he may appoint the tenant for life (*Forster v. Abraham* (1874), L. R. 17 Eq. 351).

(*m*) *Re Stamford* (Earl), *Payne v. Stamford*, [1896] 1 Ch. 288; see note (*d*), p. 81, *post*.

(*n*) *Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333, per PEARSON, J., at p. 341.

(*o*) *Meinertzhagen v. Davis* (1844), 1 Coll. 335; *Re Smith's Trusts*, [1872] W. N. 134; *Re Cunard's Trusts* (1878), 48 L. J. (CH.) 192.

(*p*) *Re Thompson's Settlement Trusts, Thompson v. Alexander*, [1905] 1 Ch. 229 (where the power was “to appoint a new trustee or new trustees,” not a person or persons to be a new trustee or new trustees); and see p. 65, *ante*.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, replacing, with slight variations of language, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 31, and the Conveyancing Act, 1882 (46 Vict. c. 39), s. 5; the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 31, being itself a re-enactment, with variations, of stat. (1860) 23 & 24 Vict. c. 145 (commonly called Lord Cranworth's Act), s. 27, which was repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 71, except as to any instrument executed or act done before the 1st January, 1882; see *Re Walker and Hughes' Contract* (1883), 24 Ch. D. 698; *Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508; *Re Boucherett, Barne v. Erskine*, [1908] 1 Ch. 180. The enactment applies to religious or educational trusts (*Re Coates to Parsons* (1886), 34 Ch. D. 370; see title CHARITIES, Vol. IV., p. 263), and to trustees for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and amending Acts (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 47). The enactment does not affect the practice of the High Court as to the appointment of new trustees (*Re Aston* (1883), 23 Ch. D. 217, C. A., per JESSEL, M.R., at pp. 217, 218).

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (5). The enactment supersedes an inconsistent enactment in a previous private Act of Parliament (*Re Lloyd's Trustees* (1888), 57 L. J. (CH.) 246; see *Cecil v. Langdon* (1884), 28 Ch. D. 1, C. A.).

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appointed by a court or otherwise, is dead (*s*), or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses (*t*), or is unfit (*a*), to act therein, or is incapable of acting therein (*b*), then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust (*c*), or if there is no such person (*d*), or no such person able and willing to act (*e*), then the surviving or continuing trustees or trustee for the time being (*f*), or the personal representatives (*g*) of the last surviving or continuing trustee (*h*), may by writing *inter vivos* (*i*) appoint any other (*k*) person or persons

(*s*) This includes the case of a person nominated trustee in a will but dying before the testator (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (4)).

(*t*) See pp. 83 *et seq.*, 111 *et seq.*, *post*.

(*a*) See p. 70, *ante*.

(*b*) *Ibid*.

(*c*) This means the persons nominated by the instrument in terms which are applicable to the exercise of the statutory power (*Cecil v. Langdon* (1884), 28 Ch. D. 1, C. A.). It includes persons who are given a general power to appoint new trustees or a new trustee for the settlement (*Re Walker and Hughes' Contract* (1883), 24 Ch. D. 698). But persons empowered by the instrument to appoint a new trustee in, among other events, the event of a trustee becoming incapable, but not in the event of his becoming unfit to act, are not persons nominated to appoint a new trustee in the place of one who becomes unfit to act (*Re Wheeler and De Rochow*, [1896] 1 Ch. 315).

(*d*) There is no such person if he cannot be found (*Cradock v. Witham*, [1895] W. N. 75).

(*e*) This applies where the persons entitled to appoint cannot agree in appointing (*Re Sheppard's Settlement Trusts*, [1888] W. N. 234).

(*f*) A trustee can insist on exercising the power of appointment against the wishes of the majority of the *cestuis que trust* (*Re Higginbottom*, [1892] 3 Ch. 132). The power conferred on a continuing trustee extends to a refusing or retiring trustee if willing to exercise it (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (4)). His concurrence in the appointment of new trustees is not requisite in the absence of evidence that he is able and willing to concur therein (*Re Coates to Parsons* (1886), 34 Ch. D. 370).

(*g*) Personal representatives mean the acting executors or administrators (*Re Parker's Trusts*, [1894] 1 Ch. 707, *per* KEKEWICH, J., at p. 721; Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8 (4); and see p. 72, *ante*). They are not bound to exercise the power conferred upon them (*Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A., *per* PEARSON, J., at p. 89).

(*h*) A person who has never acted in the trust is not reckoned as a trustee; and therefore, where all the trustees named in a will predecease the testator, the executors of the last survivor of them cannot appoint new trustees (*Nicholson v. Field*, [1893] 2 Ch. 511). But the executors of a sole trustee who dies after having acted can exercise the power (*Re Shafto's Trusts* (1885), 29 Ch. D. 247). And in cases in which stat. (1860) 23 & 24 Vict. c. 145 (commonly called Lord Cranworth's Act), s. 27, is still applicable (see note (*q*), p. 73, *ante*), and is expressly or impliedly incorporated in the trust instrument, the only proving and acting executor of a last surviving trustee can exercise the power though other executors were appointed and have not renounced (*Re Boucherett, Barne v. Erskine*, [1908] 1 Ch. 180).

(*i*) *Re Parker's Trusts*, *supra*. A sole surviving trustee cannot appoint new trustees by will; and if by his will he appoints general executors and special executors of the trust, the power of appointing new trustees is vested in the general executors (*ibid.*; compare Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8).

(*k*) A person cannot, therefore, under this power appoint himself to be a trustee (*Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297, *Re Sampson, Sampson v. Sampson*, [1906] 1 Ch. 435).

to be a trustee or trustees in the place of the trustee dead (*l*), remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or incapable (*m*).

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ment of  
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**151.** Where a new trustee is appointed for the whole or any part of the trust property, the number of trustees may be increased (*n*). It is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee is not discharged from his trust by the appointment of a new trustee or new trustees under the provisions of the statute, unless there will be at least two trustees to perform the trust (*o*).

Number of  
trustees.

**152.** Where a new trustee is appointed for the whole or any part of the trust property a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts thereof, notwithstanding the non-appointment of any new trustees or trustee for other parts of the trust property, and any existing trustee may be appointed or remain one of the separate set of trustees, or, if only one trustee was originally appointed, one separate trustee may be so appointed for the part so held on distinct trusts (*p*).

Separate sets  
of trustees.

**153.** Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, must be executed or done (*q*).

Assurances.

(*l*) See note (*o*), p. 73, *ante*.

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (1). The court does not generally appoint a new trustee where there is a person able and willing to exercise the statutory power of appointment; see note (*b*), p. 76, *post*. But where the right person to exercise it is a lunatic trustee the appointment can be made in lunacy or by the continuing trustees (*Re Blake (a Person of Unsound Mind)*, [1887] W. N. 173, C. A.; see p. 72, *ante*). A new trustee cannot be appointed under the statutory power in place of an infant appointed a trustee by the instrument creating the trust (*Re Tallatire*, [1885] W. N. 191). A new trustee cannot be appointed under the statutory power when there is no vacancy to be filled up (*Re Gregson's Trusts* (1886), 34 Ch. D. 209, *per* NORTH, J., at p. 210). As to the power of the court to make the appointment, see *ibid.*; and p. 76, *post*.

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (2) (a).

(*o*) *Ibid.*, s. 10 (2) (a), (c). The Public Trustee may, however, in any case be appointed sole trustee; see *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611; pp. 213, 214, *post*.

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (2) (b). Separate sets of trustees may be appointed by the court for distinct trusts notwithstanding that in a certain event the trusts may coalesce (*Re Hetherington's Trusts* (1886), 34 Ch. D. 211). Under the earlier enactment (Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 5), which authorised the appointment of a separate set of trustees on an appointment of new trustees, there was a conflict of authority whether the appointment could be made without the authority of the court except on an appointment of new trustees for the whole of the trust property (*Re Paine's Trusts* (1885), 28 Ch. D. 725; *Savile v. Couper* (1887), 36 Ch. D. 520; *Re Moss's Trusts* (1888), 37 Ch. D. 513; *Re Nesbitt's Trusts* (1887), 19 L. R. Ir. 509, C. A.), but the doubt has been set at rest by the language of the present enactment (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (2)). As to the appointment of a separate set of trustees by the court, see p. 79, *post*.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (2) (d). As to the vesting of trust property in new trustees, see pp. 102 *et seq.*, *post*.



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ment of  
Office.Powers of  
new trustee.Appointment  
under Trustee  
Appointment  
Acts.

**154.** Every new trustee appointed under the above provisions, as well before as after all the trust property has become by law or by assurance or otherwise vested in him, has the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust (r).

**155.** Appointments of new trustees of some charities and charitable and other objects may be made under the Trustee Appointment Acts, 1850—1890 (s).

(iv.) *Appointment by the Court.*(a) *In General.*Appointment  
by court.

**156.** By statute (t) the High Court and, within their respective jurisdictions, a palatine court or a county court (u), may, whenever it is expedient to appoint a new trustee or new trustees (a), and it is found inexpedient, difficult, or impracticable to do so without the assistance of the court (b), make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee (c).

(r) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10 (3).

(s) Trustee Appointment Act, 1850 (13 & 14 Vict. c. 28); Trustee Appointment Act, 1869 (32 & 33 Vict. c. 26); Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19); see titles BURIAL AND CREMATION, Vol. III., p. 444; CHARITIES, Vol. IV., p. 262; ECCLESIASTICAL LAW, Vol. XI., pp. 370, 802, 821, 822; LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., p. 198.

(t) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25.

(u) *Ibid.*, s. 46; and see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; and titles COUNTY COURTS, Vol. VIII., pp. 691 *et seq.*; COURTS, Vol. IX., pp. 121 *et seq.*, 125, 126.

(a) The court will not appoint a new trustee where it is not expedient to do so (*Re Sheppard's Trusts* (1862), 4 De G. F. & J. 423, C. A., *per* TURNER, L. J., at p. 425).

(b) Where a sole or continuing trustee is desirous of exercising his statutory power of appointment, an application to the court, though made by a majority of the beneficiaries, and though the trustee has no beneficial interest under the trust, will be refused (*Re Higginbottom*, [1892] 3 Ch. 132), unless it be for the appointment of the Public Trustee (*Re Kensit*, [1908] W. N. 235); and generally the court will not appoint a new trustee, where the appointment can be made under a power in the instrument of trust or under the statutory power (*Re Soulbey's Trusts* (1873), 21 W. R. 256; *Re Gibbons' (John) Trusts* (1882), 45 L. T. 756; *Re Sutton (a Lunatic)*, [1885] W. N. 122, C. A.; but see *Re Jackson's Trusts* (1868), 16 W. R. 572; *Re Shafto's Trusts* (1885), 29 Ch. D. 247). As to the effect of proceedings for the administration of the trust on the exercise of a power of appointing new trustees under the instrument of trust or of the statutory power, see p. 69, *ante*.

(c) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25 (1). A new trustee may be appointed under the Act notwithstanding that the trustees have no trust property vested in them (*Re Boyce* (1864), 4 De G. J. & Sm. 205, *per* Lord WESTBURY, L. C., at pp. 208, 209). In some earlier cases it was held that the court could reappoint as new trustees persons who were already trustees (*Re Stokes' Trusts* (1872), L. R. 13 Eq. 333; *Re Dalgleish's Settlement* (1876), 4 Ch. D. 143, C. A.; *Re Pearson (a Lunatic)* (1877), 5 Ch. D. 982, C. A.; *Re Tatham's Trusts*, [1877] W. N. 259; *Re Harford's Trusts* (1879), 13 Ch. D. 135; *Re Crowe's Trusts* (No. 2) (1880), 14 Ch. D. 610), but this has been negatived in other and later cases (*Re Driver's*

**157.** The court, in appointing new trustees, does not confine itself to the original number (*d*), nor, on the other hand, insist on filling up the original number (*e*), but does not appoint a sole trustee where originally there were more than one (*f*). If there are two or more continuing trustees, the court in some cases authorises the continuing trustees to carry on the trust without appointing a new trustee to act with them (*g*).

**158.** The High Court may appoint a new trustee where the trust property is vested in or stands in the name of a lunatic or person of unsound mind (*h*). Where a testator dies a lunatic and all the trustees named in his will have predeceased him, the court may appoint new trustees of his will (*i*).

SECT. 2.  
Commence-  
ment of  
Office.

Number  
appointed.

Appointment  
in cases of  
lunacy.

*Settlement* (1875), L. R. 19 Eq. 352; *Re Aston* (1883), 23 Ch. D. 217, C. A.; *Re Vicat (a Person of Unsound Mind)* (1886), 33 Ch. D. 103, C. A.; *Re Dewhirst's Trusts* (1886), 33 Ch. D. 416, C. A.; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590; *Re Stocken's Settlement Trusts*, [1893] W. N. 203). All the powers and provisions of the Act with reference to the appointment of new trustees apply to and include trustees for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts, whether appointed by the court or by the settlement or under provisions contained in the settlement (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 47). As to the appointment by the court of a new trustee of a policy of assurance effected by a man on his life in favour of his wife and children under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11, see title HUSBAND AND WIFE, Vol. XVI., pp. 401, 402. As to the appointment of a judicial trustee, see pp. 209, 210, *post*.

(*d*) *Re Welch* (1838), 3 My. & Cr. 292; *Birch v. Cropper* (1848), 2 De G. & Sm. 255; *Re Tunstall's Will, Ex parte Tunstall* (1851), 4 De G. & Sm. 421; *Plenty v. West* (1853), 16 Beav. 356; *Re Boyce* (1864), 4 De G. J. & Sm. 205; and see p. 75, *ante*.

(*e*) *Bulkeley v. Eglinton (Earl)* (1855), 1 Jur. (N. S.) 994; *Re Marriott's Settlement* (1868), 18 L. T. 749; *Re Fowler's Trusts* (1886), 55 L. T. 546.

(*f*) *Re Dickinson's Trusts* (1855), 1 Jur. (N. S.) 724; *Re Ellison's Trust* (1856), 2 Jur. (N. S.) 62. The court will never vest an infant's trust fund in a sole trustee (*Re Dickinson's Trusts, supra*); but a sole new trustee has been appointed where there was but one trustee originally and the trust would shortly come to an end (*Re Reynault (a Lunatic)* (1852), 16 Jur. 233). It appears that, as far as jurisdiction is concerned, the court may now appoint two trustees, or even a sole trustee, notwithstanding a direction in the trust instrument that the number should never be reduced below three (*Re Leslie's Hassop Estates*, [1911] 1 Ch. 611).

(*g*) *Re Leon*, [1892] 1 Ch. 348, C. A.; *Re Price*, [1894] W. N. 169; *Dugmore v. Suffield*, [1896] W. N. 50; *Re Lees' Settlement Trusts*, [1896] 2 Ch. 508; *Re Fitzherbert's Settlement Trusts*, [1898] W. N. 58 (8); and see p. 79, *post*. Under the earlier statutes the court would not generally sanction in this way a reduced number of trustees in the case of a continuing trust (*Re Lamb's Trusts* (1884), 28 Ch. D. 77; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590), but only when distribution of the trust fund was imminent or there were other special circumstances (*Re Watson (a Person of Unsound Mind)* (1881), 19 Ch. D. 384, C. A.; *Re Martyn (a Lunatic)*, *Re Toutt's Will* (1884), 26 Ch. D. 745, C. A.; *Davies v. Hodgson* (1886), 32 Ch. D. 225).

(*h*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 141; Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1; and see p. 72, *ante*. Applications for the appointment are made in the same manner and subject to the same regulations as applications for the appointment of a new trustee by the High Court in other cases; see p. 78, *post*.

(*i*) *Re Orde* (1883), 24 Ch. D. 271, C. A. The jurisdiction is now vested in the High Court (Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1).

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Commence-  
ment of  
Office.

Application  
for appoint-  
ment.

Costs.

159. An order for the appointment of a new trustee may be made on the application of any person beneficially interested under the trust, whether under disability or not, or of any person duly appointed trustee thereof (*k*). Where all the parties interested do not join in the application, it is usual to serve the application upon the other persons who are interested in the trust either as trustees or beneficiaries (*l*).

The court may order the costs and expenses of and incident to an application for an order appointing a new trustee to be paid or raised out of the real or personal property in respect whereof the order is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just (*m*).

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36 (1); *Re Price*, [1894] W. N. 169. As to applications in lunacy, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 141, 142; Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1; Rules in Lunacy, 1892, rr. 17 (b), 57—59 (Stat. R. & O. Rev., Vol. VIII., Lunatic, England, pp. 3, 9). The application may be made by a person who has a contingent interest in the trust property (*Re Sheppard's Trusts* (1862), 4 De G. F. & J. 423, C. A.). Married women can apply for the appointment of new trustees without the concurrence of their husbands (*Re Outwin's (G.) Trusts* (1883), 48 L. T. 410). The president and secretary of the Wesleyan Conference have been held capable of applying for the appointment of new trustees of a Wesleyan chapel (*Re Harden Wesleyan Chapel* (1853), 1 W. R. 212). As to orders respecting the private estates of the Sovereign, see Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 10; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38; title CONSTITUTIONAL LAW, Vol. VI., p. 413, note (*a*).

(*l*) *Re Richards' Trust* (1852), 5 De G. & Sm. 636; *Re Sloper* (1854), 18 Beav. 596; *Re Lonsdale's Trust* (1850), 14 Jur. 1101; *Thomas's Trust* (1851), 15 Jur. 187; *Re Maynard's Settlement Trusts* (1852), 16 Jur. 1084; *Re Fellows' Settlement* (1856), 2 Jur. (N. S.) 62; *Re Blanchard* (1861), 3 De G. F. & J. 131, C. A., *per* TURNER, L. J., at p. 137. But the court may dispense with this service where good reason is shown for so doing (*Re Smyth's Settlement* (1851), 2 De G. & Sm. 781; *Re Richards' Trust*, *supra*, *per* PARKER, V.-C., p. 637; *Re Blanchard*, *supra*, at p. 137; *Re Lightbody's Trusts* (1884), 33 W. R. 452; *Re Wilson, a Lunatic* (1886), 31 Ch. D. 522, C. A.). The application need not be served on a trustee who has absconded (*Re Harrison's Trusts* (1852), 22 L. J. (CH.) 69; *Re Nicholson's Trusts*, [1884] W. N. 76; *Hyde v. Benbow*, [1884] W. N. 117), or who is permanently resident abroad (*Re Stewart* (1860), 8 W. R. 297, C. A.; *Re Bignold's Settlement Trusts* (1872), 7 Ch. App. 223; *Re Pye's Trusts* (1880), 42 L. T. 247). In the High Court an application under the Trustee Act, 1893 (56 & 57 Vict. c. 53), must be entitled in the matter of the Act (*Gough v. Bage* (1871), 25 L. T. 738), and must be made in the Chancery Division (R. S. C., Ord. 54B, r. 1), and ordinarily by summons (R. S. C., Ord. 55, r. 13A); but in a complicated case it may be made by petition (R. S. C., Ord. 54B, r. 2; *Re Morris's Settlement Trusts* (1889), 60 L. T. 96). It must not be made by action (*Thomas v. Walker* (1854), 18 Beav. 521).

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 38; R. S. C., Ord. 65, r. 27 (19), (23); and see *Re Fellows' Settlement*, *supra*; *Re Parby's Marriage Settlement Trusts* (1857), 29 L. T. (O. S.) 72; *Re Primrose* (1857), 23 Beav. 590; *Turner v. Mullineux* (1861), 9 W. R. 252; *Re Grant's Trusts* (1862), 2 John. & H. 764, where the costs were apportioned rateably between two funds; *Re Wills* (1863), 12 W. R. 97; *Re Crabtree* (1866), 14 W. R. 497; *Re Brackenbury's Trusts* (1870), L. R. 10 Eq. 45; *Re Wiseman's Trusts* (1870), 18 W. R. 574; *Re Pring's Trusts* (1873), 28 L. T. 467; *Re Spettigue's Trusts* (1884), 32 W. R. 385; *Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A.



**160.** Every trustee appointed by a court of competent jurisdiction has, as well before as after the trust property becomes, by law or by assurance or otherwise, vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust (*n*).

SECT. 2.  
Commence-  
ment of  
Office.

Powers of  
trustee  
appointed  
by court.

The order and any consequential vesting order or conveyance (*o*) does not operate as a discharge to any former or continuing trustee further or otherwise than an appointment of new trustees under a power for that purpose contained in an instrument of trust would have operated (*p*).

(b) *Cases in which Appointment will be Made.*

**161.** Where the instrument creating the trust contains no power to appoint new trustees, and no trustee named therein is alive when the instrument comes into operation, an application to the court to appoint new trustees is necessary, since there is no one who is enabled under the Trustee Act, 1893 (*q*), to make the appointment (*r*).

No trustees.

**162.** Where one of the original trustees is an infant, and inconvenience to the trust estate is caused thereby, the court appoints a new trustee in his place (*s*).

Infant  
trustee.

**163.** A new trustee can be appointed in the place of a trustee who is physically incapable (*t*), or is a lunatic or of unsound mind (*a*). The court may make any order for the appointment of a new trustee in substitution for a trustee who is convicted of felony or is a bankrupt (*b*); but the statutory provision does not authorise the appointment of a person to be executor or administrator (*c*).

Trustee  
incapable or  
lunatic.

**164.** The court, when it is expedient to do so, allows trustees to retire from a part of the trust and appoints new trustees of that part, without appointing a new trustee of the residue (*d*).

As to part  
of trust.

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 37.

(*o*) See pp. 103 *et seq.*, *post*.

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25 (2).

(*q*) 56 & 57 Vict. c. 53, s. 10; see pp. 73 *et seq.*, *ante*.

(*r*) *Re Orde* (1883), 24 Ch. D. 271, C. A.; *Re Lightbody's Trusts* (1884), 33 W. R. 452; *Re Ambler's Trusts* (1888), 59 L. T. 210; *Nicholson v. Field*, [1893] 2 Ch. 511.

(*s*) *Re Porter's Trust* (1856), 2 Jur. (N. S.) 349. As to the inconvenience caused by an infant trustee, see title INFANTS AND CHILDREN, Vol. XVII., pp. 51, 52.

(*t*) *Re Barber* (1888), 39 Ch. D. 187; *Re Weston's Trusts*, [1898] W. N. 151 (10).

(*a*) *Re Martin's Trusts*, *Re Martin (a Person of Unsound Mind), Land, Building, Investment and Cottage Improvement Co. v. Martin* (1887), 34 Ch. D. 618, C. A.; *Re M.*, [1899] 1 Ch. 79, 85; and see pp. 110, 111, *post*. Since the Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), vesting orders in such a case are made in the Chancery Division.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25 (1).

(*c*) *Ibid.*, s. 25 (3); and see *Re Willey*, [1890] W. N. 1, C. A.; *Eaton v. Daines*, [1894] W. N. 32.

(*d*) *Re Cotterill's Trusts*, [1869] W. N. 183; *Re Cunard's Trusts* (1878), 48 L. J. (CH.) 192; *Re Hetherington's Trusts* (1886), 34 Ch. D. 211; *Re Moss's Trusts* (1888), 37 Ch. D. 513; *Re Aston's Trusts* (1890), 25 L. R. Ir. 96; and see note (*p*), p. 75, *ante*.

SECT. 2.  
Commence-  
ment of  
Office.

Additional  
trustee.

When action  
necessary.

Appointment  
in place of  
dissolved  
company.

**165.** The court may appoint an additional new trustee when there is no vacancy in the number of trustees (*e*).

**166.** Where it is sought to appoint a new trustee in the place of one who is within the jurisdiction and desires to continue to act, the provisions of the Trustee Act, 1893 (*f*), do not apply, and an action must be brought for the removal of the trustee and the appointment of another person in his place (*g*).

**167.** Where a company in which property is vested becomes automatically dissolved (*h*), a person may be appointed under the Trustee Act, 1893 (*i*), to be a trustee of the property in the place of the dissolved company; and an order may be made vesting the property in him (*k*).

(*e*) *Who will be Appointed.*

Principles  
on which  
appointment  
is made.

**168.** In all cases of appointment by the court of a new trustee the court has regard to the wishes of the creator of the trust if expressed in or to be inferred from the instrument creating the trust (*l*) and to the question whether the appointment will preclude or impede the execution of the trust (*m*), and will not appoint a trustee with a view to the interests of some of the *cestuis que trust* in opposition to those of others (*n*).

Beneficiary.

**169.** A beneficiary or the husband of a beneficiary under the trust will not be appointed a trustee by the court (*o*), except where a suitable independent person cannot be found to undertake the

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(*e*) *Re Boycott's Settlement Trusts* (1856), 5 W. R. 15; *Grant v. Grant* (1865), 34 Beav. 623; *Re Brackenburg's Trusts* (1870), L. R. 10 Eq. 45; *Re Gregson's Trusts* (1886), 34 Ch. D. 209; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25. In a proper case the costs of the appointment have been thrown on the *corpus* of the trust property (*Grant v. Grant, supra*); but where the additional trustee was applied for by one beneficiary and opposed by another, the costs were ordered to be paid by the applicant (*Re Brackenburg's Trusts, supra*).

(*f*) 56 & 57 Vict. c. 53, s. 25.

(*g*) *Re Blanchard* (1862), 3 De G. F. & J. 131, C. A.; see pp. 114, 115, *post*. As to where a trustee is out of the jurisdiction, see note (*l*), p. 70, *ante*.

(*h*) Under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 72 (1), 195 (4); see title COMPANIES, Vol. V., p. 592.

(*i*) 56 & 57 Vict. c. 53, s. 25.

(*k*) *Ibid.*, s. 26; see pp. 103 *et seq.*, *post*; see also *Hanover (King) v. Bank of England* (1869), L. R. 8 Eq. 350; *Re General Accident Assurance Corporation, Ltd.*, [1904] 1 Ch. 147; *Re Mills (Richard) & Co. (Brierly Hill), Ltd., Smith v. The Co.*, [1905] W. N. 36; *Re No. 9, Bomore Road*, [1906] 1 Ch. 359. But the appointment has been refused in the case of a patent (*Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737). As to the order made in case of an industrial society, see *Re Ruddington Land*, [1909] 1 Ch. 701; title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 37, note (*g*).

(*l*) *Re Tempest* (1866), 1 Ch. App. 485, *per* TURNER, L.J., at p. 487. The court will not appoint a person, or the nominee of a person, whom the creator of the trust has evidently intended to exclude from all interest in or connexion with the trust property (*ibid.*).

(*m*) *Ibid.*, at p. 488.

(*n*) *Ibid.*, at p. 487.

(*o*) *Ex parte Clutton* (1853), 17 Jur. 988, *per* WOOD, V.-C., at p. 989; *Ex parte Conybeare's Settlement* (1853), 1 W. R. 458, C. A., *per* TURNER, L.J.

office (a), or there are other special circumstances (b). In that case an undertaking has been required from the person appointed that, in case of his becoming sole trustee, he will use every endeavour to obtain the appointment of a co-trustee (c).

SECT. 2.  
Commence-  
ment of  
Office.

**170.** The court does not as a rule appoint as a new trustee the solicitor to the beneficiary for life under the trust (d), or the solicitor to the existing trustee (e).

Solicitor.

**171.** An alien or person residing out of the jurisdiction is not appointed (f), unless special circumstances, such as the residence of the *cestui que trust* out of the jurisdiction, render his appointment expedient (g).

Alien or  
person out of  
jurisdiction

**172.** The court has refused to appoint a corporation as trustee (h), or to recognise a corporation as guaranteeing the performance of the trust by the trustees which it appoints (i).

Corporation.

(v.) *Appointment by the Charity Commissioners.*

**173.** In the case of charitable trusts (k), the Charity Commissioners have concurrent jurisdiction with the High Court (l) as to the appointment of new trustees (m).

Concurrent  
jurisdiction.

#### SUB-SECT. 4.—*Trustees by Devolution.*

**174.** The terms of the instrument creating the trust may be such as, upon the death of a trustee leaving no co-trustee surviving, to invest the person on whom the trust property then devolves

Trusteeship  
by devolution.

(a) *Ex parte Clutton* (1853), 17 Jur. 988; *Re Clissold's Settlement* (1864), 10 L. T. 642; *Re Parrott* (1881), 30 W. R. 97; *Re Burgess's Trusts*, [1877] W. N. 87; *Re Lightbody's Trusts* (1884), 33 W. R. 452.

(b) *Ex parte Conybeare's Settlement* (1853), 1 W. R. 458, C. A.; *Re Custis's Trust* (1871), 5 L. R. Eq. 429.

(c) *Re Hattatt's Trusts* (1870), 18 W. R. 416; *Re Burgess's Trusts*, *supra*; *Re Lightbody's Trusts*, *supra*.

(d) *Re Kemp's Settled Estates* (1883), 24 Ch. D. 485, C. A.; *Re Stamford (Earl), Payne v. Stamford*, [1896] 1 Ch. 288, *per* STIRLING, J., at pp. 298 *et seq.*; *Re Spencer's Settled Estates*, [1903] 1 Ch. 75; see *Re Orde* (1883), 24 Ch. D. 271, C. A.; see also p. 73, *ante*. But the appointment will be made if a contrary course would be inconvenient (*Re Brentnall's Trusts*, [1872] W. N. 77; *Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345, *per* STIRLING, J., at pp. 359, 360 (where it was convenient to appoint, as new trustees, the persons who were trustees of another settlement relating to the trust property and of whom the solicitor was one); *Re Spencer's Settled Estates*, *supra*, *per* BYRNE, J., at p. 82).

(e) *Re Norris, Allen v. Norris* (1884), 27 Ch. D. 333, *per* PEARSON, J., at p. 340.

(f) *Re Guibert's Trust Estate* (1852), 16 Jur. 852; *Re Drewe's Settlement Trusts*, [1876] W. N. 168, *per* MALINS, V.-C.

(g) *Re Hill's Trusts*, [1874] W. N. 228; *Re Drewe's Settlement Trusts*, *supra*; *Re Austen's Settlement* (1878), 38 L. T. 601; *Re Liddiard* (1880), 14 Ch. D. 310; *Re Cunard's Trusts* (1878), 48 L. J. (CH.) 192; *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148.

(h) *Re Brogden, Billing v. Brogden*, [1888] W. N. 238.

(i) *Ibid.*

(k) See title CHARITIES, Vol. IV., pp. 101 *et seq.*

(l) *Ibid.*, pp. 265 *et seq.*

(m) *Ibid.*, p. 268.



SECT. 2.  
Commence-  
ment of  
Office.

with the office and powers of a trustee (*n*). Such person, if the personal representative, has an absolute right to decline to accept the position and duties of trustee (*o*), and is liable at any time to be deprived of the office and powers by the appointment of new trustees (*p*), after which he will not remain a trustee, unless he is thereby appointed a new trustee (*q*). Subject to any direction to the contrary in the instrument creating the trust, the legal personal representatives or representative of a sole trustee, or of a last surviving or continuing trustee, may, until the appointment of new trustees, exercise or perform any power or trust given to or capable of being exercised by the sole or last surviving or continuing trustee (*a*).

SUB-SECT. 5.—*Acceptance and Disclaimer of Office.*

(i.) *Acceptance of Office.*

Acceptance  
of office.

**175.** A person who is appointed a trustee assumes the office upon his acceptance thereof (*b*). The acceptance may be either express or implied (*c*). Upon acceptance the trust property vests in him indefeasibly (*d*), and he cannot afterwards disclaim the trust (*e*).

Express  
acceptance.

**176.** A person expressly accepts the office of trustee by executing the instrument of trust in which he is named a trustee (*f*), or may

(*n*) *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A., per JESSEL, M.R., at pp. 146, 147, and per JAMES, L.J., at p. 149; *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 30 (1); *Re Jordan, Hayward v. Hamilton*, [1904] 1 Ch. 260, per BYRNE, J., at pp. 262 *et seq.*; *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123.

(*o*) *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216, 225, C. A. As to disclaimer by a trustee by devolution, see note (*b*), p. 83, *post*.

(*p*) *Re Morton and Hallett, supra*, at p. 149; *Re Jordan, Hayward v. Hamilton, supra*, at pp. 262 *et seq.*; *Re Routledge's Trusts, Routledge v. Saul*, [1909] 1 Ch. 280.

(*q*) *Re Morton and Hallett, supra*, at p. 149; *Re Routledge's Trusts, Routledge v. Saul, supra*.

(*a*) *Conveyancing Act*, 1911 (1 & 2 Geo. 5, c. 37), s. 8, overriding *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690; see, further, p. 101, *post*. This provision applies only to trusts constituted after, or created by instruments coming into operation after, the 31st December, 1881 (*Conveyancing Act*, 1911 (1 & 2 Geo. 5, c. 37), s. 8 (3)). It does not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust (*ibid.*, s. 8 (5)).

(*b*) *Shep. Touch.* 284, 285; *Bonifaut v. Greenfield* (1587), Cro. Eliz. 80; *Thompson v. Leach* (1690), 2 Vent. 198, 199; *Townson v. Tickell* (1819), 3 B. & Ald. 31. As to acceptance and refusal of the office of executor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 142 *et seq.*

(*c*) *Montford (Lord) v. Cadogan (Lord)* (1816), 19 Ves. 635, per Lord ELDON, L.C., at p. 638; *Montgomery v. Johnson* (1848), 11 I. Eq. R. 476.

(*d*) A person must give his assent before any interest in property can indefeasibly pass to him (*Townson v. Tickell, supra*, per BEST, J., at p. 39); but a transfer or other disposition of property to a person without his knowledge vests the property in him at once, subject to his right to disclaim the property when informed of it (*Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, per PARKE, B., at p. 520; *Siggers v. Evans* (1855), 5 E. & B. 367, 381; *Standing v. Bowring* (1885), 31 Ch. D. 282, C. A., per COTTON, L.J., at p. 288; *Mallott v. Wilson*, [1903] 2 Ch. 494).

(*e*) *Doe d. Chidgey v. Harris, supra*, at pp. 520, 524.

(*f*) *Montford (Lord) v. Cadogan (Lord), supra*, at p. 638; *Jones v. Higgins* (1866), L. R. 2 Eq. 538, per KINDERSLEY, V.-C., at pp. 543, 544.

do so by some other writing or by parol (*g*). A parol expression of acceptance does not, however, bind him unless it is unequivocal (*h*).

SECT. 2.  
Commence-  
ment of  
Office.

177. A person impliedly accepts the office of trustee if he personally interferes with the trust property (*i*), or otherwise acts in the trust (*k*), or allows proceedings in reference to the trust property to be instituted (*l*), or dealings with the trust property to be carried on (*m*) in his name. A person who is named an executor and trustee in a will is deemed, if he proves the will, to accept the trusts of the will both as to personal property (*n*) and as to real property (*o*).

Implied  
acceptance.

178. Acceptance of a trust is not implied from the trustee named in a deed merely taking charge of the deed temporarily for safe keeping (*p*), or from acts in connexion with the trust subsequent to his actual disclaimer or refusal thereof (*q*).

When  
acceptance  
not implied.

(ii.) *Disclaimer of Office.*

179. A person who is appointed a trustee may, before he has accepted the office or in any way acted therein (*a*), disclaim the office or refuse to serve (*b*). He cannot, however, disclaim the

Disclaimer  
of office.

(*g*) *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, 519, 524; *Middleton v. Pollock, Ex parte Elliott* (1876), 2 Ch. D. 104; *Middleton v. Pollock, Ex parte Wetherall* (1876), 4 Ch. D. 49. Where a person did nothing to accept the trusts of a settlement except signing, many years afterwards, a memorandum indorsed upon it which related only to part of the settled property, he was only held liable as a trustee in respect of that part of the property (*Malzy v. Edge* (1856), 2 Jur. (N. S.) 80); but as to inability to disclaim part of a trust, see p. 84, *post*.

(*h*) *Doe d. Chidgey v. Harris, supra*, at p. 524.

(*i*) *Montford (Lord) v. Cadogan (Lord)* (1816), 19 Ves. 635, 638; *Bence v. Gilpin* (1868), L. R. 3 Exch. 76, *per* KELLY, C.B., at p. 81.

(*k*) *Doyle v. Blake* (1804), 2 Sch. & Lef. 231; *Urch v. Walker* (1838), 3 My. & Cr. 702; *James v. Frearson* (1842), 1 Y. & C. Ch. Cas. 370; *White v. Barton* (1854), 18 Beav. 192, 195; and see *Robinson v. Pett* (1734), 3 P. Wms. 249. But a release of the trust property to the other trustees implies a disclaimer and not an acceptance of the trust (*Nicloson v. Wordsworth* (1818), 2 Swan. 365, *per* Lord ELDON, L.C., at p. 371; see note (*h*), p. 84, *post*).

(*l*) *Montford (Lord) v. Cadogan (Lord), supra*; *Cook v. Fryer* (1842), 1 Hare, 498.

(*m*) *James v. Frearson, supra*.

(*n*) *Mucklow v. Fuller* (1821), Jac. 198; *Booth v. Booth* (1838), 1 Beav. 125; and see pp. 60, 61, *ante*.

(*o*) *Ward v. Butler* (1824), 2 Mol. 533. But he may disclaim as regards copyhold trust property (*Wellesley (Lord) v. Withers* (1855), 4 E. & B. 750); see, however, note (*d*), p. 84, *post*.

(*p*) *Evans v. John* (1841), 4 Beav. 35, *per* Lord LANGDALE, M.R., at pp. 36, 37.

(*q*) See pp. 85, 86, *post*.

(*a*) See p. 82, *ante*.

(*b*) *Smith v. Wheeler* (1671), 1 Vent. 128, *per* HALE, C.J., at p. 130; *Nicloson v. Wordsworth, supra*, *per* Lord ELDON, L.C., at p. 369; *Small v. Marwood* (1829), 9 B. & C. 300, 309; *Siggers v. Evans* (1855), 5 E. & B. 367, 381; *White v. M'Dermott* (1872), 7 I. R. C. L. 1. This applies equally to trustees by devolution (*Legg v. Mackrell* (1860),

- SECT. 2.  
Commence-  
ment of  
Office.
- Form of  
disclaimer.
- Renunciation  
of probate.
- After lapse  
of time.
- office and retain the estate (c); nor can he disclaim the trust as to part of the property, even when the property attempted to be disclaimed is in a different country from the rest (d). The disclaimer involves disclaimer of any benefit annexed to the office (e), but does not prevent acceptance of an independent benefit conferred by the instrument of trust (f).
- No formal act or instrument is necessary to effect the disclaimer or refusal (g); but in order to furnish evidence of the fact and to render it impossible for the person subsequently either to assume to act or to be charged with acting as a trustee, a disclaimer by deed is convenient and proper (h).
- A trustee who has refused to act in a trust but has not executed a deed of disclaimer may, in legal proceedings in relation to the trust, disclaim by counsel at the bar of the court (i).
- Where a testator has appointed a person an executor and also a trustee, the fact of his renouncing probate and not acting as trustee is strong evidence that he has refused the trust (k), and is conclusive evidence of such refusal if the duties of executor are by the will inseparable from the duties of the trust (l).
- 180.** The execution of a formal disclaimer after a lapse of time
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- 2 De G. F. & J. 551, C. A.; *Re Ridley, Ridley v. Ridley*, [1904] 2 Ch. 774; *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216, C. A.).
- (c) *Re Martinez' Trusts* (1870), 22 L. T. 403.
- (d) *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, C. A. It has been held at law that two out of three trustees could disclaim copyholds which were part of the trust property for the purpose of avoiding heavy fines (*Wellesley (Lord) v. Withers* (1855), 4 E. & B. 750). But this is not a proper proceeding (*R. v. Garland* (1870), L. R. 5 Q. B. 269, 272), and would probably be now held ineffectual in equity; see *Re Lord and Fullerton's Contract, supra*.
- (e) *Staney v. Wilney* (1866), L. R. 2 Eq. 418; *Lewis v. Mathews* (1869), L. R. 8 Eq. 277.
- (f) *Polluxfen v. Moore* (1746), 3 Atk. 272; *Andrews v. Trinity Hall, Cambridge* (1804), 9 Ves. 525; *Talbot (Earl) v. Radnor* (1834), 3 My. & K. 252; *Warren v. Ruddall, Ex parte Godfrey* (1860), 1 John. & H. 1.
- (g) *Townson v. Tickell* (1819), 3 B. & Ald. 31, per HOLROYD, J., at p. 39; *Stacey v. Elph* (1833), 1 My. & K. 195, 199; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, per ROLFE, B., at p. 520; *White v. M'Dermott* (1872), 7 I. R. C. L. 1; *Re Birchall, Birchall v. Ashton* (1889), 40 Ch. D. 436, C. A. A disclaimer by parol is sufficient (*Bingham v. Clanmorris (Lord)* (1828), 2 Mol. 253, per HART, L.C.). As to the costs of a disclaiming trustee, see p. 85, *post*.
- (h) *Nicloson v. Wordsworth* (1818), 2 Swan. 365; *Townson v. Tickell, supra*, at p. 39; *Stacey v. Elph, supra*, per LEACH, M.R., at p. 199; *Begbie v. Crook* (1835), 2 Scott, 128. The deed operates as a disclaimer of the trust property as well as of the trust; and a release of the trust property by a disclaiming trustee to his co-trustees is improper, as purporting to accept and deal with the property (*Crewe v. Dicken* (1798), 4 Ves. 97; *Urch v. Walker* (1838), 3 My. & Cr. 702; and see p. 83, *ante*); but it is not fatal to the disclaimer if the intention to disclaim is otherwise clear (*Nicloson v. Wordsworth, supra*; *Sharp v. Sharp* (1819), 2 B. & Ald. 405; *Wellesley (Lord) v. Withers, supra*, at p. 757).
- (i) *Ladbroke v. Bleaden* (1852), 16 Jur. 630; *Foster v. Dawber* (1860), 1 Drew. & Sm. 172.
- (k) *M'Kenna v. Eager* (1875), 9 I. R. C. L. 79; *Re Gordon, Roberts v. Gordon* (1877), 6 Ch. D. 531, per JESSEL, M.R., at p. 534.
- (l) *Re Gordon, Roberts v. Gordon, supra*, at p. 534.



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is good if the trustee who executes it has never in the meantime acted or consented to act in the trust (*m*). Where, however, a trustee does not, until after the lapse of many years, by deed disclaim the trust or expressly decline to act therein, the fact of his not having executed the instrument of trust is not sufficient to prove his non-acceptance of the trust, and additional strong evidence is necessary to prove that he has not accepted it and that the trust property is not vested in him (*n*).

**181.** A disclaimer or refusal to act in the trust takes effect *ab initio* and vests the trust property, as from the date when the trust disposition came into operation, exclusively in the trustees who consent to act (*o*). If all the trustees disclaim, the property reverts in the disposer, or, if he is dead, in his legal representative, who becomes, by operation of law, the trustee thereof for the purposes of the trust (*p*). Effect on trust property.

**182.** The disclaimer of the trustee, or of all the trustees nominated by the disposer, does not avoid the trust (*q*); but a new trustee will be appointed by a court of equity to execute it (*r*). Trust not affected.

**183.** A trustee who disclaims is entitled to his expenses of disclaiming out of the trust fund (*s*), and to his costs of any proceedings to which he is made a party on the footing of being a trustee (*t*), except so far as he incurs or occasions costs beyond those actually incidental to making good his disclaimer (*a*). Costs of disclaiming trustee.

**184.** A person who has disclaimed or refused a trust reposed in him cannot afterwards act in it, even by exercising the power of Effect of disclaimer.

(*m*) *Peppercorn v. Wayman* (1852), 5 De G. & Sm. 230, 235.

(*n*) *Re Uniacke* (1844), 1 Jo. & Lat. 1; *Noble v. Meymott* (1851), 14 Beav. 471, 476, 480; *Paddon v. Richardson* (1855), 7 De G. M. & G. 563, C. A.; see *Re Birchall, Birchall v. Ashton* (1889), 40 Ch. D. 436, C. A. Where, on probate of a will being obtained, power was reserved to a person named therein as one of the executors and trustees to come in and prove, the fact that he never did so and never acted in the trusts of the will was held, after a lapse of thirty years, not to be sufficient evidence, in the absence of an actual disclaimer, that he had not accepted the trusts (*Re Needham* (1844), 1 Jo. & Lat. 34, *per* SUGDEN, L.C., at p. 36).

(*o*) *Smith v. Wheeler* (1671), 1 Vent. 128; *Adams v. Taunton* (1820), 5 Madd. 435; *Small v. Marwood* (1829), 9 B. & C. 300, 307; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, *per* PARKE, B., at p. 524; *Peppercorn v. Wayman, supra*; *Re Birchall, Birchall v. Ashton, supra*. Consequently dispositions of the trust property by the other trustees are effectual before the disclaiming trustee has executed the disclaimer or has even become aware of his appointment as a trustee (*Peppercorn v. Wayman, supra*).

(*p*) *Mallott v. Wilson*, [1903] 2 Ch. D. 494, 502, 503; and see p. 67, *ante*.

(*q*) *Robson v. Flight* (1865), 4 De G. J. & Sm. 608, C. A., *per* Lord WESTBURY, L.C., at p. 613.

(*r*) *A.-G. v. Stephens* (1834), 3 My. & K. 347, 352.

(*s*) *Re Tryon* (1844), 7 Beav. 496.

(*t*) *Sherratt v. Bentley* (1830), 1 Russ. & M. 655; *Norway v. Norway* (1834), 2 My. & K. 278; *Howard v. Rhodes* (1837), 1 Keen, 581; *Bray v. West* (1838), 9 Sim. 429; *Benbow v. Davies* (1848), 11 Beav. 369; *Bulkeley v. Eglinton (Earl)* (1855), 1 Jur. (N. S.) 994; *Heap v. Jones* (1856), 5 W. R. 106; *Legg v. Mackrell* (1860), 2 De G. F. & J. 551.

(*a*) *Martin v. Persse* (1828), 1 Mol. 146; and see title MORTGAGE, Vol. XXI., pp. 295, 296.

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appointing a new trustee (*b*); and he does not become a trustee by subsequently acting in connexion with the trust as agent of the accepting trustees (*c*), or as adviser of the *cestuis que trust* (*d*).

SUB-SECT. 6.—*Custodian Trustees.*

Public  
Trustee.

**185.** Subject to the Public Trustee Act, 1906 (*e*), and to the rules thereunder for the time being in force (*f*), the Public Trustee (*g*), if he consents to act as such (*h*) with respect to any trust created by any trust instrument or arising upon an intestacy, except the trusts of an instrument made solely by way of security for money, and whether or not the number of trustees has been reduced below the original number (*i*), may be appointed to be custodian trustee (*k*), either (1) by an order of a court of competent jurisdiction made on the application of a person entitled to apply for the appointment of a new trustee; or (2) by the testator, settlor, or other creator of a trust; or (3) by the person having power to appoint new trustees (*l*).

Companies  
and societies.

**186.** Any incorporated banking or insurance or guarantee or trust company, or other body corporate which is for the time being empowered to undertake trusts, may act as custodian trustee in like manner as the Public Trustee (*m*), so long as it does not state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund of the United Kingdom in respect of any act or omission on its part when so acting (*n*).

SUB-SECT. 7.—*Bare Trustees.*

Definition.

**187.** A person who holds trust property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and *sui juris* in respect of it, and who has himself no present beneficial interest in it, and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, is a bare trustee, and is bound to convey or transfer the property accordingly when required to do so (*o*).

(*b*) *Re Birchall, Birchall v. Ashton* (1889), 40 Ch. D. 436, 437, C. A.

(*c*) *Dove v. Everard* (1830), 1 Russ. & M. 231; *Lowry v. Fulton* (1838), 9 Sim. 104, 115, 124.

(*d*) *Stacey v. Elph* (1833), 1 My. & K. 195, 198.

(*e*) 6 Edw. 7, c. 55.

(*f*) See note (*e*), p. 214, *post*.

(*g*) See p. 215, *post*.

(*h*) In the case of his appointment by a testator, his subsequent consent, and, in every other case, his previous consent to act, is requisite (Public Trustee Rules, 1912, r. 8 (Stat. R. & O., 1912, p. 1231)).

(*i*) See pp. 214, 215, *post*.

(*k*) As to the powers and duties of a custodian trustee, see p. 215, *post*.

(*l*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (1); Public Trustee Rules, 1912, rr. 8—11.

(*m*) See pp. 215, 216, *post*.

(*n*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (3); Public Trustee Rules, 1912, r. 30; *Re Cherry's Trusts, Robinson v. Wesleyan Methodist Chapel Purposes (Trustees for)*, [1914] 1 Ch. 83.

(*o*) *Christie v. Ovington* (1875), 1 Ch. D. 279; *Morgan v. Swansea Urban Sanitary Authority* (1878), 9 Ch. D. 582; *Re Docwra, Docwra v. Faith*

**188.** A bare trustee cannot settle an account on behalf of the *cestui que trust* without his consent (*p*), and cannot, without the concurrence of the *cestui que trust*, petition for adjudication of bankruptcy against a person who owes a debt to him as such bare trustee (*q*).

**189.** A bare trustee is not, in respect of any estate held by him as such, the protector of a settlement under the Fines and Recoveries Act, 1833 (*r*).

SUB-SECT. 8.—*Constructive Trustees.*

(i.) *In General.*

**190.** A trust of property follows the legal estate wherever it goes and constitutes any holder of it who is not duly constituted an express trustee a constructive trustee (*a*), except when it comes into the hands of a purchaser for valuable consideration without notice of the trust (*b*).

**191.** Where a testator has devised real property in trust and his legal representative becomes a constructive trustee thereof by

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Limited  
power of  
bare trustee.  
Bare trustee  
not a pro-  
tector of a  
settlement.

Constructive  
trustee, how  
constituted.

Powers of  
legal repre-  
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(1885), 29 Ch. D. 693; *Re Cunningham and Frayling*, [1891] 2 Ch. 567, *per* STIRLING, J., at pp. 571, 572. A bare trustee may originally have had duties in respect of the property which have since ceased (*Christie v. Ovington* (1875), 1 Ch. D. 279, *per* HALL, V.-C., at p. 281), or which have been superseded by a request from the persons entitled to the property to convey it to them (*Morgan v. Swansea Urban Sanitary Authority* (1878), 9 Ch. D. 582, *per* JESSEL, M.R., at p. 585). A person who has himself an existing beneficial interest of any kind in the trust property is in no circumstances a bare trustee of it (*Lysaght v. Edwards* (1876), 2 Ch. D. 499, *per* JESSEL, M.R., at p. 506). But trustees for sale, after selling the property under an order of court to a purchaser who has paid the purchase-money into court, are bare trustees of it, notwithstanding that they have a beneficial interest in the proceeds of sale, since their beneficial interest in the property itself has ceased, and they have no duty to perform in respect of it except to convey it to the purchaser (*Re Docwra, Docwra v. Faith* (1885), 29 Ch. D. 693). Where a passive trust was created to preserve contingent remainders, or to bar dower, or to keep alive an incumbrance or for some other purpose, the trustee might never have any function to perform in respect of the property (1 Hayes' Conveyancing, pp. 103—109). As to the liability of a bare trustee where the equitable estate is in a trustee for others, see p. 186, *post*.

(*p*) *Fell v. Lutwidge* (1741), Barn. (CH.) 319, *per* Lord HARDWICKE, L.C., at p. 321.

(*q*) *Re Adams, Ex parte Culley* (1878), 9 Ch. D. 307, C. A.; *Re Hastings, Ex parte Dearle* (1884), 14 Q. B. D. 184, C. A.

(*r*) 3 & 4 Will. 4, c. 74; see *ibid.*, s. 22; and titles REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 252, 253; SETTLEMENTS, Vol. XXV., p. 692.

(*a*) As to constructive trustees, see p. 47, *ante*; and title EQUITY, Vol. XIII., pp. 154 *et seq.* For the purpose of the Statutes of Limitation, constructive trustees are within the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; see pp. 200, 201, *post*. For the cases in which a constructive trust will prevent the running of time, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 142, 164.

(*b*) *A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at p. 21; see pp. 88 *et seq.*, *post*. But as to trust money, see p. 90, *post*. Where a person made an imperfect disposition of real property in trust by omitting the word "heirs" in the assurance of it to the trusts, his heir-at-law was held to be trustee of it (*Dilrow v. Bone* (1862), 3 Giff. 538). As to purchasers for value without notice, see title EQUITY, Vol. XIII., pp. 76, 77, 81, 160.



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reason of the trustees named in the will disclaiming the trust (c), the legal representative can execute a trust which imposes no other duty than simply to clothe the equitable ownership with the legal estate (d). Where, however, the trust is in the form of a power of leasing or of some other trust or power requiring the exercise of judgment and discretion, he cannot, though he holds the property subject to the trust, execute the trust or exercise the power, even though it may have been obligatory on the trustees named in the will to execute it (e).

(ii.) *On Failure of Trustee.*

Constructive  
trustee in  
default of  
express  
trustee.

**192.** Where owing to no person having been originally effectively appointed a trustee (f), or to the trustees having all died before the instrument creating the trust came into operation (g), or to their all disclaiming the trust (h), the trust property becomes in law vested in a person who is a stranger to the trust, he is in equity a constructive trustee of the property and holds it upon the trust to which it is subject (i).

(iii.) *By Acquisition of Trust Property.*

(a) *Acquisition with Notice of Trust.*

Acquisition  
of trust  
property.

**193.** Where a person, whether gratuitously or for valuable consideration, acquires property, or an interest in property, which is subject to a subsisting trust, he becomes a trustee of it for the purposes of the trust, if he has either actual or constructive notice of the trust (k).

(c) See p. 67, *ante*.

(d) *Robson v. Flight* (1865), 4 De G. J. & Sm. 608, C. A.

(e) *Ibid*.

(f) *Sonley v. Clock-makers' Co. (Master, etc.)* (1780), 1 Bro. C. C. 80; but see *Gravenor v. Hallum* (1767), Amb. 643, *per* Lord CAMDEN, L.C., at p. 644.

(g) *A.-G. v. Hickman* (1732), 2 Eq. Cas. Abr. 193, 194; *A.-G. v. Downing (Lady)* (1767), Wilm. 1, 19, 22, 24; *Moggridge v. Thackwell* (1792), 1 Ves. 464, *per* Lord THURLOW, L.C., at p. 475; and see S. C. on rehearing (1803), 7 Ves. 36, affirmed in House of Lords (1807), 13 Ves. 416.

(h) *Robson v. Flight*, *supra*.

(i) *Sonley v. Clock-makers' Co. (Master, etc.)*, *supra*; *Re Davis' Trusts* (1871), L. R. 12 Eq. 214; and see p. 67, *ante*. Where necessary the court will make the heir-at-law of the creator of the trust a trustee (*A.-G. v. Downing (Lady)*, *supra*, at pp. 21, 23; *Sonley v. Clock-makers' Co. (Master, etc.)*, *supra*; *Brydges v. Brydges*, *Philips v. Brydges* (1796), 3 Ves. 120, *per* ARDEN, M.R., at p. 127; *Robson v. Flight*, *supra*).

(k) *Saunders v. Dehew* (1692), 2 Vern. 271; *Thompson v. Simpson* (1841), 1 Dr. & War. 459, 486; *Allen v. Knight* (1847), 11 Jur. 527; *Rolfe v. Gregory* (1865), 4 De G. J. & Sm. 576; *Baillie v. M'Kewan* (1865), 35 Beav. 177; *Boursot v. Savage* (1866), L. R. 2 Eq. 134; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556; and see title ESTOPPEL, Vol. XIII., pp. 393, 394. A person buying real estate with notice of the rights of another therein is a trustee for him in respect thereof (*Loke Yew v. Port Swettenham Rubber Co., Ltd.*, [1913] A. C. 494, P. C.). As to what is constructive notice, see *Cookson v. Lee* (1853), 23 L. J. (CH.) 473, C. A. A person is held to have constructive notice of the trust if he abstains from making proper inquiries which would have led to his discovering its existence (*Justice v. Wynne* (1860), 12 I. Ch. R. 289, C. A., *per* BALL, J., at pp. 310,

**194.** In order to constitute a person who takes trust property or trust money for his own purposes a constructive trustee of it he must have notice that it is being misapplied by being transferred to him, or, in other words, he must be party to a fraud or breach of trust on the part of the actual trustee (*l*).

(*b*) *Acquisition without Notice of Trust.*

**195.** A person who, without notice of the trust, acquires property or an interest in property which is in fact subject to a subsisting trust, takes the property as a trustee and subject to the performance of the trust, if he acquires gratuitously either the legal estate (*n*) or an equitable interest in the property (*n*); or if he acquires for valuable consideration an equitable interest in the property without the right to call for the legal estate (*o*); in the latter case, however, he can protect himself from the trust by afterwards getting in the legal estate from a person who commits no breach of trust in parting with it to him (*p*), although he cannot do so by obtaining the legal estate from a person who is not justified in equity in transferring it to him (*a*). On the other hand, he takes the property discharged from the trust if he acquires the legal estate in the property for valuable consideration (*b*), or acquires an equitable interest in it for

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311; see *Williams v. Williams* (1881), 17 Ch. D. 437). Constructive notice is as good as any other notice (*Cookson v. Lee*, (1853), 23 L. J. (CH.) 473, C. A., per Lord CRANWORTH, L.C., at p. 478). See, further, title EQUIT. Vol. XIII., pp. 84 *et seq.*, and see also *ibid.*, pp. 83, 84.

(*l*) *Colchester Corporation v. Lowten* (1813), 1 Ves. & B. 226, per Lord ELDON, L.C., at p. 246; *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474, per JESSEL, M.R., at p. 479; *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370; *Moxham v. Grant*, [1900] 1 Q. B. 88, C. A.

(*m*) Where property is subject to a trust, the trust follows the legal estate wherever it goes, unless it comes into the hands of a purchaser for valuable consideration without notice (*A.-G. v. Downing (Lady)* (1767), Wilm. 1, per WILMOT, C.J., at p. 21).

(*n*) *Taylor v. Blakelock* (1886), 32 Ch. D. 560, 563, 570, C. A.

(*o*) *Maundrell v. Maundrell* (1805), 10 Ves. 246, 260; *Newton v. Newton* (1868), 4 Ch. App. 143; *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556.

(*p*) *Maundrell v. Maundrell, supra*; *Carter v. Carter* (1857), 3 K. & J. 617; *Bates v. Johnson* (1859), John. 304; *Sharples v. Adams* (1863), 32 Beav. 213, per ROMILLY, M.R., at p. 216; *Taylor v. Russell*, [1892] A. C. 244; *Bailey v. Barnes*, [1894] 1 Ch. 25, 37, C. A.; even though he gets in the legal estate after he has notice of the trust and *pendente lite* (*Bailey v. Barnes, supra*). Where a purchaser for value, without notice of an equitable title, acquires an inchoate title and, after notice, completes it by getting in the legal estate, he will not, as an ordinary rule, be deprived, in favour of a person having only an equitable title, of the advantage which he has thereby gained (*Dodds v. Hills* (1865), 2 Hem. & M. 424; *Roots v. Williamson* (1888), 38 Ch. D. 485, per STIRLING, J., at pp. 497, 498).

(*a*) *Sharples v. Adams, supra*, at p. 216. As to priority between equitable mortgages, see also title MORTGAGE, Vol. XXI., pp. 327 *et seq.*

(*b*) *Thorndike v. Hunt, Browne v. Butler* (1859), 3 De G. & J. 563, C. A.; *Pilcher v. Rawlins* (1872), 7 Ch. App. 259; *Heath v. Crealock* (1874), 10 Ch. App. 22; *Taylor v. Blakelock, supra*; and see title MORTGAGE, Vol. XXI., pp. 327 *et seq.* Absence of notice of the trust is essential to his immunity from liability (*Bodmin (Lady) v. Vandenbendy* (1683), 1 Vern. 179; *Anon.* (1683), 2 Vent. 361). A subsequent purchaser from him is not affected by notice of the trust, since the property has been discharged from it by the previous purchase without notice (*Brandlyn v. Ord* (1738), 1 Atk. 571; *Lowther v. Carlton*

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receipt of  
trust money.

valuable consideration, and at the same time acquires a paramount right to call for the legal estate (c).

(c) *Receipt of Trust Money.*

**196.** A banker, broker, solicitor, or other stranger to the trust, receiving money from a trustee which he knows to be part of the trust property, does not become a constructive trustee thereof (d), unless he knows that the money is being applied in a manner inconsistent with the trust, or, in other words, unless he is a party either to a fraud or to a breach of trust on the part of the trustee (e). In so far as such money remains in the disposition of the trustee the *cestuis que trust* may follow it and claim it as against the trustee (f).

(1742), 2 Atk. 242; *M'Queen v. Farquhar* (1805), 11 Ves. 467, *per* Lord ELDON, L.C., at p. 478). The only exception to the rule which protects a purchaser with notice who takes from a purchaser without notice is that which prevents a trustee from buying back trust property which he has sold, or a person who has acquired property by fraud from saying that he sold it to a *bonâ fide* purchaser without notice and has repurchased it from him (*Barrow's Case* (1880), 14 Ch. D. 432, C. A., *per* JESSEL, M.R., at p. 445).

(c) *Wilkes v. Bodington* (1707), 2 Vern. 599; *Stanhope v. Verney (Earl)* (1761), 2 Eden, 81; *Wilmot v. Pike* (1845), 5 Hare, 14, *per* WIGRAM, V.-C., at p. 22; *Rooper v. Harrison* (1855), 2 K. & J. 86; *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, C. A., *per* STIRLING, L.J., at pp. 262, 263.

(d) *Keane v. Roberts* (1819), 4 Madd. 332; *Maw v. Pearson* (1860), 28 Beav. 196; *Harries v. Rees* (1867), 37 L. J. (CH.) 102, C. A., *per* ROLT, L.J., at pp. 106, 107; *Gray v. Johnston* (1868), L. R. 3 H. L. 1; *Barnes v. Addy* (1874), 9 Ch. App. 244, *per* Lord SELBORNE, L.C., at pp. 251, 252; *Re Spencer, Spencer v. Hart* (1881), 51 L. J. (CH.) 271, C. A.; *Stanian v. Evans, Evans v. Stanian* (1886), 34 Ch. D. 470; *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370, *per* STIRLING, J., at p. 381; *Re Jackson, Re Cottrell, Boughton-Leigh v. Boughton-Leigh* (1889), 40 Ch. D. 495; *Thomson v. Clydesdale Bank, Ltd.*, [1893] A. C. 282; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243; *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693, P. C.; *Mutton v. Peat*, [1899] 2 Ch. 556; *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary*, [1902] A. C. 543, P. C.; and see titles BANKERS AND BANKING, Vol. I., p. 584; SOLICITORS, Vol. XXVI., p. 760.

(e) *Pannell v. Hurley* (1845), 2 Coll. 241; *Salomons v. Laing* (1850), 12 Beav. 377; *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903, C. A.; *Bridgman v. Gill* (1857), 24 Beav. 302; *Morgan v. Stephens* (1861), 3 Giff. 226, *per* STUART, V.-C., at p. 237; *Lee v. Sankey* (1873), L. R. 15 Eq. 204, *per* BACON, V.-C., at p. 211; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Soar v. Ashwell*, [1893] 2 Q. B. 390, C. A.; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561, C. A.

(f) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696, C. A.; *Hancock v. Smith* (1889), 41 Ch. D. 456, C. A. If a trustee mixes trust money with his own in his private account at a bank and draws upon the account by cheques, the rule in *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572, 608 (see title BANKERS AND BANKING, Vol. I., p. 586), does not apply, and the trustee must be taken to have drawn out his own money in preference to the trust money (*Re Hallett's Estate, Knatchbull v. Hallett, supra*). But, as between two *cestuis que trust* whose money a trustee has so paid into his private account, the rule in *Devaynes v. Noble, Clayton's Case, supra*, applies, and the sum first paid in will be held to have been first drawn out (*Re Hallett's Estate, Knatchbull v. Hallett, supra, per* BAGGALLAY, L.J., at p. 743; *Hancock v. Smith, supra*; *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433, *per* NORTH, J., at p. 436; *Mutton v. Peat, supra, per* BYRNE, J., at p. 560).



(iv.) *By Intermeddling with the Trust.*

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son tort*.

197. A person who, not being a trustee (*g*) and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, makes himself a trustee *de son tort*—a trustee of his own wrong, or, as it is also termed, a constructive trustee (*h*). The responsibility which attaches to a trustee may extend in equity to a person who is not properly a trustee, if he either makes himself a trustee *de son tort* or actually participates in any fraudulent conduct of a trustee to the injury of the *cestui que trust* (*i*).

A person who is employed as solicitor or agent for trust property may become a constructive trustee or trustee *de son tort* by intermeddling with the performance of the trust (*k*), or by dealing with the property in a manner not warranted by the terms of his employment or agency (*l*), or in a manner inconsistent with the performance of trusts of which he is cognisant (*m*). A person does not, however, become a constructive trustee merely by acting as the solicitor or agent of trustees in transactions within their legal powers, although of a character of which a court of equity would disapprove, unless he receives and becomes chargeable with some part of the trust property, or unless he knowingly assists in a dishonest and fraudulent act on the part of the trustees (*n*).

Solicitors and  
agents.

(*g*) A person whose acts are referable to his appointment as a trustee is not to be deemed a trustee *de son tort* (*Mara v. Browne*, [1896] 1 Ch. 199, C. A., *per* Lord HERSHELL, at p. 207).

(*h*) *Re Barney, Barney v. Barney*, [1892] 2 Ch. 265; *Mara v. Browne*, *supra*, *per* A. L. SMITH, L.J., at p. 209; see p. 47, *ante*. A person who, without having been validly appointed, acts as trustee, is liable as such (*Rackham v. Siddall* (1850), 1 Mac. & G. 607, C. A., *per* Lord COTTENHAM, L.C., at p. 621; *Pearce v. Pearce* (1856), 22 Beav. 248; *Hennessey v. Bray* (1863), 33 Beav. 96, 102). If a person, not expressly a trustee, buys property, or otherwise traffics, with the money of another, the law raises a trust by implication and clothes that person with a fiduciary character for the purpose of making him accountable (*Docker v. Somes* (1834), 2 My. & K. 655, *per* Lord BROUGHAM, L.C., at p. 665; compare *Re Franklyn, Franklyn v. Franklyn* (1913), 30 T. L. R. 187, C. A.). It is not within the scope of a solicitor's business to constitute himself a constructive trustee, and, therefore, his doing so does not bind and make liable as a constructive trustee a partner who is not aware of the dealings establishing the constructive trusteeship (*Mara v. Browne*, *supra*, at pp. 208, 212, 214; but see *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337).

(*i*) *Portlock v. Gardner* (1842), 1 Hare, 594, 606; *A.-G. v. Leicester Corporation* (1844), 7 Beav. 176; *Bridgman v. Gill* (1857), 24 Beav. 302; *Rolfe v. Gregory* (1865), 4 De G. J. & Sm. 576; *Barnes v. Addy* (1874), 9 Ch. App. 244, *per* Lord SELBORNE, L.C., at pp. 251, 252; *Re Bell, Lake v. Bell* (1886), 34 Ch. D. 462; *Soar v. Ashwell*, [1893] 2 Q. B. 390, C. A.

(*k*) *Myler v. Fitzpatrick* (1882), Madd. & G. 360; *Hardy v. Caley* (1864), 33 Beav. 365; *Archer v. Lavender* (1875), 9 I. R. Eq. 220, 225.

(*l*) *Morgan v. Stephens* (1861), 3 Giff. 226; *Lee v. Sankey* (1873), L. R. 15 Eq. 204.

(*m*) *Lee v. Sankey*, *supra*, *per* BACON, V.-C., at p. 211.

(*n*) *Barnes v. Addy*, *supra*, at pp. 251, 252; *Archer v. Lavender*, *supra*, *per* CHATTERTON, V.-C., at p. 225. The fact that a person has had trust funds in his hands as solicitor to the trustees does not make him chargeable as a constructive trustee (*Re Spencer, Spencer v. Hart* (1881), 51 L. J. (CH.) 271, C. A., *per* BAGGALLAY, L.J., at p. 273; *Brinsden v. Williams*, [1894] 3 Ch. 185; *Plaskitt v. Eddis* (1898), 79 L. T. 136).

## SECT. 3.

Tenure  
and Trans-  
mission of  
Trust  
Property.

Not beneficial  
unless so  
indicated.

Resulting  
trust of  
beneficial  
interest.

SECT. 3.—*Tenure and Transmission of Trust Property.*SUB-SECT. 1.—*Estate of Trustees.*(i.) *Nature of Estate.*

198. Where property is given to a person upon trust, there is a presumption that the property is given to him entirely as a trustee and not to any extent beneficially (o). Where, however, the trust does not exhaust the whole beneficial interest in the property, this presumption can be rebutted by an indication in the instrument of disposition that he is intended to take the residue of it for his own benefit (p).

A gift of property by will to a person upon trust to carry out certain purposes creates a resulting trust of so much as is not required for the fulfilment of those purposes (q); but under a gift to a person subject to the carrying out of certain purposes, described in the will as trusts or charges, he takes the property beneficially after the purposes have been fulfilled (r).

(o) *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, per HENLEY, Lord Keeper, at p. 251; *Middleton v. Spicer* (1783), 1 Bro. C. C. 201, per Lord THURLOW, L.C., at p. 205; *Southouse v. Bate* (1814), 2 Ves. & B. 396; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810, per STUART, V.-C., at p. 815; *Wainford v. Heyl* (1875), L. R. 20 Eq. 321; *Re West, George v. Grose*, [1900] 1 Ch. 84, per KEKEWICH, J., at p. 87.

(p) *North v. Crompton* (1671), 1 Cas. in Ch. 196; *Rogers v. Rogers* (1733), 3 P. Wms. 193; *Hill v. London (Bishop)* (1739), 1 Atk. 618; *Walton v. Walton* (1807), 14 Ves. 318, 322; *Hughes v. Evans* (1843), 13 Sim. 496; *Russell v. Clowes* (1846), 2 Coll. 648; *Williams v. Roberts* (1858), 4 Jur. (N. S.) 18; *Williams v. Arkle* (1875), L. R. 7 H. L. 606; *Croome v. Croome* (1889), 61 L. T. 814, H. L.; *A.-G. v. Jefferys*, [1908] A. C. 411.

(q) *King v. Denison* (1813), 1 Ves. & B. 260; *Southouse v. Bate, supra*; *Barrs v. Fewkes* (1864), 2 Hem. & M. 60; *Croome v. Croome* (1888), 59 L. T. 582, C. A., per COTTON, L.J., at p. 584; *Re West, George v. Grose*, [1900] 1 Ch. 84; and see pp. 49 *et seq.*, *ante*.

(r) *Cunningham v. Mellish* (1691), Prec. Ch. 31; *Beaufort (Duchess Dowager) v. Granville (Lady Dowager)* (1710), 3 Bro. Parl. Cas. 37; *Docksey v. Docksey* (1711), 3 Bro. Parl. Cas. 39; *Dawson v. Clarke* (1811), 18 Ves. 247; *King v. Denison, supra*; *Barrs v. Fewkes, supra*, at pp. 65, 66; *Clarke v. Hilton* (1866), L. R. 2 Eq. 810; *Re West, George v. Grose, supra*. As to residue of personal property vested in executors as such and undisposed of, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 284, 285. Where a testator gives specific portions of his personal property to his executors upon trust, and elsewhere in the will calls them trustees, he does not thereby constitute them trustees of the rest of his personal property (*Batteley v. Windle* (1786), 2 Bro. C. C. 31; *Pratt v. Sladden* (1807), 14 Ves. 192). A gift of property to persons named as executors and trustees, to be disposed of to such person or persons and in such manner and proportion as they think proper, has been held an absolute beneficial gift to them (*Gibbs v. Rumsey* (1813), 2 Ves. & B. 294). But the contrary has been held where the terms of the will were very slightly different (*Buckle v. Bristow* (1864), 10 Jur. (N. S.) 1095; *Yeap Cheah Neo v. Ong Cheah Neo* (1875), L. R. 6 C. P. 381). Where property is devised or bequeathed to a trustee upon certain trusts subject to the payment of legacies or other charges, he is a trustee only in respect of the designated trusts and not in respect of the legacies and charges, and no express trust is created for their payment (*Cunningham v. Foot* (1878), 3 App. Cas. 974; *Re Barker, Buxton v. Campbell*, [1892] 2 Ch. 491; *Re*

A gift to a person for a trust or purpose, which he is left at liberty either to perform or not at his option, is a beneficial gift to him(s). The trust or purpose in that case is rather the motive for the gift than the specific object for which it is given (*t*).

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

**199.** A person who accepts a trust to sell or otherwise deal with or manage property for others undertakes, on becoming trustee, so long as he occupies that position, not to sell, deal with, or manage the property for his own benefit and advantage (*u*), and he must not intentionally place himself in a position in which his interest may conflict with his duty (*a*). No act of his can restrict or prejudice the title of his *cestui que trust* (*b*).

Where trust  
optional.  
No personal  
advantage.

**200.** No right to defeat a trust exists in the person who happens to be the depositary of the trust property unless that right has been specifically given by the instrument creating the trust (*c*). A trustee cannot justify the application of part of a trust fund to other purposes by suggesting that enough will remain of the fund to answer the purposes of the trust (*d*).

No defeasance  
of trust by  
trustee.

**201.** As against strangers, a trustee and his *cestui que trust* are regarded in equity as one person, so that possession of trust property, whether real or personal, by the *cestui que trust* is possession by the trustee (*e*). On the other hand, while the relation between trustee

Possession  
of trust  
estate.

*Lacy, Royal General Theatrical Fund Association v. Kydd*, [1899] 2 Ch. 149, 156, 157).

(*s*) *Thorp v. Owen* (1843), 2 Hare, 607, 616; *Barrs v. Fewkes* (1864), 2 Hem. & M. 60, *per* WOOD, V.-C., at p. 65.

(*t*) *Andrews v. Partington* (1790), 2 Cox, Eq. Cas. 223, *per* Lord THURLOW, L.C., at p. 224; *Brown v. Casamajor* (1799), 4 Ves. 498; *Hammond v. Neame* (1818), 1 Swan. 35, 38; *Benson v. Whittam, Hemming v. Whittam* (1831), 5 Sim. 22, *per* SHADWELL, V.-C., at p. 30; *Thorp v. Owen*, *supra*, at p. 611.

(*u*) *Ex parte Lacey* (1802), 6 Ves. 625, *per* Lord ELDON, L.C., at p. 626.

(*a*) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A., *per* RIGBY, L.J., at p. 442; and see p. 121, *post*.

(*b*) *Brydges v. Brydges, Philips v. Brydges* (1796), 3 Ves. 120, *per* ARDEN, M.R., at p. 127; *Selby v. Alston* (1797), 3 Ves. 339, 341; *Blennerhasset v. Day* (1812), 2 Ball & B. 104, 133. A judgment or charging order obtained against a person who holds property in trust will not enable that property to be extended or taken in execution or otherwise affected as against the *cestui que trust* or so as to override his equitable interest therein (*Burgh v. Francis* (1673), Cas. temp. Finch, 28; *Finch v. Winchelsea (Earl)* (1715), 1 P. Wms. 277; *Kennedy v. Daly* (1804), 1 Sch. & Lef. 355, *per* Lord REDESDALE, L.C., at p. 373; *Whitworth v. Gaugain* (1846), 1 Ph. 728; *Beavan v. Oxford (Earl)* (1856), 6 De G. M. & G. 507, C. A.; *Kinderley v. Jervis* (1856), 22 Beav. 1, 32 *et seq.*; *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238, C. A.; and see titles EXECUTION, Vol. XIV., pp. 49, 67, 102 *et seq.*; INTERPLEADER, Vol. XVII., pp. 613, 614). So also trust property is not affected by the bankruptcy of the trustee; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 168.

(*c*) *A.-G. v. Aspinall* (1837), 2 My. & Cr. 613, *per* Lord COTTENHAM, L.C., at p. 629.

(*d*) *Ibid.*, at p. 625.

(*e*) *Pomfret (Earl) v. Windsor (Lord)* (1752), 2 Ves. Sen. 472, *per* Lord HARDWICKE, L.C., at p. 481; *Keene d. Byron (Lord) v. Deardon* (1807), 8 East, 248, *per* Lord ELLENBOROUGH, C.J., at p. 263; *Parker v. Carter* (1845), 4 Hare, 400, *per* WIGRAM, V.-C., at p. 417. As to letting beneficiaries



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Property.

Possession of  
trustee after  
termination  
of trust.

and *cestui que trust* subsists, the possession of the trust property by the trustee is the possession of the *cestui que trust* (*f*). If property is given to the trustee to sell, it remains in him for that purpose until something is done to put an end to the character in which he stands; he is bound to protect the interest of the *cestui que trust* without the intervention of the *cestui que trust*; and the length of time during which he has omitted to discharge his trust is no bar to his power or duty to perform it (*g*).

Where a trustee has as such taken possession of trust property, he cannot hold on adversely to a *cestui que trust* after his estate as trustee has determined; but his continuance in possession is deemed that of the *cestui que trust* (*h*).

(ii.) *Extent of Estate.*

Estate either  
express or  
implied.

**202.** The estate taken by a trustee in the trust property may be either expressly conferred on him by the terms of the instrument of trust or implied therefrom (*i*).

Legal estate  
in freehold  
property.

**203.** Where freehold property is assured by the legal owner thereof, whether by instrument *inter vivos* or by will, unto and to the use of a trustee upon trusts, the legal estate therein vests in

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into possession, see *Blake v. Bunbury* (1790), 1 Ves. 194; *Jenkins v. Milford* (1820), 1 Jac. & W. 629; *Baylies v. Baylies* (1844), 1 Coll. 537; *Horner v. Wheelwright* (1856), 2 Jur. (N. S.) 367; *Warren v. Rudall, Ex parte Godfrey* (1860), 1 John. & H. 1; *Taylor v. Taylor, Ex parte Taylor* (1875), L. R. 20 Eq. 297; *Re Bentley*, *Wade v. Wilson* (1885), 54 L. J. (CH.) 782. As to the doctrine that *cestuis que trust* in possession with the acquiescence of trustees are their tenants at will, see *Vallance v. Savage* (1831), 7 Bing. 595; *Garrard v. Tuck* (1849), 8 C. B. 231; *Melling v. Leak* (1855), 16 C. B. 652; *Perry v. Shipway* (1859), 1 Giff. 1. The seisin of the trustee which is derived from the possession of the *cestui que trust* is not interrupted by the death of the *cestui que trust*, but immediately enures for the benefit of the person next entitled to the equitable interest (*Parker v. Carter* (1845), 4 Hare, 400). The possession of trust chattels by a *cestui que trust* under the instrument of trust is in law the possession of the trustee (*White v. Morris* (1852), 11 C. B. 1015; *Barker v. Furlong*, [1891] 2 Ch. 172). As to the effect of the possession of a *cestui que trust* on time running against the title of the trustee or of other *cestuis que trust* under the Statute of Limitations, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 125, 126. As to payment to a *cestui que trust* preventing time from running against a trustee under the Statutes of Limitation, see *ibid.*, pp. 72, 73.

(*f*) *Grenville (Lord) v. Blyth* (1809), 16 Ves. 224; *Parker v. Carter, supra*, at pp. 413, 414; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 138, 139.

(*g*) *Chalmer v. Bradley* (1819), 1 Jac. & W. 51, per PLUMER, M.R., at p. 67. A person who holds property on trust cannot by his own act convert it into his own property; and, if he assumes to do so, no lapse of time will give him a title to it as against the *cestui que trust* (*ibid.*, at p. 68; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 161, 163).

(*h*) *Stone v. Godfrey* (1854), 5 De G. M. & G. 76, C. A., per TURNER, L.J., at p. 92.

(*i*) *Doe d. Leicester v. Biggs* (1809), 2 Taunt. 109; *Biscoe v. Perkins* (1813), 1 Ves. & B. 485; *Barker v. Greenwood* (1838), 4 M. & W. 421, 429; *Stevenson v. Liverpool Corporation* (1874), L. R. 10 Q. B. 81; *Baker v. White* (1875), L. R. 20 Eq. 166; *Cunliffe v. Brancker* (1876), 3 Ch. D. 393, C. A.; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554.

him (*k*). Where such property is assured unto a trustee to the use of or in trust for some other person or persons, the legal estate vests in the other person or persons, if the assurance is by an instrument *inter vivos* (*l*); but, if the assurance is by will, the vesting of the legal estate depends upon the intention of the testator as expressed or as implied from the extent and nature of the trusts, powers and duties reposed in the trustee (*m*). A devise of freehold property to a trustee upon trust to stand seised to the use of a beneficiary may, in the absence of indication of a contrary intention, vest the legal estate in the trustee (*n*).

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mission of  
Trust  
Property.

**204.** Where copyhold or leasehold or other personal property is assured by the legal owner thereof to a trustee upon trust for another, the legal estate, except so far as, in the case of a testamentary disposition, a contrary intention is indicated, vests in the trustee (*o*), who has consequently, as regards copyhold property, the right to be admitted (*p*).

Copyhold,  
leasehold, and  
personal  
property.

**205.** Where real property, other than a presentation to a church (*q*), is devised to a trustee or executor, the devise passes the fee simple or other entire estate or interest which the testator had power to dispose of by will therein, unless a definite term of years, absolute or determinable, or an estate of freehold, is given to him expressly or by implication (*r*). Similarly where real property is devised to a trustee without an express limitation of the estate to be taken by him, and the beneficial interest therein, or in the surplus rents

Testator's  
entire estate.

(*k*) Statute of Uses (27 Hen. 8, c. 10); *Keene d. Byron (Lord) v. Deardon* (1807), 8 East, 248, *per* Lord ELLENBOROUGH, C.J., at p. 262; *Doe d. Lloyd v. Passingham* (1827), 6 B. & C. 305; *Doe d. Booth v. Field* (1831), 2 B. & Ad. 564; *Cooper v. Kynock* (1872), 7 Ch. App. 398, *per* MELLISH, L.J., at pp. 404, 405; and see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 275.

(*l*) Statute of Uses (27 Hen. 8, c. 10); *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582, *per* Lord DENMAN, C.J., at pp. 587, 588; and see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 271 *et seq.*

(*m*) *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Houston v. Hughes* (1827), 6 B. & C. 403; *Playford v. Hoare* (1829), 3 Y. & J. 175; *Doe d. Keen v. Walbank* (1831), 2 B. & Ad. 554; *Blaggrave v. Blaggrave* (1849), 4 Exch. 550; *Rackham v. Siddall* (1850), 1 Mac. & G. 607; *Fenwick v. Potts* (1856), 8 De G. M. & G. 506, C. A.; *Baker v. White* (1875), L. R. 20 Eq. 166, *per* JESSEL, M.R., at p. 171; *Re Hart's Estate, Orford v. Hart*, [1883] W. N. 164; *Richardson v. Harrison* (1885), 16 Q. B. D. 85, C. A.; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, *per* STIRLING, J., at pp. 559, 560.

(*n*) *Jones (Lady) v. Say and Seal (Lord)* (1728), 8 Vin. Abr. 262; *Harton v. Harton* (1798), 7 Term Rep. 652, *per* LAWRENCE, J., at p. 654.

(*o*) *Houston v. Hughes*, *supra*, *per* BAYLEY, J., at p. 421; *R. v. Garland* (1870), L. R. 5 Q. B. 269; *Baker v. White*, *supra*, *per* JESSEL, M.R., at pp. 176 *et seq.*; *Allen v. Bewsey* (1877), 7 Ch. D. 453, C. A.; *Re Townsend's Contract*, [1895] 1 Ch. 716. Copyholds are not within the Statute of Uses (27 Hen. 8, c. 10) (*Rigden v. Vallier* (1751), 2 Ves. Sen. 252, *per* Lord HARDWICKE, L.C., at p. 237).

(*p*) *R. v. Garland*, *supra*; *Allen v. Bewsey*, *supra*. As to trusts of copyhold property, see also title COPYHOLDS, Vol. VIII., pp. 81, 88, 91, 93.

(*q*) As to the right of presentation and its exercise, see title ECCLESIASTICAL LAW, Vol. XI., pp. 564 *et seq.*

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 30.

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Property.

Quantum  
of estate  
defined or  
implied.

and profits thereof, is either not given to a person for life, or given to a person for life but the purposes of the trust may continue beyond the life of such person, the devise vests in the trustee the fee or other the entire legal estate which the testator had power to dispose of by will in the property and not an estate determinable when the purposes of the trust are satisfied (s).

**206.** Subject to these statutory provisions the quantum of estate taken by a trustee may be defined by the instrument of trust (*t*); but the definition is liable to be modified by the other contents or evident intention of the instrument in the case of a will (*a*), and, sometimes, even in the case of a deed (*b*). If not expressly defined it is determined, in the case of a will, by the nature of the trusts, powers and duties reposed in the trustee (*c*). The mere fact that the purposes of a trust are no longer capable of

(s) Wills Act, 1837 (7 Will 4 & 1 Vict. c. 26), s. 31. As to this and the preceding provision, see *Freme v. Clement* (1881), 18 Ch. D. 499, *per* JESSEL, M.R., at p. 514. Before these enactments, where real property was devised to trustees for particular purposes, it was held that the legal estate therein was vested in them as long as the execution of the trust required it, and no longer; and that as soon as the purposes were satisfied, it vested in the person beneficially entitled to the property (*Doe d. Player v. Nicholls* (1823), 1 B. & C. 336; *Glover v. Monckton* (1825), 3 Bing. 13; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Adams v. Adams* (1845), 6 Q. B. 860; *Doe d. Kimber v. Cafe* (1852), 7 Exch. 675; *Creaton v. Creaton* (1856), 3 Sm. & G. 386, 392). Under a devise of freehold and copyhold lands to trustees in trust for a son, to be transferred to him as soon as he should attain twenty-one years, and in case he should die before attaining that age then to another person, his heirs and assigns, the trustees were held to take an estate determinable when the son attained twenty-one years, since that fully effectuated the purposes of the will (*Doe d. Player v. Nicholls*, *supra*). The devise to the trustee is subject to the rights of the personal representatives of the testator; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 236 *et seq.*

(t) *Venables v. Morris* (1797), 7 Term Rep. 438; *Colmore v. Tyndall* (1828), 2 Y. & J. 605; *Doe d. Booth v. Field* (1831), 2 B. & Ad. 564; *Lewis v. Rees* (1856), 3 K. & J. 132; *Cooper v. Kynock* (1872), 7 Ch. App. 398; *Re Irwin*, *Irwin v. Parkes*, [1904] 2 Ch. 752.

(a) *Doe d. Compere v. Hicks* (1797), 7 Term Rep. 433; *Wykham v. Wykham* (1811), 18 Ves. 395, *per* Lord ELDON, L.C., at 421; *Adams v. Adams*, *supra*; *Riley v. Garnett* (1849), 3 De G. & Sm. 629, *per* KNIGHT BRUCE, V.-C., at p. 632; *Doe d. Kimber v. Cafe*, *supra*; *Cooper v. Kynock*, *supra*, at pp. 403, 404. Under a devise to trustees and their heirs upon trust to preserve contingent remainders, their estate has been held to be limited to the lives during which the preservation of the contingent remainders was required (*Haddelsey v. Adams* (1856), 22 Beav. 266).

(b) *Curtis v. Price* (1805), 12 Ves. 89; *Beaumont v. Salisbury* (*Marquis*) (1854), 19 Beav. 198; *Re Monckton's Settlement*, *Monckton v. Monckton*, [1913] 2 Ch. 636.

(c) *Shaw v. Weigh* (1728), 2 Stra. 798, 803; *Villiers v. Villiers* (1740), 2 Atk. 71, 72; *Gibson v. Montfort* (*Lord*) (1750), 1 Ves. Sen. 485; *Trent v. Hanning* (1806), 7 East, 97; *Doe d. Woodcock v. Barthrop* (1814), 5 Taunt. 382; *Anthony v. Rees* (1831), 2 Cr. & J. 75; *Doe d. Booth v. Field*, *supra*; *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582, *per* Lord DENMAN, C.J., at p. 589; *Doe d. Noble v. Bolton* (1839), 11 Ad. & El. 188; *Collier v. Walters* (1873), L. R. 17 Eq. 252; *Davies to Jones and Evans* (1883), 24 Ch. D. 190; but see *London and South Western Rail. Co. v. Bridger* (1864), 12 W. R. 948; *Re Stamford and Warrington* (*Earl*), *Payne v. Grey*, [1912] 1 Ch. 343, C. A.



being carried into effect does not cut down the estate of a trustee under a will which might continue for a longer period (*d*). An estate in a trustee dependent on a purpose respecting the trust property or the income thereof which he is directed to carry out (1) does not come into being if the purpose is dependent on a contingency which never arises (*e*) or fails by reason of its illegality (*f*), and (2) is determined when the purpose ceases on an event contemplated by the instrument creating the trust (*g*), but (3) is not determined by the accomplishment of the purpose (*h*), unless the instrument so directs (*i*).

**207.** As regards freehold, copyhold and leasehold property, where there is an indefinite devise of property to trustees and their heirs upon trust either to pay or allow a beneficiary to receive the rents during life, or for a purpose which does not require for its performance that they should have the entire estate, and this devise is followed either (1) by a simple remainder to another person in fee simple or in fee tail, or (2) by an absolute interest as another person shall appoint, or (3) by a new devise to a person in fee simple or fee tail, or otherwise giving an absolute interest, the estate of the trustees is by implication limited to the life of the first beneficiary or to the duration of the purpose for which the trust is created (*k*).

**208.** Where an estate is given to trustees, all the trusts which they are to perform must, at least *primâ facie*, be performed by them by virtue and in respect of the estate vested in them (*l*). Where one of the duties imposed on them is to sell the trust estate if they should deem the sale expedient, they can only do this by exercising dominion over the fee simple, and therefore in such case, even without apt words, there would be strong reason for holding that they were intended to take the fee (*m*); but where the purposes of a

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Indefinite  
devise to  
trustees  
followed by  
gift over.

Relation of  
trusts and  
duties to  
estate.

(*d*) *Doe d. Shelley v. Edlin* (1836), 4 Ad. & El. 582 (where real property was devised to a trustee upon trust to pay the rents and profits to a married woman for her separate use for her life, and after her death to convey it as she should by deed or will appoint, and the trustee was held to take the legal estate, notwithstanding that the married woman predeceased the testator, so that the trusts altogether failed).

(*e*) *Goodtitle d. Hart v. Knot* (1774), 1 Cowp. 43.

(*f*) *Doe d. Burdett v. Wrighte* (1819), 2 B. & Ald. 710; *Churcher v. Martin* (1889), 42 Ch. D. 312; *Re Lacy, Royal General Theatrical Fund Association v. Kydd*, [1899] 2 Ch. 149, 156.

(*g*) *Doe d. Shelley v. Edlin*, *supra*, per Lord DENMAN, C.J., at pp. 589, 590; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Doe d. Davies v. Davies* (1841), 1 Q. B. 430, per PATTESON, J., at p. 438.

(*h*) *Doe d. Shelley v. Edlin*, *supra*; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Doe d. Davies v. Davies*, *supra*; *Poad v. Watson* (1856), 6 E. & B. 606, 618, Ex. Ch.; *Collier v. Walters* (1873), L. R. 17 Eq. 252, 261 *et seq.* Where trustees have the legal estate under a trust to sell and pay debts, and they pay all the debts by a sale of part of the property, they still retain the legal estate in the residue (*Doe d. Cadogan v. Ewart*, *supra*).

(*i*) *Ackland v. Lutley*, *supra*; *Collier v. Walters*, *supra*, per JESSEL, M.R., at p. 263; *Re Townsend's Contract*, [1895] 1 Ch. 716, per STIRLING, J., at pp. 720, 721.

(*k*) *Doe d. Woodcock v. Barthrop* (1814), 5 Taunt. 382; *Baker v. White* (1875), L. R. 20 Eq. 166, per JESSEL, M.R., at pp. 177, 178; and see *Stevenson v. Liverpool Corporation* (1874), L. R. 10 Q. B. 81.

(*l*) *Watson v. Pearson* (1848), 2 Exch. 581, 593.

(*m*) *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142, 144; *Watson v. Pearson*, *supra*, at p. 593. As to a trust to let, see *Doe d. Tomkyns v. Willan*

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

Recurring  
trusts.

Particular  
trusts and  
duties :—

(1) Applica-  
tion of rents  
and profits.

trust on which an estate is devised to trustees are such as not to require a fee in them, then, if subject to the specified trusts the estate is given over, the parties taking under such devise over take legal estates, the estate given to the trustees being taken to have been meant to be co-extensive only with the trust to be performed (*n*).

Where, therefore, there are recurring occasions for the exercise of active duties by trustees constituted by a will and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries (*o*).

**209.** In the following cases trustees take the entire estate or an estate so long as the particular trust continues :—

A devise to trustees upon trust to pay over the rents and profits of freehold property to a beneficiary during his life vests the legal estate in them during his life (*p*). On the other hand, if the trust is to permit and suffer the beneficiary to take the rents and profits during his life, he takes the legal estate for his life (*q*). Even in the latter case, however, the legal estate remains vested in the trustees if there is any direction or any indication of an intention that they shall actively interfere (*r*), as, for instance, if the beneficiary is to receive the rents and profits with the approbation of the trustees (*s*), or is only to receive the net rents and profits, which implies that the trustees shall pay the outgoings (*t*), or if the trust is for the separate use of a female beneficiary, in which case the necessity of protecting her interest is held to vest the estate in the trustees (*u*).

(1818), 2 B. & Ald. 84; *Lambert v. Browne* (1871), 5 I. R. C. L. 218, 224; *Collier v. Walters* (1873), L. R. 17 Eq. 252, 265.

(*n*) See p. 97, *ante*.

(*o*) *Harton v. Harton* (1798), 7 Term Rep. 652; *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658, *per* Lord DAVEY, at p. 683; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, *per* STIRLING, J., at p. 561.

(*p*) *Doe d. Leicester v. Biggs* (1809), 2 Taunt. 109, *per* MANSFIELD, C.J., at p. 112; *Doe d. Gratrex v. Homfray* (1837), 6 Ad. & El. 206; *Barker v. Greenwood* (1838), 4 M. & W. 421, *per* PARKE, B., at p. 429; *Baker v. White* (1875), L. R. 20 Eq. 166, *per* JESSEL, M.R., at p. 171. The law is the same where property is devised not directly to trustees, but to the intent that they shall receive the rents and profits and pay them to the beneficiary (*Doe d. Gratrex v. Homfray*, *supra*; *Davies to Jones and Evans* (1883), 24 Ch. D. 190; *Stevenson v. Liverpool Corporation* (1874), L. R. 10 Q. B. 81); and the estate vested in the trustees by implication in order to enable them to receive and pay over the rents and profits will, it seems, override an express devise to the beneficiary (*Griffith v. Smith* (1603), Moore (K. B.), 753; *Bush v. Allen* (1695), 5 Mod. Rep. 63, 101 (HOLT, C.J., dissenting); *Anthony v. Rees* (1831), 2 Cr. & J. 75; but see *London and South-Western Rail. Co. v. Bridger* (1864), 12 W. R. 948).

(*q*) *Broughton v. Langley* (1703), 2 Ld. Raym. 873; *Right d. Phillipps v. Smith* (1810), 12 East, 455; *Barker v. Greenwood*, *supra*, at p. 429; *Doe d. Noble v. Bolton* (1839), 11 Ad. & El. 188; *Baker v. White*, *supra*, at p. 171.

(*r*) *Shapland v. Smith* (1780), 1 Bro. C. C. 75; *White v. Parker* (1835), 1 Bing. (N. C.) 573; *Barker v. Greenwood*, *supra*, at p. 429; *Adams v. Adams* (1845), 6 Q. B. 860.

(*s*) *Gregory v. Henderson* (1813), 4 Taunt. 772; *Barker v. Greenwood*, *supra*, at p. 430.

(*t*) *White v. Parker*, *supra*; *Barker v. Greenwood*, *supra*.

(*u*) *Jones (Lady) v. Say and Seal* (Lord) (1728), 8 Vin. Abr. 262; *Harton*



Where the trust is, in the alternative, to pay the rents and profits to a beneficiary or permit him to receive them during his life, it has been held that if the trust is in a deed the first alternative prevails and vests the legal estate in the trustee (*a*), but that if it is in a will effect will be given to the second alternative so as to vest the legal estate in the beneficiary (*b*).

Where real property is devised to trustees upon trust to convey it to the person or persons designated in the will, they take the entire legal estate, since without it they cannot convey the property (*c*). If, however, the trust is preceded by a trust to permit a beneficiary to occupy a house and to receive the rents and profits during his life or until another person attains twenty-one years, the legal estate vests in the beneficiary for his life or until the other person attains twenty-one years (*d*).

A devise to trustees upon trust to pay debts or legacies, or an annuity, vests the legal estate in them for that purpose, even if there is a trust to permit a person to receive the rents (*e*), but in such a case a devise to trustees of property merely charged with such payments has not that effect (*f*). Where, however, under the language of the will, trustees who are also executors take the legal estate, during the life of a beneficiary, in real property charged with payment of debts, the charge of debts which as executors they are bound to pay has the effect of extending their legal estate beyond the life of the beneficiary (*g*).

(iii.) *Incidents of Estate.*

**210.** The possession by a trustee of the legal estate or legal ownership of trust property invests him with the legal burdens and privileges incident to that estate or ownership (*h*). He is liable to

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

(2) Trust to convey.

(3) Trust or charge for payment of debts, legacies or annuities.

Trustee liable for legal outgoings and taxes.

*v. Harton* (1798), 7 Term Rep. 652; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, *per* STIRLING, J., at p. 560.

(*a*) *Doe d. Leicester v. Biggs* (1809), 2 Taunt. 109.

(*b*) *Ibid.*; *Baker v. White* (1875), L. R. 20 Eq. 166; *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258, C. A., *per* LINDLEY, L.J., at p. 267, *per* FRY, L.J., at p. 269; but see *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465, C. A.

(*c*) *Doe d. Booth v. Field* (1831), 2 B. & Ad. 564; *Doe d. Noble v. Bolton* (1839), 11 Ad. & El. 188; *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658, 683.

(*d*) *Doe d. Noble v. Bolton*, *supra*.

(*e*) *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Spence v. Spence* (1862), 12 C. B. (N. S.) 199; *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Adams and Perry's Contract*, *supra*, at p. 560. So, too, where there is a direction that they shall pay debts or annuities out of the property without a direct devise to them (*Doe d. Beezley v. Woodhouse* (1790), 4 Term Rep. 89).

(*f*) *Doe d. Cadogan v. Ewart*, *supra*; *Re Adams and Perry's Contract*, *supra*, at p. 560.

(*g*) *Creaton v. Creaton* (1856), 3 Sm. & G. 386; *Spence v. Spence*, *supra*.

(*h*) *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177, *per* HENLEY, Lord Keeper, at p. 251; as to the trustee's right to reimbursements in respect of the burdens, see pp. 157 *et seq.*, *post*. But where property is in trust, the *cestui que trust*, and not the trustee, has the right to any vote for Parliament which may be incident to it (Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 74); see title ELECTIONS, Vol. XII.,



SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

Trustee  
liable for  
trade debts  
and calls on  
shares.

Right to  
title deeds.

Right to call  
for legal  
estate.

Death of  
co-trustee.

pay the rates on the property (*i*) and, if it is leasehold, to pay the rent and perform the covenants under which it is held (*k*).

**211.** Where a trustee trades or otherwise deals with trust property he is deemed, as against all persons other than the beneficiaries, to do so on his own account (*l*), and is consequently personally liable for all debts incurred in the course of the trade or dealing (*m*), and may be made bankrupt in respect of it (*n*). If a trustee holds shares in a company, he has the same liabilities in respect of them as if he was beneficial owner thereof, even though the fact of the trusteeship is noted in the company's books, but is entitled to indemnity (*o*).

**212.** Where trust property includes both realty and personalty, the trustee is entitled, as against a beneficiary for life, to the custody of the title deeds (*p*).

**213.** Where the owner of an absolute equitable estate in land vests it in trustees, they have a right to call for the legal estate from the bare trustee (*q*).

SUB-SECT. 2.—*Transmission of Estate.*

(i.) *On Death.*

**214.** On the death of one of two or more trustees, the right to

p. 150. If a trustee conveys land which is wholly surrounded by his own land, the conveyance passes a right to a way of necessity over this land (*Howton v. Frearson* (1798), 8 Term Rep. 50); compare title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., p. 289. As to trust estates in copyholds, see title COPYHOLDS, Vol. VIII., pp. 55, 81, 88.

(*i*) *R. v. Sterry* (1840), 12 Ad. & El. 84, 93; *R. v. Stapleton (Inhabitants)* (1863), 4 B. & S. 629. As to payment of income tax, see title INCOME TAX, Vol. XVI., pp. 617, 659, 670, 677.

(*k*) *Walters v. Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629, C. A.; *White v. Hunt* (1870), L. R. 6 Exch. 32; *Wright v. Pitt* (1870), L. R. 12 Eq. 408; *Ramage v. Womack*, [1900] 1 Q. B. 116; and see title LANDLORD AND TENANT, Vol. XVIII., p. 589.

(*l*) *Re Hodson, Ex parte Richardson* (1818), 3 Madd. 138, per LEACH, V.-C., at p. 157; *Outbush v. Outbush* (1839), 1 Beav. 184, per Lord LANGDALE, M.R., at p. 187; *Lumsden v. Buchanan* (1865), 4 Macq. 950, H. L., per Lord WESTBURY, L.C., at p. 955; *Re Leeds Banking Co., Fearnside's Case, Dobson's Case* (1866), 12 Jur. (N. S.) 60. A trustee may so limit and restrict a contract which he enters into as to exclude personal liability; but this can only be effected by express stipulation (*Lumsden v. Buchanan, supra*, at pp. 955, 956; *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337, per Lord CAIRNS, L.C., at p. 355); see *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Robinson's Settlement, Gant v. Hobbs*, [1912] 1 Ch. 717, 728, C. A.

(*m*) *Ex parte Garland* (1804), 10 Ves. 110, per Lord ELDON, L.C., at p. 119; *Owen v. Delamere* (1872), L. R. 15 Eq. 134, per BACON, V.-C., at pp. 138, 139; *Muir v. City of Glasgow Bank, supra*, per Lord PENZANCE, at p. 368; *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548, 552, 553.

(*n*) *Ex parte Garland, supra*, at p. 119; *Re Johnson, Shearman v. Robinson, supra*, at p. 552.

(*o*) See title COMPANIES, Vol. V., pp. 150, 492.

(*p*) *Wheeler v. Tootell* (1903), 51 W.R. 693; see *Corin v. Thomas* (1881), 46 L. T. 916; and title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 239, 281, note (*f*). A beneficiary for life of personalty is not entitled to the title deeds of the property (*Wheeler v. Tootell, supra*).

(*q*) *Angier v. Stannard* (1834), 3 My. & K. 566; *Poole v. Pass* (1839), 1 Beav. 600.

the trust estate, with all its incidents, belongs to the surviving trustees or trustee (*r*), and when, as is usually the case, the estate is vested in the trustees jointly, the legal interest in it passes to the survivor or survivors (*a*).

**215.** On the death of a sole or last surviving trustee all personal estate, including chattels real, vested in him subject to the trust devolves upon his personal representatives (*b*). Similarly, any estate or interest of inheritance, or limited to the heir as special occupant (*c*), in any corporeal or incorporeal hereditaments, other than copyhold or customary land vested in the tenant on the court rolls (*d*), vested in such trustee on any trust, devolves to and becomes vested in his personal representatives or representative from time to time, notwithstanding any testamentary disposition by him, in like manner as if it were a chattel real; and the like powers for one only of several joint personal representatives, as well as for a single personal representative and for all the personal representatives together, to dispose of and otherwise deal with the property belong to his personal representatives or representative for the time being, with all the like incidents, but subject to all the like rights, equities and obligations, as if it were a chattel real vesting in them or him (*e*). Where he is a trustee of copyhold or customary land of which he is tenant on the court rolls, the land descends on his death to his customary heir (*f*).

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

Death of  
sole trustee.

(*r*) Co. Litt. 113 a, 181 b; *Butler v. Bray (Lady)* (1560), Dyer, 189; *Hudson v. Hudson* (1735), Cas. temp. Talb. 127; *A.-G. v. Gleg* (1738), 1 Atk. 356; *Lane v. Debenham* (1853), 11 Hare, 188; *Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22. As to when trust property is not property passing on the death of the deceased for the purposes of the death duties, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 193.

(*a*) See titles CHOSSES IN ACTION, Vol. IV., p. 399; COMPANIES, Vol. V., p. 196; MORTGAGE, Vol. XXI., pp. 110, 117; PERSONAL PROPERTY, Vol. XXII., p. 403; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 203.

(*b*) At common law all trust property is, for the purpose of devolution, on the same footing as beneficial property. This rule has only been altered by statute in the case of real estate, as to which see the text, *infra*.

(*c*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 178, 180, 181.

(*d*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; see title COPYHOLDS, Vol. VIII., p. 88.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30; as to this provision, see *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690, 700. It has been suggested that until probate or administration has been taken out the legal estate vests in the heir; see *Re Pilling's Trusts* (1884), 26 Ch. D. 432; *John v. John*, [1898] 2 Ch. 573, 576, C. A.; but see title DESCENT AND DISTRIBUTION, Vol. XI., p. 5, note (*g*). Before this Act freehold trust estates could be devised and would pass under a general devise unless a contrary intention was shown, *e.g.*, by a charge of debts (*Re Bellis's Trusts* (1877), 5 Ch. D. 504). In default of a devise freehold trust estates descended to the heirs of the trustee (*Re Cunningham and Frayling*, [1891] 2 Ch. 567), except that after the 7th August, 1874, if the trustee was a bare trustee, such estates devolved on his personal representatives (Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 38), s. 5; Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48); and see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 5, 6.

(*f*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; and see titles

## SECT. 3.

(ii.) *On Change of Trustee.*

Tenure  
and Trans-  
mission of  
Trust  
Property.

Necessity  
for vesting.

Vesting  
declaration.

**216.** On an appointment of new trustees the trust property ought to be vested in all the persons who, after the appointment, are the trustees thereof (*g*). The transfer by which this is effected, though it is frequently made previously to or by the same instrument as the appointment, ought, in strictness, to be made only after the appointment has been completed (*h*).

**217.** Where a deed by which a new trustee is appointed to perform a trust contains a declaration by the appointor to the effect that any estate or interest in any land or chattel subject to the trust, or the right to recover and receive any debt or thing in action subject to the trust, is to vest in the persons who by virtue of the deed become and are the trustees for performing the trust, the declaration, without any conveyance or assignment, operates to vest the estate, interest or right in those persons as joint tenants and for the purposes of the trust (*i*). Similarly, where a deed by which a retiring trustee is discharged under the power given by statute (*j*) contains a similar declaration by the retiring and continuing trustees and by the other persons, if any, empowered to appoint trustees, the declaration, without any conveyance or assignment, operates to vest the estate, interest or right to which it relates in the continuing trustees alone as joint tenants and for the purposes of the trust (*k*). The declaration cannot in either case extend to or include a legal estate or interest in copyhold or customary land, or land conveyed by way of mortgage for securing money subject to the trust, or any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament (*l*).

Registration.

For the purpose of the registration of the deed in any registry, the person or persons making the declaration are deemed the conveying party or parties, and the conveyance is deemed to be made by him or them under a statutory power (*m*).

(iii.) *Married Women, Convicts, and Bankrupts.*

Transmission  
by married  
woman.

**218.** A married woman can without her husband dispose of, or join in disposing of, real or personal property held by her solely or

COPYHOLDS, Vol. VIII., pp. 55, 88 ; DESCENT AND DISTRIBUTION, Vol. XI., pp. 5, 6.

(*g*) *Noble v. Meymott* (1851), 14 Beav. 471, per ROMILLY, M.R., at p. 478. For forms of appointments of new trustees, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 47 *et seq.*

(*h*) *Noble v. Meymott*, *supra*, at p. 478. A refusal to transfer trust funds to new trustees is not justified by the fact that no transfer has been made to them of other trust funds which ought to have been so transferred (*ibid.*, at p. 479).

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (1) ; *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642 (trust of the legal estate in the case of an equitable mortgage).

(*j*) See pp. 112, 113, *post*.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (2).

(*l*) *Ibid.*, s. 12 (3).

(*m*) *Ibid.*, s. 12 (4).



jointly with any other person as trustee in like manner as if she were a *feme sole* (*n*).

**219.** Where a person becomes a convict within the meaning of the Forfeiture Act, 1870 (*o*), trust property vested in him, exclusive of any beneficial interest which he has therein, does not vest in an administrator appointed under that Act, but remains in him or survives to his co-trustee, or descends to his representative, as if he had not become a convict (*p*).

**220.** Where a person becomes bankrupt, property held by him on trust for another person does not pass to his trustee in bankruptcy, but remains vested in him upon the trust to which it is subject (*q*).

SUB-SECT. 3.—*Vesting Orders.*

(i.) *In General.*

**221.** By statute (*r*) the High Court, and in cases within their respective jurisdictions a palatine court (*s*) and a county court (*t*), may make a vesting order as to trust property, and as to property which, for the purposes of those powers, is deemed to be held by a person as a trustee (*a*), where it is impossible or difficult to deal with the property without such order (*b*).

**222.** The powers of the High Court to make vesting orders extend to real and personal property in all the British dominions except Scotland (*c*), and may be exercised for vesting any land, stock or

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

Where trustee  
becomes a  
convict.

Where trustee  
becomes  
bankrupt.

Powers of  
court.

Extent of  
powers.

(*n*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1. As to the law before this enactment, see title HUSBAND AND WIFE, Vol. XVI., p. 380.

(*o*) 33 & 34 Vict. c. 23.

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 235.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44 (1), 54; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 168, 169. Similarly, his interest as trustee in land cannot rightly be taken in execution; and, if it is so taken, the tenant by *elegit* is bound by the trust (*Finch v. Winchelsea* (*Earl*) (1720), cited 3 P. Wms. 399, n.); see title EXECUTION, Vol. XIV., p. 67.

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53). As to the application of the Act to registered land and charges, see Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 85; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 320; as to its application to mortgages generally, see title MORTGAGE, Vol. XXI., pp. 294, 316, 317.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 46; see title COURTS, Vol. IX., pp. 122, 123, 125, 126.

(*t*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 46; see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; title COUNTY COURTS, Vol. VIII., pp. 691 *et seq.*

(*a*) As to the definition of a trustee, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50; *Re Probert's Estate* (1853), 1 W. R. 237; p. 6, *ante*.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26—41.

(*c*) *Ibid.*, s. 41. As to orders under the previous Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 54, respecting land in Ireland, see *Re Hewitt's Estate* (1858), 6 W. R. 537; *Re Tait's Trusts*, [1870] W. N. 257; and respecting land in Canada, see *Re Schofield* (1855), 24 L. T. (o. s.) 322; *Re Groom's Trust Estate* (1864), 11 L. T. 336. Similar powers as to all the British dominions except Scotland are conferred on the High Court in Ireland by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 2.

SECT. 3.  
Tenure  
and Trans-  
mission of  
Trust  
Property.

Where the  
Crown is  
interested.  
Application  
for order.

chose in action in any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction (*d*).

A vesting order cannot be made against the Crown, where the Crown has a beneficial interest in any part of the property (*e*).

**223.** An order concerning any land, stock (*f*) or chose in action subject to a trust may be made on the application of any person beneficially interested, whether under disability or not, or on the application of any person duly appointed trustee thereof (*g*). All the *cestuis que trust*, and the persons in whom the property is vested, should either join in the application or be served with it (*h*), unless owing to their absence from the country or otherwise there is good reason to the contrary (*i*). The court may order the costs and expenses of and incident to an application for a vesting order, or of and incident to such order or any conveyance or transfer in pursuance thereof, to be paid or raised out of the real or personal property in respect whereof the order is made or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just (*k*).

(ii.) *As to Land.*

**224.** The court may make a vesting order vesting trust land in

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 39; see *Re Breary*, [1873] W. N. 48; and title CHARITIES, Vol. IV., pp. 262, 265.

(*e*) *Re Pratt's Trusts* (1886), 55 L. T. 313; *Pryce-Jones v. Williams*, [1902] 2 Ch. 517, per JOYCE, J., at p. 522; *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737; but see *Re Minchin's Estate* (1854), 2 W. R. 179; *Re Giraud* (1863), 32 Beav. 385. A vesting order was made where the Crown did not appear, and where, if it took at all, it could not take for its own benefit (*Re Martinez's Trusts* (1870), 22 L. T. 403). The proper course in such a case is for a sale to be ordered under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 5; see title CONSTITUTIONAL LAW, Vol. VI., p. 413, note (*a*). As to orders respecting the private estates of the Sovereign, see Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 10; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38; title CONSTITUTIONAL LAW, Vol. VI., p. 413, note (*a*).

(*f*) See note (*g*), p. 108, *post*.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36 (1). An application to the High Court under the Act for a vesting order is governed by the same rules and principles as an application to that court for the appointment of a new trustee; see p. 78, *ante*. As to proceedings under the Trustee Act, 1893 (56 & 57 Vict. c. 53), generally, see R. S. C., Ord. 54B; Ord. 55, r. 13A.

(*h*) *Re Prescott's Trust* (1852), 19 L. T. (o. s.) 371.

(*i*) *Re Blanchard's Estate* (1863), 2 New Rep. 386; *Re Stanley's Trusts*, [1893] W. N. 30. As to where the *cestui que trust* is a lunatic, see *Re Bourke* (1864), 2 De G. J. & Sm. 426, C. A.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 38; and see *Bradley v. Minton* (1852), 16 Beav. 294; *Ex parte Davies* (1852), 16 Jur. 882; *Ayles v. Cox*, *Ex parte Attwood* (1853), 17 Beav. 584; *Re Nash's Estate* (1855), 4 W. R. 111; *Re Thornton's Trusts* (1861), 9 W. R. 475; *Re Knox's Trusts*, [1895] 2 Ch. 483, C. A.; *Re Ruthven's Trusts*, [1906] 1 I. R. 236, C. A.; R. S. C., Ord. 65, r. 27 (19), (23). Where a trustee-mortgagee absconds, the costs of a vesting order as to the land falls on the mortgagor (*Webb v. Crosse* [1912] 1 Ch. 323). For the form of an order under the section that the costs and expenses be a charge on the real property and be raised by mortgage thereof, see 2 Seton, Judgments and Orders, 7th ed., p. 1179.

Vesting  
orders as to  
land.

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Tenure  
and Trans-  
mission of  
Trust  
Property.

such person and in such manner and for such estate as the court directs, or releasing or disposing of the contingent right to such person as the court directs (*l*), in the following cases, namely:—

(1) Where the court appoints or has appointed a new trustee (*m*);  
(2) Where a trustee entitled to or possessed of land or to a contingent right therein, either solely or jointly with any other person or in coparcenery (*n*), either (i.) is an infant (*o*), (ii.) is out of the jurisdiction of the court (*a*), or (iii.) cannot be found (*b*);

(3) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of land;

(4) Where, as to the last trustee known to have been entitled to or possessed of land, it is uncertain whether he is alive or dead;

(5) Where there is no heir or personal representative of a trustee who was entitled to or possessed of land and has died intestate as to the land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead (*c*);

(6) Where a trustee jointly or solely entitled to or possessed of land, or a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement (*d*).

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 50. As to vesting orders on the death of a trustee of copyholds, see title COPYHOLDS, Vol. IV., p. 88.

(*m*) *Re Manning's Trusts* (1854), Kay, Appendix, p. xxviii.; *Re Ord's Trust* (1855), 3 W. R. 386; *Re Rathbone* (1876), 2 Ch. D. 483, C. A.

(*n*) *Re Templer's Trusts* (1864), 4 New Rep. 494; *Re Greenwood's Trusts* (1884), 27 Ch. D. 359.

(*o*) *Re Howard's Estate* (1852), 5 De G. & Sm. 435; *Re Lush's Estate, Ex parte Greive* (1852), 5 De G. & Sm. 435, 436, note (a); *Re Williams' Estate* (1852), 5 De G. & Sm. 515; *Davey v. Miller* (1853), 1 Sm. & G., Appendix, p. xix.; *Re Arrowsmith's Trusts, Re Thompson (a Person of Unsound Mind)* (1858), 6 W. R. 642; *Re Cooper's Settlement* (1861), 9 W. R. 531; *Re Templer's Trusts, supra*; *Dewar v. Mailand* (1866), L. R. 2 Eq. 834; *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549; *Re Beaufort's Will*, [1898] W. N. 148 (5). As to service on the infant or his guardian, see *Re Tweedy* (1861), 9 W. R. 398; *Re Willan* (1861), 9 W. R. 689; *Re Russell's Estate*, [1866] W. N. 125; *Re Little* (1869), L. R. 7 Eq. 323; *Re Jones' Mortgage* (1874), 22 W. R. 837; *Re Adams' Trusts*, [1887] W. N. 175; *Re Davies's Trust*, [1889] W. N. 215.

(*a*) *Re Skitter's Mortgage Trust* (1856), 4 W. R. 791; *Hooper v. Strutton* (1864), 12 W. R. 367; *Re O'Donnell's Trust* (1871), 19 W. R. 522; *Re Keeley's Trusts* (1885), 53 L. T. 487.

(*b*) *Re Hulme's Trusts* (1887), 57 L. T. 13. A vesting order has been made in the case of property vested in a company or society at the time of its dissolution (*Re General Accident Assurance Corporation, Ltd.*, [1904] 1 Ch. 147; *Re Mills (Richard) & Co. (Brierly Hill), Ltd., Smith v. The Co.*, [1905] W. N. 36; *Re No. 9 Bomore Road*, [1906] 1 Ch. 359; *Re Ruddington Land*, [1909] 1 Ch. 701; but see *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737; *Hastings Corporation v. Letton*, [1908] 1 K. B. 378).

(*c*) *Re Greenwood's Trusts* (1884), 27 Ch. D. 359.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 26; see *Rowley v. Adams* (1851), 14 Beav. 130; *Re Badcock's Trusts* (1854), 2 W. R. 386; *M'Murray v. Spicer* (1868), L. R. 5 Eq. 527; *Re O'Donnell's Trust, supra*; *Re Grayson's Trusts* (1879), 27 W. R. 534; *Re Keeley's Trusts*



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Tenure  
and Trans-  
mission of  
Trust  
Property.Estate  
vesting under  
the order.Effect of  
vesting order.

Where the order is consequential on the appointment of a new trustee, the land is vested for such estate as the court directs in the persons who on the appointment are the trustees (*e*). Where the order relates to a trustee entitled jointly with another person, and the trustee is out of the jurisdiction of the court or cannot be found, the land or right is vested in such other person either alone or with some other person (*f*).

**225.** A vesting order, where it is consequential on the appointment of a new trustee, has the same effect as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate as the court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the court directs; and in every other case a vesting order has the same effect as if the trustee or other person, or description or class of persons, to whose rights or supposed rights the statutory provisions as to vesting orders relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order (*g*).

Order  
conclusive.

**226.** Where a vesting order is made as to land under the Trustee Act, 1893 (*h*), or under the Lunacy Act, 1890 (*i*), founded on an allegation of the personal incapacity of a trustee, or on an allegation that a trustee is out of the jurisdiction of the court or cannot be found, or that it is uncertain which of several trustees was the survivor, or whether the last trustee is living or dead, or on an allegation that a trustee has died intestate without an heir, or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made is conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order (*k*).

(1885), 53 L. T. 487; *Re Knox's Trusts*, [1895] 2 Ch. 483, C. A., where the recusant trustee was ordered to pay costs; *Re Ruthven's Trusts*, [1906] 1 I. R. 236, C. A. The refusal of a trustee to convey is not wilful if there is a doubt as to the title (*Re Mills' Trusts* (1888), 40 Ch. D. 14, C. A.).

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 26; see *Re Watts's Settlement* (1851), 9 Hare, 106; *Re Plyer's Trust* (1851), 9 Hare, 220; *Re Fisher's Trustees* (1853), 1 W. R. 505; *Smith v. Smith* (1854), 3 Drew. 72; *Re Bute's (Marquis) Will* (1859), John. 15; *Re Rathbone* (1876), 2 Ch. D. 483, C. A.; *Re Pilling's Trusts* (1884), 26 Ch. D. 432; *Re Rackstraw's Trusts* (1885), 52 L. T. 612; *Re Sarum (Bishop)*, [1886] W. N. 140; *Re Williams' Trusts* (1887), 36 Ch. D. 231.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 26; see *Re Templer's Trusts* (1864), 4 New Rep. 494; *Re Greenwood's Trusts* (1884), 27 Ch. D. 359.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 32; see *Hargreaves v. Wright* (1853), 1 W. R. 408; *Powell v. Matthews* (1855), 1 Jur. (N. S.) 973. The effect may be to bar an estate tail (*Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549; *Re Hambrough's Estate, Hambrough v. Hambrough*, [1909] 2 Ch. 620).

(*h*) 56 & 57 Vict. c. 53.

(*i*) 53 & 54 Vict. c. 5, ss. 133—143; Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1; see pp. 110, 111, *post*.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 40.

**227.** The court may, however, direct a reconveyance and the payment of costs occasioned by any such order if improperly obtained (*l*).

**228.** Where land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would in respect thereof become entitled to or possessed of the land on trust, the court may make an order releasing the land from the contingent right or vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land (*m*).

**229.** Where a court gives judgment or makes an order directing the sale or mortgage of land, every person who is entitled to or possessed of the land or a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, is deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of the Trustee Act, 1893 (*n*); and the court may, if it thinks expedient, make an order vesting the land, or any part thereof, for such estate as may seem fit, in the purchaser or mortgagee or in any other person (*a*).

**230.** Where a judgment is given for the specific performance of a contract concerning land or for the partition or sale in lieu of partition or exchange of any land, or generally where a judgment is given for the conveyance of land, either in cases arising out of the doctrine of election or otherwise, the court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of the Trustee Act, 1893 (*b*), and may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of the Trustee Act, 1893 (*b*), and thereupon the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees (*c*).

SECT. 3.

**Tenure  
and Trans-  
mission of  
Trust  
Property.**

Reconvey-  
ance.

Release of  
contingent  
right.

Where sale  
or mortgage  
ordered by  
court.

Where specific  
performance,  
partition, or  
conveyance  
of land  
ordered by  
court.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 40.

(*m*) *Ibid.*, ss. 27, 50; see *Wake v. Wake* (1853), 1 W. R. 283; *Hargreaves v. Wright* (1853), 1 W. R. 408.

(*n*) 56 & 57 Vict. c. 53; *Wood v. Beeltestone* (1854), 1 K. & J. 213; *Herring v. Clark* (1868), 4 Ch. App. 167; *Re Stamper, Stamper v. Stamper* (1882), 46 L. T. 372; *Beale v. Bragg*, [1902] 1 I. R. 99. As to the power of the court to order a sale or mortgage of land, see titles MORTGAGE, Vol. XXI., p. 106; SALE OF LAND, Vol. XXV., p. 313.

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 30; Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 1.

(*b*) 56 & 57 Vict. c. 53.

(*c*) *Ibid.*, s. 31; *Caswell v. Sheen* (1893), 69 L. T. 854; *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549; R. S. C., Ord. 55, r. 13A (*c*). As to specific performance, see also *Wellesley v. Wellesley, Mornington v. Mornington, Ex parte Mornington (Countess)* (1853), 4 De G. M. & G. 537, C. A.; *Grace v. Baynton*, [1877] W. N. 79; *Hall v. Hale* (1884), 51 L. T. 226; title SPECIFIC PERFORMANCE, Vol. XXVII., p. 97. As to

## SECT. 3.

Tenure  
and Trans-  
mission of  
Trust  
Property.

Appointment  
of person to  
convey.

Copyhold  
land.

**231.** In all cases where a vesting order may be made the court may, if it is more convenient, appoint a person to convey the land or release the contingent right; and a conveyance or release by that person in conformity with the order has the same effect as the vesting order would have had (*d*).

**232.** Where an order vesting copyhold land in a person is made with the consent of the lord of the manor, the land vests accordingly without surrender or admittance (*e*). Where an order is made appointing a person to convey copyhold land, he must execute and do all assurances and things for completing the assurance of the land; and the lord of the manor and every other person must, subject to the customs of the manor and the usual payments, make admittance to the land, and do all other acts for completing the assurance thereof, as if the persons in whose place the appointment was made were free from disability and had executed and done those assurances and things (*f*).

(iii.) *As to Stock and Choses in Action.*

Vesting  
orders as to  
stock.

**233.** The court may make an order vesting the right to transfer or call for a transfer of stock (*g*), or to receive the dividends or

partition, see also *Singleton v. Hopkins* (1855), 4 W. R. 107; *Re Molyneux (a Lunatic)* (1862), 10 W. R. 512, C. A.; *Re Sherard (Lady C.)*, *Lowther v. Cuffe* (1863), 1 De G. J. & Sm. 421, C. A.; *Mellor v. Porter* (1883), 25 Ch. D. 158, *per* KAY, J., at p. 161; *Davis v. Ingram*, [1897] 1 Ch. 477; title PARTITION, Vol. XXI., p. 853. For forms of order, see 2 Seton, Judgments and Orders, 7th ed., pp. 1226 *et seq.*

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 33; see *Re Plyer's Trust* (1851), 9 Hare, 220; *Hargreaves v. Wright* (1853), 1 W. R. 408; *Wellesley v. Wellesley*, *Mornington v. Mornington*, *Ex parte Mornington (Countess)* (1853), 4 De G. M. & G. 537, C. A.; *Wood v. Beedlestone* (1854), 1 K. & J. 213; *Wilks v. Groom* (1856), 6 De G. M. & G. 205, C. A.; *Hancox v. Spittle* (1857), 3 Sm. & G. 478; *Re Willan* (1861), 9 W. R. 689; *Re Taylor*, [1866] W. N. 5; *Derham v. Kiernan* (1871), 5 I. R. Eq. 217; *Grace v. Baynton*, [1877] W. N. 79; *Foster v. Parker* (1878), 8 Ch. D. 147; *Hall v. Hale* (1884), 51 L. T. 226. As to lunatic trustees, see *Herring v. Clark* (1868), 4 Ch. App. 167; *Re Mason (a Person of Unsound Mind)* (1875), 10 Ch. App. 273; *Re Vicat (a Person of Unsound Mind)* (1886), 33 Ch. D. 103, C. A., where a continuing trustee was appointed; *Re Jones (a Person of Unsound Mind)*, *Zincraft's Will Trusts* (1886), 33 Ch. D. 414, C. A.; *Re Nicholson (a Person of Unsound Mind)* (1887), 34 Ch. D. 663, C. A.; *Cowper v. Harmer* (1887), 57 L. T. 714, where it was held that a covenant by the lunatic for quiet enjoyment could not be inserted in a lease.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 34 (1); and see *Re Flitcroft* (1855), 1 Jur. (N. S.) 418; *Re Howard* (1855), 3 W. R. 605; *Cooper v. Jones* (1855), 2 Jur. (N. S.) 59; *Paterson v. Paterson* (1866), L. R. 2 Eq. 31; *Re Godfrey's Trusts* (1883), 23 Ch. D. 205; *Re Franklyn's Mortgages*, [1888] W. N. 217.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 34 (2); and see *Re Heys' Will* (1851), 9 Hare, 221; *Re Collingwood's Trusts* (1858), 6 W. R. 536; *Re Lane and Irving* (1864), 12 W. R. 710; *Re Cuming* (1869), 5 Ch. App. 72 (lunatic trustee).

(*g*) "Stock" includes shares whether fully paid or not, and any fund, annuity, or security transferable in books kept by any company or society or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50; *Re New Zealand Trust and Loan Co.*, [1893] 1 Ch. 403, C. A.).



income thereof, or to sue for or recover a chose in action, in such person as the court appoints, in the following cases, namely:—

(1) Where the court appoints or has appointed a new trustee ;

(2) Where a trustee entitled alone or jointly with another person to stock or to a chose in action either (i.) is an infant (*h*), or (ii.) is out of the jurisdiction of the court, or (iii.) cannot be found, or (iv.) neglects or refuses to transfer stock or receive the dividends on income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto, for twenty-eight days next after a request in writing has been made to him by the person so entitled (*i*), or (v.) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, for twenty-eight days next after an order of the court for that purpose has been served on him ; and

(3) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead (*k*).

**234.** Where the order is consequential on the appointment by the court of a new trustee, the right is to be vested in the persons who, on the appointment, are the trustees ; and where the person whose right is dealt with by the order was entitled jointly with another person, the right is to be vested in that other person either alone or jointly with any additional person whom the court may appoint (*l*).

**235.** In all cases where a vesting order may be made the court may, if it is more convenient, appoint a proper person to make or join in making the transfer (*m*).

**236.** The person in whom the right to transfer or call for the

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and Trans-  
mission of  
Trust  
Property.

Terms of  
order.

Appointment  
of person to  
transfer.

Exercise of  
right.

The provisions as to vesting orders apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 (6) ). “Transfer ” includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee (*ibid.*, s. 50).

(*h*) *Devoy v. Devoy* (1857), 3 Sm. & G. 403 ; *Stone v. Stone* (1857), 3 Jur. (N. S.) 708 ; *Sanders v. Homer* (1858), 25 Beav. 467 ; *Rives v. Rives*, [1866] W. N. 144 ; *Gardner v. Cowles* (1876), 3 Ch. D. 304 ; *Re Harwood (Infants)* (1882), 20 Ch. D. 536 ; *Re Findlay (an Infant)* (1886), 32 Ch. D. 221 ; *Re Barnett's Estate, Foster v. Barnett*, [1889] W. N. 216 ; *Re Dehaynin (Infants)*, [1909] W. N. 251, C. A.

(*i*) *Re Knox's Trusts*, [1895] 2 Ch. 483, C. A. The refusing trustee may be ordered to pay the costs of the application (*ibid.*). The application cannot be made until the twenty-eight days have expired (*Re Knox's Trusts*, [1895] 1 Ch. 538). The posting of a request to the trustee is *prima facie* evidence of its delivery to him (*Re Struve's Trusts*, [1912] W. N. 149).

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 ; *Re New Zealand Trust and Loan Co.*, [1893] 1 Ch. 403, C. A. There is no jurisdiction to make the order where new trustees are appointed in place of deceased trustees under a power in the instrument of trust and there is no personal representative of the last surviving trustee (*Re Cane's Trusts*, [1895] 1 I. R. 172, distinguishing *Re Ellis' Settlement* (1857), 24 Beav. 426).

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 (1).

(*m*) *Ibid.*, s. 35 (2).

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and Trans-  
mission of  
Trust  
Property.

Effect of  
order.

transfer of stock is vested by an order of the court may transfer the stock to himself or another person, according to the order (*n*). The court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under an order is to be exercised (*o*).

**237.** The Banks of England and Ireland and all other companies must obey every order according to its tenor, and after notice in writing of an order relating to stock may not transfer any stock to which it relates or pay any dividends thereon except in accordance with the order (*p*).

(iv.) *In Case of Lunatic Trustee.*

Vesting order  
in case of  
lunatic  
trustee.

**238.** Where a lunatic or person of unsound mind is solely or jointly seised or possessed of any land (*q*) upon trust, or is solely or jointly entitled to any stock or chose in action upon trust, the High Court has, under the Lunacy Acts, 1890 to 1911 (*r*), powers of making vesting orders, or of appointing a person to convey the land or release contingent rights in it, or to transfer the stock, similar to those which by the Trustee Act, 1893 (*s*), are conferred on the court having jurisdiction under that Act (*t*). The jurisdiction of the High

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 (3); *Re Gregson*, [1893] 3 Ch. 233, C. A.; *Re C. M. G., Spinster (a Person of Unsound Mind not so Found)*, [1898] 2 Ch. 324, C. A.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35 (5).

(*p*) *Ibid.*, s. 35 (3), (4); *Re Gregson*, *supra*, per LINDLEY, L.J., at p. 237; *Re C. M. G., Spinster (a Person of Unsound Mind not so Found)*, *supra*.

(*q*) Including land in any British possession (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 110). Before this Act land in Ireland was not within the lunacy jurisdiction; see *Re Lamotte, a Lunatic* (1876), 4 Ch. D. 325, C. A.; *Re Hodgson (a Person of Unsound Mind)*, *Kenlis (Lord) v. Hodgson* (1879), 11 Ch. D. 888, C. A.; *Re Smyth* (1886), 55 L. T. 37, C. A.

(*r*) Lunacy Acts, 1890 (53 & 54 Vict. c. 5), ss. 135—143; 1891 (54 & 55 Vict. c. 65); 1908 (8 Edw. 7, c. 47), s. 2; 1911 (1 & 2 Geo. 5, c. 40), s. 1. The procedure relating to orders under the Trustee Act, 1893 (56 & 57 Vict. c. 53), applies (R. S. C., Ord. 55, r. 13b). Before the Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), these powers were exercisable by the judge in Lunacy; and it was sometimes necessary to make an application and to draw up the order thereon both in the Chancery Division of the High Court and in Lunacy (*Re Stewart* (1860), 8 W. R. 297, C. A.; *Re Boyce* (1864), 4 De G. J. & Sm. 205, C. A.; *Re M.*, [1899] 1 Ch. 79).

(*s*) 56 & 57 Vict. c. 53; see pp. 103 *et seq.*, *ante*.

(*t*) Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1. A vesting order under these provisions cannot be obtained in a county court (*Re Noyce*, [1892] 1 Q. B. 642, C. A.). It may be made where the trustee is a criminal lunatic (*Re R.*, [1906] 1 Ch. 730, C. A.), or where, under a power for that purpose contained in the instrument of trust, a new trustee has been appointed in place of a lunatic trustee (*Re East (a Person of Unsound Mind not so Found by Inquisition)*, *Re Bellwood's Will Trusts* (1873), 8 Ch. App. 735). Applications for vesting orders are governed by the same rules and principles as applications for the appointment of new trustees; see p. 78, *ante*. The application should be served on the committee of a lunatic trustee (*Re Saumarez* (1856), 8 De G. M. & G. 390, C. A.), but need not be served on a trustee of unsound mind not so found (*Re East (a Person of Unsound Mind not so Found by Inquisition)*, *Re Bellwood's Will Trusts*, *supra*; *Re Green (a Person of Unsound Mind not so Found)*, *Re Murton's Trusts* (1875), 10 Ch. App. 272). As to a vesting order of land vested in a lunatic which is sold by order of the court in a creditor's administration action, see

Court in the case of a lunatic trustee who is an infant or who is out of the jurisdiction (*u*), or in a case in which there has been an order for sale (*w*), is not affected by the provisions of the Lunacy Acts.

The order may vest the property in the other trustees (*a*); but such an order is, it seems, only made when the land is immediately divisible (*b*), and not when the trustees have continuing duties to perform (*c*).

Where a trustee has become lunatic it has been the practice to appoint a new trustee and not to vest the trust property directly in the beneficiary (*d*).

**239.** Where the judge in Lunacy orders the committee of the estate of a lunatic to exercise in the name and on behalf of the lunatic a power of appointing a new trustee which is vested in the lunatic (*e*), he may make any order respecting the property which, under the Trustee Act, 1893 (*f*), might have been made on the appointment of a new trustee thereunder (*g*).

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and Trans-  
mission of  
Trust  
Property.

Where com-  
mittee is  
ordered to  
appoint a  
new trustee.

(v.) *By the Charity Commissioners.*

**240.** In the case of charitable trusts (*h*) the Charity Commissioners have concurrent jurisdiction with the High Court to make vesting orders as to the trust property (*i*).

Concurrent  
jurisdiction.

#### SECT. 4.—*Vacation of Office.*

##### SUB-SECT. 1.—*Retirement.*

**241.** A person cannot be compelled to remain a trustee and act in

When trustee  
may retire.

*Re Wragg, Gregory v. Mousley* (1863), 1 De G. J. & Sm. 356, C. A.; and as to an order vesting leasehold property of a lunatic in persons who purchased it from him while of sound mind, see *Re Pagani (a Person of Unsound Mind)*, *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A. As to vesting the right to call for a transfer of and to transfer stock standing in the name of a lunatic trustee, see *Re Gregson*, [1893] 3 Ch. 233, C. A.; *Re C. M. G., Spinster (a Person of Unsound Mind not so Found)*, [1898] 2 Ch. 324, C. A.; pp. 108 *et seq.*, *ante*.

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 143; see *Re Arrowsmith's Trusts*, *Re Thompson (a Person of Unsound Mind)* (1858), 6 W. R. 642.

(*w*) *Herring v. Clark* (1868), 4 Ch. App. 167; *Re Stamper, Stamper v. Stamper* (1882), 46 L. T. 372; *Re Gardner's Trusts* (1878), 10 Ch. D. 29; *Caswell v. Sheen* (1893), 69 L. T. 854.

(*a*) *Re Leon*, [1892] 1 Ch. 348, C. A.

(*b*) *Re Hodgson (a Person of Unsound Mind)*, *Kenlis (Lord) v. Hodgson* (1879), 11 Ch. D. 888, C. A.; *Re Watson (a Person of Unsound Mind)* (1881), 19 Ch. D. 384, C. A.; *Re Wachter* (1882), 22 Ch. D. 535, C. A.; *Re Martyn, a Lunatic, Re Tout's Will* (1884), 26 Ch. D. 745, C. A.

(*c*) *Re Nash* (1881), 16 Ch. D. 503, C. A.; *Re Aston* (1883), 23 Ch. D. 217, C. A.; *Re Ray* (1882), 47 L. T. 500, C. A.; and see p. 77, *ante*.

(*d*) *Re Holland, Re Howarth's Trusts* (1881), 16 Ch. D. 672, C. A.

(*e*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 128; see p. 72, *ante*.

(*f*) 56 & 57 Vict. c. 53; see pp. 105 *et seq.*, 109, 110, *ante*.

(*g*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 129. Under the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (1), the order may be made by a master in Lunacy (*Re Fuller (a Person of Unsound Mind not so Found)*, [1900] 2 Ch. 551, C. A.; *Re Langdale (a Lunatic)*, [1901] 1 Ch. 3, C. A.).

(*h*) See title CHARITIES, Vol. IV., pp. 101 *et seq.*

(*i*) See *ibid.*, pp. 261 *et seq.*, 314, 315.



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the execution of a trust (*k*); but a trustee, who has accepted a trust, cannot from mere caprice or other trivial cause, or owing to some act or circumstances affecting himself personally, throw up the trust at the expense of the *cestui que trust* (*l*). He may, however, insist on being discharged at the expense of the trust property, if he has served for a long time and is of advanced age and in failing health (*m*), or if much litigation has taken place (*n*), or other difficult circumstances have arisen in connexion with the trust which did not exist and were not contemplated when he undertook the office (*o*). In such cases, if he cannot otherwise obtain his discharge, he may apply for it to a court of equity in an action to administer the trust (*p*), and he is not bound to show that there is some other person ready to accept the trust (*q*). If no person is willing to do so it may be necessary to postpone the discharge of the trustee and keep him before the court; but if this is done the court takes care that he shall not suffer thereby (*r*).

How  
retirement  
effected.

**242.** Except so far as authorised by statute (*s*) or by the instrument, if any, creating the trust (*t*), a trustee can only retire during the continuance of a trust by the valid appointment of another trustee in his place (*a*).

By statute (*b*), if and so far as a contrary intention is not expressed by the instrument, if any, creating the trust, and subject to the provisions of that instrument, where there are more than two trustees,

(*k*) *Forshaw v. Higginson* (1855), 20 Beav. 485, per ROMILLY, M.R., at p. 487.

(*l*) *Howard v. Rhodes* (1837), 1 Keen, 581; *Courtenay v. Courtenay* (1846), 3 Jo. & Lat. 519, per SUGDEN, L.C., at p. 529; *Forshaw v. Higginson* *supra*, at pp. 486 *et seq.*

(*m*) *Gardiner v. Downes* (1856), 22 Beav. 395.

(*n*) *Barker v. Peile* (1865), 2 Drew. & Sm. 340.

(*o*) *Coventry v. Coventry* (1837), 1 Keen, 758 (where the tenant for life had charged the trust property with annuities and other incumbrances); *Greenwood v. Wakeford* (1839), 1 Beav. 576, per Lord LANGDALE, M.R., at pp. 581, 582; *Forshaw v. Higginson*, *supra*; *Gardiner v. Downes*, *supra*, per ROMILLY, M.R., at p. 397.

(*p*) *Forshaw v. Higginson*, *supra*, at p. 487 (where the persons having the power of appointing a new trustee refused to exercise it); *Re Chetwynd's Settlement*, *Scarisbrick v. Nevinston*, [1902] 1 Ch. 692. The court cannot under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25 (1), as to which see pp. 76 *et seq.*, *ante*, discharge a trustee (*Re Aston* (1883), 23 Ch. D. 217, C. A.; *Re Chetwynd's Settlement*, *Scarisbrick v. Nevinston*, *supra*, per FARWELL, J., at p. 693).

(*q*) *Courtenay v. Courtenay*, *supra*, at p. 533.

(*r*) *Ibid.*, at p. 533; see *Re Chetwynd's Settlement*, *Scarisbrick v. Nevinston*, *supra*, at p. 694.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 11; see the text, *infra*.

(*t*) See Encyclopædia of Forms and Precedents, Vol. III., p. 256.

(*a*) — *v. Osborne* (1801), 6 Ves. 455; *Wilkinson v. Parry* (1828), 4 Russ. 272, 276; *Adams v. Paynter* (1844), 1 Coll. 530, 534; *Courtenay v. Courtenay*, *supra*, at p. 533; *Forshaw v. Higginson*, *supra*, at p. 487. If a trustee of a trust fund pays it into court, he thereby so far retires from the trust that a new trustee can be appointed in his place under a power to appoint a new trustee in the place of one refusing or declining to act (*Re Williams' Settlement* (1858), 4 K. & J. 87). If a new trustee has not been effectually appointed, the retiring trustee remains liable (*Pearce v. Pearce* (1856), 22 Beav. 248).

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 11 (1).

one of them may by deed declare that he desires to be discharged from the trust; in that case, if his co-trustees and the other person, if any, who is empowered to appoint trustees of the trust consent by deed to his discharge and to the vesting of the trust property in the co-trustees alone, he is deemed to have retired from the trust, and is by the deed discharged therefrom, without any new trustee being appointed in his place (*c*). When the Public Trustee is appointed a trustee or co-trustee may retire under the above provision without the consents thereby required and notwithstanding that there are not more than two trustees (*d*).

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**243.** Where a trustee is justified in retiring, he is not liable to pay any costs occasioned thereby; but whether he is entitled to his own costs in the matter depends on the circumstances of the case (*e*). A trustee on retiring, and the representative of a deceased trustee on transferring the trust property to a new trustee, has a right to an examined copy of the deed appointing the new trustee, but not to a duplicate thereof, or to an attested copy of the instrument creating the trust (*f*).

Costs and  
rights of  
retiring  
trustee.

**244.** Where a trustee retires in favour of another person in consideration of a sum of money paid to him by that person, a court of equity will declare the deed containing the appointment of that person as trustee to be void, so that the trust and the trust property will remain in the trustees in whom they were vested before it was executed (*g*).

Corrupt  
retirement.

**245.** A trustee who retires in favour of a new trustee, with the knowledge or suspicion that a breach of trust is intended to be committed after his retirement, is liable for any loss occasioned by the breach of trust (*h*). If one of two trustees who feels no confidence in his co-trustee retires in favour of a new trustee appointed by that co-trustee, he renders himself liable to grave risk in the event of any subsequent misconduct on the part of the continuing trustee and the new trustee (*i*).

Retirement  
in contempla-  
tion of breach  
of trust.

**246.** The retirement of a trustee does not terminate his liabilities as a shareholder, or in any other capacity in which he has

Effect of  
retirement.

(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 11. This provision applies to and includes trustees for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts, whether appointed by the court or by the settlement, or under provisions contained in the settlement (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 47).

(*d*) See p. 214, *post*.

(*e*) *A.-G. v. Murdoch* (1856), 2 K. & J. 571, *per* WOOD, V.-C., at p. 573.

(*f*) *Warter v. Anderson* (1853), 11 Hare, 301; as to his right to a release, see pp. 116, 117, *post*.

(*g*) *Sugden v. Crossland* (1856), 3 Sm. & G. 192.

(*h*) *Webster v. Le Hunt, Le Hunt v. Webster* (1861), 9 W. R. 918, C. A.; *Palairot v. Carew* (1863), 32 Beav. 564, *per* ROMILLY, M.R., at pp. 567, 568; *Clark v. Hoskins* (1868), 37 L. J. (CH.) 561, 566, C. A.; *Head v. Gould*, [1898] 2 Ch. 250. But he will not be liable for an entirely different breach of trust from that which was contemplated when he retired (*Clark v. Hoskins, supra*, at p. 567).

(*i*) *Forshaw v. Higginson* (1855), 20 Beav. 485, *per* ROMILLY, M.R., at p. 487.

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**Vacation of Office.** steps for getting rid of those liabilities by transferring the shares out of his name or otherwise (*k*).

**Resumption of trust.** **247.** A trustee who has retired from the trust cannot after the lapse of several years resume his position as trustee without being formally reappointed (*l*), notwithstanding that his retirement and the appointment of his successor were not formally effected (*m*).

SUB-SECT. 2.—*Removal.*

**Removal by appointment of new trustee.** **248.** A trustee can be removed from the trust by the appointment of a new trustee in his place in any circumstances in which the power, if any, in the instrument creating the trust or the statutory power (*n*) authorises such an appointment (*o*).

**Removal by the court.** **249.** The court removes a trustee where he refuses to execute the trust (*p*), or has mismanaged the trust (*q*), or has disqualified himself by his circumstances or conduct from continuing to hold the office (*r*), and may, perhaps, do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with the objects of it (*s*) or with the *cestuis que trust* (*a*). A trustee will not, however, be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interests of the *cestuis que*

(*k*) *Mitchell's (Alexander) Case* (1879), 4 App. Cas. 547, 567, 572, 576.

(*l*) *Lancashire v. Lancashire* (1848), 2 Ph. 657.

(*m*) *Ibid.*

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10. As to the removal of trustees of charitable trusts, see title CHARITIES, Vol. IV., pp. 268 *et seq.*

(*o*) See pp. 67 *et seq.*, *ante*.

(*p*) *Palairot v. Carew* (1863), 32 Beav. 564; *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121, C. A., *per* JESSEL, M.R., at p. 127.

(*q*) *Ex parte Phelps (a Lunatic)* (1742), 9 Mod. Rep. 357; *Ex parte Reynolds* (1800), 5 Ves. 707; *Peatfield v. Benn* (1853), 17 Beav. 522.

(*r*) *Millard v. Eyre* (1793), 2 Ves. 94; *Passingham v. Sherborn* (1846), 9 Beav. 424, 427 *et seq.*; *O'Reilly v. Alderson* (1849), 8 Hare, 101; *Re Ledwich* (1844), 6 I. Eq. R. 561; *Charitable Donations Commissioners v. Archbold* (1847), 11 I. Eq. R. 187; *A.-G. v. Murdoch* (1852), 1 De G. M. & G. 86, C. A.; S. C., on further directions (1856), 2 K. & J. 571; *Moore v. M'Glynn*, [1894] 1 I. R. 74. The court, on application, removes a trustee who has committed a felony (*Re Danson* (1899), 48 W. R. 73), or a trustee who has become bankrupt, where in administering the trust he has to receive or deal with trust money so that he has the opportunity of misappropriating it (*Re Barker's Trusts* (1875), 1 Ch. D. 43; *Re Adams' Trust* (1879), 12 Ch. D. 634), or where, besides the bankruptcy, he has acted in a manner prejudicial to the trust (*Re Betts, Maclean v. Betts* (1897), 41 Sol. Jo. 209). Friction or hostility between a trustee and the person who has the present beneficial interest in the trust property is not of itself a reason for the removal of the trustee; but it is taken into account, where it is grounded on the mode in which the trust has been administered, or where it has arisen wholly or partially out of substantial overcharges by the trustee against the trust property (*Letterstedt v. Broers* (1884), 9 App. Cas. 371, 389, P. C.).

(*s*) *A.-G. v. Hardy* (1851), 1 Sim. (N. S.) 338, *per* Lord CRANWORTH, V.-C., at p. 357; but see *A.-G. v. Clapham* (1855), 4 De G. M. & G. 591, 632, C. A.; *Letterstedt v. Broers*, *supra*, at pp. 386, 387.

(*a*) *A.-G. v. Hardy*, *supra*, at p. 357; but see *A.-G. v. Clapham*, *supra*, at p. 632; *Letterstedt v. Broers*, *supra*, at pp. 386, 387.



*trust* (b). When a trustee is removed, he is usually ordered to pay the costs of his removal (c).

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**250.** In the absence of circumstances which, under the power, if any, in the instrument creating the trust, or under the statutory power (d), authorise the appointment of a new trustee, the court cannot order the removal of a trustee against his will in proceedings under the Trustee Act, 1893 (e), but an action must be instituted for the purpose (f).

Procedure  
for effecting  
removal.

SUB-SECT. 3.—*Death.*

**251.** The office of trustee terminates on his death (g), but his estate may remain subject to liabilities incurred during his trusteeship (h).

Death of  
trustee.

SUB-SECT. 4.—*Termination of Trust.*

**252.** When a trust has terminated, the persons who have become absolutely entitled to the trust property can require the trustee to transfer it to them at their expense (i), on furnishing to him clear proof that his duties and responsibilities are at an end (k).

Transfer of  
trust  
property.

**253.** A trustee is bound to hand over the trust property to the right person (l). If, therefore, he is deceived by a forged certificate

Transfer to  
person right-  
fully entitled.

(b) *Re Bridgman* (1860), 8 W. R. 598; *Assets Realisation Co. v. Trustees, Executors and Securities Insurance Corporation* (1895), 65 L. J. (CH.) 74.

(c) *A.-G. v. Murdoch* (1856), 2 K. & J. 571, *per* WOOD, V.-C., at p. 573; *Palairot v. Carew* (1863), 32 Beav. 564.

(d) See pp. 73 *et seq.*, *ante*.

(e) 56 & 57 Vict. c. 53; see pp. 76 *et seq.*, *ante*.

(f) *Re Bridgman* (1860), 8 W. R. 598; *Re Blanchard* (1861), 3 De G. F. & J. 131, C. A.; *Re Combs* (1884), 51 L. T. 45, C. A. The court cannot in proceedings under the Trustee Act, 1893 (56 & 57 Vict. c. 53), inquire as to the alleged insanity of a trustee where it is denied by him (*Re Combs*, *supra*). The court usually effects the removal of a trustee by appointing another person in his place.

(g) As to the devolution of the trust property, see pp. 100, 101, *ante*; as to the devolution of the trusts and powers, see pp. 153 *et seq.*, *post*.

(h) See p. 185, *post*.

(i) *Taylor v. Glanville* (1818), 3 Madd. 176; *Knight v. Martin* (1829), 1 Russ. & M. 70; *Willis v. Hiscox* (1839), 4 My. & Cr. 197; *Poole v. Pass* (1839), 1 Beav. 600; *Holford v. Phipps* (1841), 3 Beav. 434; *Re Knight's Trusts* (1859), 27 Beav. 45. As to payment to an infant beneficiary, see title INFANTS AND CHILDREN, Vol. XVII., p. 66.

(k) *Holford v. Phipps*, *supra*, *per* Lord LANGDALE, M.R., at pp. 440, 441; *Warter v. Anderson* (1853), 11 Hare, 301, *per* WOOD, V.-C., at p. 303. If, in spite of adequate proof, the trustee refuses to make the transfer, he is liable to be ordered to pay the costs of any proceedings rendered necessary thereby (*Jones v. Lewis* (1786), 1 Cox, Eq. Cas. 199; *Willis v. Hiscox*, *supra*; *Thorby v. Yeats* (1842), 1 Y. & C. Ch. Cas. 438; *Re Cater's Trusts* (No. 2) (1858), 25 Beav. 366, 367). The fact of his having acted under the advice of counsel is not an absolute protection to him in such a case (*Devey v. Thornton* (1851), 9 Hare, 222, *per* TURNER, V.-C., at p. 232).

(l) *Eaves v. Hickson* (1861), 30 Beav. 136, *per* ROMILLY, M.R., at p. 141. A trustee distributing trust property should inquire as to the value of the securities distributed; see *Re Brookes*, *Brookes v. Taylor*, [1914] 1 Ch. 558. Where the share of a *cestui que trust* has been mortgaged, the fact that the mortgagee is empowered to give a valid receipt for the share does not render it obligatory on the trustee to hand over the whole share to him.

SECT. 4. or other false evidence and hands it over to the wrong person, he  
 Vacation of is liable to the rightful *cestui que trust* for so much of it as cannot  
 Office. be recovered from the wrongful recipient of it or from the person  
 who committed the fraud (*m*).

Termination  
 of trusts by  
*cestui que*  
*trust*.

**254.** Where all the actual or possible *cestuis que trust* are in existence and *sui juris*, they may together put an end to the trust in whole or in part or discharge a trustee therefrom (*n*). On the other hand, a trustee cannot by an act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee till he has performed his trust (*o*).

Record of  
 termination.

**255.** A trustee should preserve a record of the termination of the trust, in order to preclude the possibility of a question being subsequently raised as to whether it has in fact taken place (*p*).

#### SUB-SECT. 5.—Release.

Right of  
 trustee to  
 release.

**256.** Where there is an instrument declaring a clearly defined trust, and the trustee pays the income or transfers the capital of the trust property in strict accordance with the trust, he may on the termination of the trust require an acknowledgment that the accounts are settled (*q*), but he has no right to require a release under seal (*r*). Where, however, there is merely a parol trust, and no evidence as to its exact terms or as to the amount of the trust

where it exceeds in amount the sum due on the mortgage and the trustee has notice of subsequent incumbrances on it (*Re Bell, Jeffery v. Sayles*, [1896] 1 Ch. 1, C. A. ; *Hockey v. Western*, [1898] 1 Ch. 350, 356, C. A.).

(*m*) *Eaves v. Hickson* (1861), 30 Beav. 136.

(*n*) *Wilkinson v. Parry* (1828), 4 Russ. 272, per LEACH, M.R., at p. 276 ; *King v. Mullins* (1852), 1 Drew. 308 ; *Anson v. Potter* (1879), 13 Ch. D. 141. Where a trustee is called upon to part with the trust property on the ground that the *cestui que trust* has put an end to the trust, he is entitled to clear evidence of the fact that the trust is at an end, including the production of any deed or document which has effected that result (*Holford v. Phipps* (1841), 3 Beav. 434) ; and he is entitled to his costs of legal proceedings instituted to compel him to part with the trust property, where sufficient evidence of the termination of the trust has not been previously produced to him (*ibid.*). The existence of this power of terminating the trust may render valid a disposition which would otherwise transgress the rule against perpetuities ; see title PERPETUITIES, Vol. XXII., pp. 319, 326, 327.

(*o*) *Chalmer v. Bradley* (1819), 1 Jac. & W. 51, per PLUMER, M.R., at p. 68.

(*p*) *Payne v. Evens* (1874), L. R. 18 Eq. 356, 367.

(*q*) *Chadwick v. Heatley* (1845), 2 Coll. 137 ; *Re Wright's Trusts* (1857), 3 K. & J. 419. If such acknowledgment is refused, he can insist on the account being taken by the court (*Chadwick v. Heatley, supra*).

(*r*) *King v. Mullins, supra*, per KINDERSLEY, V.-C., at p. 311 ; *Warter v. Anderson* (1853), 11 Hare, 301, per WOOD, V.-C., at p. 303. A trustee is not in all cases entitled to a formal deed of release ; in many cases the receipt of the *cestui que trust* is a sufficient discharge (*Re Roberts's Trusts* (1869), 38 L. J. (CH.) 708, per MALINS, V.-C., at p. 709). The desire for a release on the part of trustees is not encouraged ; a receipt from a person entitled to money is the best release for the payment of it (*Re Hoskin's Trusts* (1877), 5 Ch. D. 229, per MALINS, V.-C., at p. 234), and no more can be required where executors or trustees are the persons entitled to receive trust money (*Re Cater's Trusts* (No. 2) (1858), 25 Beav. 366, per ROMILLY, M.R., at p. 367 ; *Re Hoskin's Trusts, supra*).

property, or where the trustee is required to deal with the property in a manner differing from the strict tenor of the trust, he can legally demand a release by deed (s). Where a *cestui que trust* has settled his share of the trust property, the trustee is entitled to a release from him, but can only require a receipt from the trustees to whom it is to be transferred (t).

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## Part III.—Administration of Trusts.

### SECT. 1.—Duties of Trustees.

#### SUB-SECT. 1.—In General.

**257.** The first duty of a trustee is to acquaint himself with the terms of the trust under which he acts (a), and with the state of the trust property (b), and with the contents of all such deeds, notices, and other documents and papers relating to or affecting the trust property, as come into his possession or under his control (c).

Acquaintance  
with the trust  
and its affairs.

**258.** A trustee must take all reasonable and proper measures to obtain possession of the trust property if it is outstanding (d), and to get in all debts and funds due to the trust estate (e), and to

Possession  
and preserva-  
tion of trust  
property.

(s) *King v. Mullins* (1852), 1 Drew. 308, 311. As to releases in respect of breaches of trust, see pp. 199, 200, *post*; as to releases generally, see title CONTRACT, Vol. VII., pp. 454 *et seq.*; as to release by an infant beneficiary, see title INFANTS AND CHILDREN, Vol. XVII., p. 66. As to setting aside a release executed under a mistake, see title MISTAKE, Vol. XXI., p. 19.

(t) *Re Cater's Trusts* (No. 2) (1858), 25 Beav. 366, 367.

(a) *Hallows v. Lloyd* (1888), 39 Ch. D. 686, *per* KEKEWICH, J., at p. 691. A trustee is not liable for failing to act in a trust which has never been brought to his notice (*Youde v. Cloud* (1874), L. R. 18 Eq. 634).

(b) *Harvey v. Olliver* (1887), 57 L. T. 239, *per* KAY, J., at p. 241; *Hallows v. Lloyd*, *supra*, at p. 691.

(c) *Hallows v. Lloyd*, *supra*, at p. 691. But new trustees, when appointed, are not bound to inquire of retiring trustees whether they have received notice of any incumbrance on or other dealing with the trust property (*ibid.*; *Phipps v. Lovegrove*, *Prosser v. Phipps* (1873), L. R. 16 Eq. 80, *per* JAMES, L.J., at p. 90).

(d) *Powell v. Evans* (1801), 5 Ves. 839; *Caffrey v. Darby* (1801), 6 Ves. 488; *Mucklow v. Fuller* (1821), Jac. 198; *Gregory v. Gregory* (1836), 2 Y. & C. (EX.) 313; *Booth v. Booth* (1838), 1 Beav. 125; *Fenwick v. Greenwell* (1847), 10 Beav. 412; *Simes v. Eyre* (1847), 6 Hare, 137; *Styles v. Guy* (1849), 1 Mac. & G. 422, C. A.; *M'Gachen v. Dew*, *Dew v. M'Gachen* (1851), 15 Beav. 84; *Story v. Gape* (1856), 2 Jur. (N. S.) 706; *Taylor v. Millington* (1858), 4 Jur. (N. S.) 204; *Grove v. Price* (1858), 26 Beav. 103; *Westmoreland v. Holland* (1870), 23 L. T. 797; *Re Pilling*, *Ex parte Ogle*, *Ex parte Smith* (1873), 8 Ch. App. 711, 717. As to the duty of all the trustees, where there are several, to possess themselves of the trust property, see p. 123, *post*; as to the custody of securities and documents of title, see p. 100, *ante*.

(e) *Lowson v. Copeland* (1787), 2 Bro. C. C. 156; *Gregory v. Gregory* *supra*; *Wiles v. Gresham* (1854), 2 Drew. 258; *Orrett v. Corser*, *Corser v. Orrett* (1855), 21 Beav. 52, 56; *Re Brogden*, *Billing v. Brogden* (1888), 38 Ch. D. 546, C. A. But he may exercise a reasonable discretion as to the time for so doing (*Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Rowley v. Adams* (1849), 2 H. L. Cas. 725). He must not allow rents



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preserve it and secure it from loss (*f*) or risk of loss (*g*). If necessary, he must institute legal proceedings to effect its security or recovery (*h*); and he should, where he has a reasonable prospect of being able to do so successfully, defend actions brought against him in respect of the trust property (*i*). He is not, however, bound, with a view to recover trust property, to take proceedings which from the financial position of the person liable to restore it or otherwise would be clearly useless (*k*).

or interest to fall into arrear (*Tebbs v. Carpenter* (1816), 1 Madd. 290, 297, 298). Unless expressly authorised to forbear doing so, he must enforce a bond or covenant in favour of the trust estate entered into by the creator of the trust (*Luther v. Bianconi* (1860), 10 I. Ch. R. 194; *Woodhouse v. Woodhouse* (1869), L. R. 8 Eq. 514, *per* STUART, V.-C., at p. 520; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546, C. A.).

(*f*) *Sutton v. Wilders* (1871), L. R. 12 Eq. 373; *Kingdon v. Castleman* (1877), 25 W. R. 345; *Briggs v. Massey* (1882), 51 L. J. (CH.) 447, C. A.; *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY, L.J., at p. 99; *Re Allan, Havelock v. Havelock-Allan* (1896), 12 T. L. R. 299; and see pp. 122, 123. *post*. Where a trustee has taken reasonable precautions, he is not liable if the trust property is stolen or lost without default on his part while in his possession (*Jones v. Lewis* (1751), 2 Ves. Sen. 240; *Job v. Job* (1877), 6 Ch. D. 562; *Jobson v. Palmer*, [1893] 1 Ch. 71); and a trustee has been held not liable for loss through the fraud of his solicitor's clerk (*Re Smith, Smith v. Thompson* (1902), 18 T. L. R. 432; compare *Evans Williams v. Byron* (1902), 18 T. L. R. 172). But he is liable for the loss of title deeds unless he can show that it was due to inevitable accident and not to negligence on his part (*Brown v. Sewell* (1853), 11 Hare, 49, *per* WOOD, V.-C., at p. 53; *Gilligan and Nugent v. National Bank, Ltd.*, [1901] 2 I. R. 513). As to insurance by a trustee, see pp. 145, 146, *post*; title INSURANCE, Vol. XVII., pp. 372, 520, 523, 524, 545 *et seq.*, 563.

(*g*) *Macnamara v. Carey* (1867), 1 I. R. Eq. 9, C. A.; *Cleary v. Fitzgerald* (1881), 7 L. R. Ir. 229, C. A., *per* MAY, C.J., at p. 247; *Bullock v. Bullock* (1886), 56 L. J. (CH.) 221. Except where otherwise directed or authorised by the instrument creating the trust, a trustee ought to get in trust property invested in trade or in any other hazardous manner (*Kirkman v. Booth* (1848), 11 Beav. 273). Securities payable to bearer ought to be deposited with bankers (*Mendes v. Guedalla* (1861), 2 John. & H. 259; *Re De Pothonier, Dent v. De Pothonier*, [1900] 2 Ch. 529), and not with a solicitor (*Field v. Field*, [1894] 1 Ch. 425). Where the trust property consists of chattels, an inventory of them ought to be made and kept (*Temple v. Thring* (1887), 56 L. J. (CH.) 767). As to investing trust money, see pp. 129 *et seq.*, *post*; as to insuring and repairing buildings, see pp. 145 *et seq.*, *post*; as to leaving trust money in a bank, see *Anon.* (1774), Lofft, 492; *Adams v. Claxton* (1801), 6 Ves. 226; *France v. Woods* (1829), Taml. 172; *Macdonnell v. Harding* (1834), 7 Sim. 178; *Brown v. Clark* (1837), 1 Jur. 838; *Lunham v. Blundell* (1857), 27 L. J. (CH.) 179; *Gough v. Etty* (1869), 20 L. T. 358; and p. 142, *post*.

(*h*) *Louson v. Copeland* (1787), 2 Bro. C. C. 156; *Kirby v. Mash* (1839), 3 Y. & C. (EX.) 295; *Luther v. Bianconi* (1860), 10 I. Ch. R. 194; *Woodhouse v. Woodhouse* (1869), L. R. 8 Eq. 514, 520; *Macnamara v. Carey*, *supra*, at pp. 23, 24; *Re Brogden, Billing v. Brogden*, *supra*. As to taking action with reference to a Bill in Parliament affecting the trust property, see *Jones v. Powell* (1841), 4 Beav. 96; as to where a trustee neglects to institute proper legal proceedings, see pp. 172, 173, *post*.

(*i*) *D'Oechsner v. Scott* (1857), 24 Beav. 239, 242; *Benet v. Wyndham* (1862), 4 De G. F. & J. 259, C. A.; *Walters v. Woodbridge* (1878), 7 Ch. D. 504, C. A.; *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317, *per* STIRLING, J., at p. 327.

(*k*) *Ward v. Ward* (1843), 2 H. L. Cas. 777, *per* Lord LYNDBURST, L.C., at pp. 784, 786, 787; *Fenwick v. Greenwell* (1847), 10 Beav. 412, *per* Lord LANGDALE, M.R., at p. 421; *Clack v. Holland* (1854), 19 Beav. 262, 271,

**259.** A trustee must not connive at or knowingly facilitate any act or conduct of another person which would involve a breach of trust or occasion loss or risk to the trust property (*l*); and he must not set up or abet an adverse title or claim of another person against his *cestui que trust* (*m*), or undertake a duty or put himself in a position which is inconsistent with his duty as trustee (*n*), or act in a manner inconsistent with that duty (*o*). He must assume the validity of the equitable title of his *cestui que trust* until it is actually negatived (*p*). At the same time, he has a right to know the title of those who pretend to be his *cestuis que trust* (*q*); and if he receives notice of an adverse claim and of an intention to hold him liable in case he disregards it, he may obtain a decision of the court as to his course of action (*r*).

SECT. I.  
Duties of  
Trustees.

Fidelity to  
trust.

**260.** A trustee must strictly conform to and carry out the terms of the trust so far as they are for the time being in force (*s*), including such powers attached thereto as are of the nature of a trust or obligation (*t*), and must perform the duties which are attached by

Administra-  
tion of trust.

272; *Hobday v. Peters* (No. 3) (1860), 28 Beav. 603; *Re Hurst, Addison v. Topp* (1892), 7 L. T. 96, C. A.; *Millar's Trustees v. Polson* (1897), 34 Sc. L. R. 798, 804, 805; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546, C. A., *per* LOPES, L.J., at p. 574. But where a trustee could have recovered part of the fund, he is liable to that extent (*Maitland v. Bateman* (1844), 8 Jur. 926). As to releasing or compounding debts or claims, and agreeing to a compromise, see p. 140, *post*.

(*l*) *Head v. Gould*, [1898] 2 Ch. 250, *per* KEKEWICH, J., at pp. 268, 269. If a trustee retires from the trust knowing or suspecting that the trustees after his retirement will commit a breach of trust, he is equally liable with them for any loss resulting therefrom to the trust estate; see p. 113, *ante*.

(*m*) *Jevon v. Bush* (1685), 1 Vern. 342; *Armstrong d. Tinker v. Peirse* (1766), 3 Burr. 1898; *Kaye v. Powel* (1791), 1 Ves. 408; *Shine v. Gough* (1811), 1 Ball & B. 436, 445; *Newsome v. Flowers* (1861), 30 Beav. 461, 470.

(*n*) *Talbot (Earl) v. Hope Scott* (No. 2) (1858), 4 K. & J. 139; *Bray v. Ford*, [1896] A. C. 44, *per* Lord HERSCHELL, at p. 51.

(*o*) *Crosskill v. Bower, Bower v. Turner* (1863), 32 Beav. 86. He must put his own interests entirely out of the question (*Cook v. Collingridge* (1823), Jac. 607, *per* Lord ELDON, L.C., at p. 621; see p. 121, *post*).

(*p*) *Beddoes v. Pugh* (1859), 26 Beav. 407, 417; *Neligan v. Roche* (1873), 7 L. R. Eq. 332.

(*q*) *Hurst v. Hurst* (1874), 9 Ch. App. 762, *per* JAMES, L.J., at p. 766.

(*r*) *Neale v. Davies* (1854), 5 De G. M. & G. 258, C. A., *per* TURNER, L.J., at p. 263, affirming the decision of WOOD, V.-C.; but see, *contra*, *ibid.*, *per* KNIGHT BRUCE, L.J., at pp. 264, 265.

(*s*) *A.-G. v. Downing (Lady)* (1767), Wilm. 1, *per* WILMOT, C.J., at pp. 23, 24; *Booth v. Booth* (1838), 1 Beav. 125, 128, 129; *Knott v. Cottie* (1852), 16 Beav. 77; *Raby v. Ridehalgh* (1855), 7 De G. M. & G. 104, C. A., *per* TURNER, L.J., at p. 108; *Devaynes v. Robinson* (1857), 24 Beav. 86; *Leedham v. Chawner* (1858), 4 K. & J. 458; *Re Massingberd's Settlement, Clark v. Trelawney* (1890), 63 L. T. 296, 298, C. A. Where a trustee acts properly with reference to the facts and circumstances which exist at the time when he acts, and which are known or ought to have been known by him at the time, he is not liable, if his action, owing to circumstances which subsequently occur, causes a loss to some of the *cestuis que trust* (*Re Hurst, Addison v. Topp*, *supra*, *per* LINDLEY, L.J., at p. 99; compare *Re Brookes, Brookes v. Taylor*, [1914] 1 Ch. 558).

(*t*) *Nickisson v. Cockill* (1863), 3 De G. J. & Sm. 622, 633, 634, C. A.; *Tempest v. Camoys (Lord)* (1868), 21 Ch. D. 576, n., C. A.; *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A., *per*



## SECT. 1.

## Duties of Trustees.

Deviation from terms of trust.

law to the administration of the trust (a). The fact of a trust being administered by the court does not absolve the trustee from his duties with respect to it (b).

It may be in some circumstances necessary or beneficial that a trustee should deviate from the strict letter of his trust; but in that case he does so under the obligation and at the peril of afterwards satisfying the court that the deviation was necessary or beneficial (c), unless he is relieved or debarred from observing the directions contained in the instrument creating or regulating the trust (1) by the request and consent of all the beneficiaries, where all of them are *sui juris* and concur (d); or (2) by an order of a court of competent jurisdiction (e); or (3) by an overriding statute (f); or (4) by the fact that the directions are illegal (g), or are incapable of being observed (h).

Trustee must use diligence and prudence.

A trustee is bound to execute the trust with fidelity and reasonable diligence (i), and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs; but beyond this he is not bound to adopt further precautions (k). In cases of doubt or difficulty he may take legal advice

BOWEN, L.J., at p. 141; *Re Hill, Hill v. Pilcher*, [1896] 1 Ch. 962, *per* KEKEWICH, J., at p. 966.

(a) *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, *per* JESSEL, M.R., at pp. 475, 476. Every trustee has not the same duties and liabilities (*ibid.*).

(b) *Garner v. Moore* (1855), 3 Drew. 277.

(c) *Harrison v. Randall* (1852), 9 Hare, 397, *per* TURNER, V.-C., at p. 407; *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534, 544, C. A.; and see p. 197, *post*; but see *Re Tollemache*, [1903] 1 Ch. 457, 955, C. A.

(d) *Re Dumbell, Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617, *per* Lord ELDON, L.C., at pp. 622, 623; *Wilkinson v. Parry* (1828), 4 Russ. 272, *per* LEACH, M.R., at p. 278; *Griffiths v. Porter* (1858), 25 Beav. 236, *per* ROMILLY, M.R., at p. 241; *Bradby v. Whitechurch*, [1868] W. N. 81; *Wharton v. Masterman*, [1895] A. C. 186; *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238.

(e) *King v. King* (1857), 1 De G. & J. 663, C. A.; but the court will not ordinarily override the terms of the trust (*Blacklow v. Laws* (1842), 2 Hare, 40; *Johnstone v. Baber* (1845), 8 Beav. 233); see, however, *Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848, where contingent interests were made absolute in spite of the infancy of some of the beneficiaries; and pp. 180, 181, *post*.

(f) As, for instance, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7 (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 58); the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56 (2) (see title SETTLEMENTS, Vol. XXV., p. 668).

(g) *Re Beard, Reversionary and General Securities Co., Ltd. v. Hall, Re Beard*, *Beard v. Hall*, [1908] 1 Ch. 383.

(h) *Collett v. Collett* (1866), 35 Beav. 372; *Re Bird, Bird v. Cross* (1894), 8 R. 326.

(i) *Charitable Corporation v. Sutton* (1742), 2 Atk. 400, *per* Lord HARDWICKE, L.C., at p. 406.

(k) *Bacon v. Bacon* (1800), 5 Ves. 331; *Joy v. Campbell* (1804), 1 Sch. & Lef. 328, *per* Lord REDESDALE, L.C., at pp. 341, 342; *Massey v. Banner* (1820), 1 Jac. & W. 241, *per* Lord ELDON, L.C., at p. 247; *Clough v. Bond* (1838), 3 My. & Cr. 490, *per* Lord COTTENHAM, L.C., at p. 497; *Speight v. Gaunt* (1883), 9 App. Cas. 1, *per* Lord BLACKBURN, at p. 19, approving S. C. (1883), 22 Ch. D. 727, C. A., *per* JESSEL, M.R., at pp. 739, 740; *Re Whiteley, Whiteley v. Learoyd* (1886), 33 Ch. D. 347, C. A., *per* LINDLEY, L.J., at p. 355; *Bullock v. Bullock* (1886), 56 L. J. (CH.) 221; *Robinson v. Harkin*, [1896] 2 Ch. 415, 424. The degree of prudence which



SECT. 1.  
Duties of  
Trustees.

on a point of law or the advice of an expert on any other matter (*l*), but that advice, if mistaken, would not formerly have relieved him from responsibility (*m*), though it may now do so if it was reasonable to act upon such advice, especially in the case of a small estate (*n*). If the point is not clear, he should, as a rule, obtain the direction of the court upon it (*o*).

**261.** A trustee must not in any way make use of the trust property or of his position as trustee for his own interest or private advantage (*p*), nor may he enter into engagements in which he has or can have a personal interest which conflicts or possibly may conflict with the interests of those whom he is bound to protect (*q*).

Trustee may  
not use his  
position for  
his personal  
advantage.

the particular trustee actually uses in the management of his own affairs is not a proper standard (*Rae v. Meek* (1889), 14 App. Cas. 558, 569; *Re De Clifford's (Lord) Estate, De Clifford (Lord) v. Quilter, De Clifford (Lord) v. Lansdowne (Marquis)*, [1900] 2 Ch. 707, 716. Trustees are not insurers of the trust property (*Re Hurst, Addison v. Topp* (1892), 67 L. T. 96, 99, C. A.). Compare Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, as to which see pp. 196 *et seq.*, *post*.

(*l*) *Stott v. Milne* (1884), 25 Ch. D. 710, C. A., *per* Lord SELBORNE, L.C., at p. 714; *Learoyd v. Whiteley* (1887), 12 App. Cas. 727, *per* Lord WATSON, at p. 734; *Davis v. Hutchings*, [1907] 1 Ch. 356, 362, 365; see also p. 141, *post*.

(*m*) *Doyle v. Blake* (1804), 2 Sch. & Lef. 231, *per* Lord REDESDALE, L.C., at p. 243; *Re Knight's Trusts* (1859), 27 Beav. 45, *per* ROMILLY, M.R., at p. 49; *Stott v. Milne*, *supra*, at p. 714; *Learoyd v. Whiteley*, *supra*, at p. 734.

(*n*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1, C. A.; see p. 197, *post*.

(*o*) *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546, C. A., *per* NORTH, J., at p. 556; and see *Re Beddoe, Downs v. Cottam*, [1893] 1 Ch. 547, C. A.; and p. 119, *ante*, p. 182, *post*. His omission to obtain the direction of the court is not necessarily culpable (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3).

(*p*) *Ex parte Lacey* (1802), 6 Ves. 625, *per* Lord ELDON, L.C., at p. 626; *Webb v. Shaftesbury (Earl), Shaftesbury (Earl) v. Arrowsmith* (1802), 7 Ves. 480, 487, 488; *Ex parte James* (1803), 8 Ves. 337; *Aberdeen Town Council v. Aberdeen University* (1877), 2 App. Cas. 544; *Re Imperial Land Co. of Marseilles, Ex parte Larking* (1877), 4 Ch. D. 566, 578, 530, C. A.; *Re Francis, Barrett v. Fisher* (1905), 74 L. J. (CH.) 198; *Bath v. Standard Land Co., Ltd.*, [1911] 1 Ch. 618, C. A., *per* FLETCHER MOULTON, L.J., at p. 637; and see pp. 47 *et seq.*, *ante*; title EQUITY, Vol. XIII., p. 158. A person in a fiduciary position, unless expressly authorised to do so, is not entitled to make a profit out of his position (*Bray v. Ford*, [1896] A. C. 44, *per* Lord HERSCHELL, at p. 51). Where a bribe is paid to a trustee to induce him to sell or let trust property, the sale or lease will be void (*Chandler v. Bradley*, [1897] 1 Ch. 315). It is a breach of trust for a trustee to make an advance out of the trust fund to a beneficiary, under a power for that purpose, in order to enable the beneficiary to repay a debt due to himself (*Molyneux v. Fletcher*, [1898] 1 Q. B. 648); though he may accept repayment out of an advance of trust money to his debtor on the security of a mortgage, if it was not made with that distinct object (*Butler v. Butler* (1877), 7 Ch. D. 116, C. A.); and see note (*a*), p. 131, *post*. A trustee who is a solicitor may demand and receive from a client, a third party, to whom he lends trust money, the costs of preparing the mortgage by which it is secured (*Whitney v. Smith* (1869), 4 Ch. App. 513).

(*q*) *Richardson v. Chapman* (1760), 7 Bro. Parl. Cas. 318; *Phayre v. Peree* (1815), 3 Dow, 116, 128, H. L.; *Aberdeen Rail. Co. v. Blakie Brothers* (1854), 1 Macq. 461, H. L., *per* Lord CRANWORTH, L.C., at p. 471; *Shallcross v. Oldham* (1862), 2 John. & H. 609; *Bennett v. Gaslight and Coke Co.* (1882), 52 L. J. (CH.) 98; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A., *per* RIGBY, L.J., at p. 442; *Costa Rica Rail. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 760, 761; and see pp. 167 *et seq.*, *post*.

SECT. 1.  
Duties of  
Trustees.  
—  
Personal  
responsibility.

**262.** A trustee, being personally responsible for the exercise of his judgment and for the performance of his duty, cannot escape responsibility by leaving to another person the exercise of that judgment (*a*) or the performance of that duty (*b*), even if he is one of several trustees and the person to whom he leaves it is his co-trustee (*c*); nor may he allow a stranger to participate in the management and control of the trust (*d*). If he leaves a trust matter to a co-trustee or employs an agent, he remains liable to his *cestui que trust* for the acts and conduct of the co-trustee or agent (*e*), except so far as the law allows him to transact the affairs of the trust through a co-trustee or responsible agent (*f*).

A trustee is liable if he allows the trust property to remain in the custody or under the control of another person (*g*), except when and for so long as the affairs of the trust render it necessary or

(*a*) *A.-G. v. Scott* (1750), 1 Ves. Sen. 413, *per* Lord HARDWICKE, L.C., at pp. 417, 418; *Taylor v. Tabrum* (1833), 6 Sim. 281; *Robson v. Flight* (1865), 4 De G. J. & Sm. 608, 613; *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121. But he may consult with the *cestuis que trust*, if he does not surrender the ultimate exercise of his own judgment (*Fraser v. Murdoch* (1881), 6 App. Cas. 855, *per* Lord SELBORNE, L.C., at p. 864); see title POWERS, Vol. XXIII., p. 15, note (*i*). As to obtaining the direction of the court, see p. 182, *post*.

(*b*) *Chambers v. Minchin* (1802), 7 Ves. 185, 196; *Adams v. Clifton* (1826), 1 Russ. 297; *Wood v. Weightman* (1872), L. R. 13 Eq. 434; *Re Bellamy and Metropolitan Board of Works* (1883), 24 Ch. D. 387, C. A.; *Robinson v. Harkin*, [1896] 2 Ch. 415, 422. A trustee cannot delegate a power to lease or sell the trust property (*Hardwick v. Mynd* (1793), 1 Anst. 109, 110; *Hawkins v. Kemp* (1803), 3 East, 410, 427; *Oliver v. Court* (1820), 8 Price, 127, 166, 167); see note (*b*), p. 150, *post*.

(*c*) *Brice v. Stokes* (1805), 11 Ves. 319; *Langford v. Gascoyne* (1805), 11 Ves. 333; *Underwood v. Stevens* (1816), 1 Mer. 712; *Re Chertsey Market, Ex parte Walthew* (1819), 6 Price, 261, *per* RICHARDS, C.B., at p. 285; *Oliver v. Court, supra*, at pp. 166, 167; *Re Dixon, Ex parte Griffin* (1826), 2 Gl. & J. 114, 116; *Clough v. Bond* (1837), 3 My. & Cr. 490, 497; *Bulteel v. Abinger (Lord)* (1842), 6 Jur. 410; *Cowell v. Gatcombe* (1859), 27 Beav. 568; *Robinson v. Harkin, supra*.

(*d*) *Salway v. Salway* (1831), 2 Russ. & M. 215, *per* Lord BROUGHAM, L.C., at p. 219; *White v. Baugh* (1835), 3 Cl. & Fin. 44, H. L.; *Kingham v. Lee* (1846), 15 Sim. 396, *per* SHADWELL, V.-C., at pp. 399, 400; *Pearce v. Pearce* (1856), 22 Beav. 248. Where trust property is sold with other property, the purchase-money must be apportioned before completion of the purchase, and the amount attributable to the trust property must be separately paid to the trustee or his solicitor (*Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, *per* JESSEL, M.R., at p. 815).

(*e*) *Re Litchfield (Earl) and Williams* (1737), 1 Atk. 87; *Chambers v. Minchin, supra*, at p. 196; *Re French, Ex parte Townsend* (1828), 1 Mol. 139; *Hanbury v. Kirkland* (1829), 3 Sim. 265; *Bacon v. Clark* (1837), 3 My. & Cr. 294; *Turner v. Corney* (1841), 5 Beav. 515, *per* Lord LANGDALE, M.R., at p. 517; *Egbert v. Butter* (1856), 21 Beav. 560; *Bostock v. Floyer* (1865), L. R. 1 Eq. 26; *Hopgood v. Parkin* (1870), L. R. 11 Eq. 74; *Rodbard v. Cooke* (1877), 25 W. R. 555; *Davis v. Hutchings*, [1907] 1 Ch. 356, 365.

(*f*) *Re Speight, Speight v. Gaunt* (1883), 22 Ch. D. 727, C. A., *per* LINDLEY, L.J., at p. 762, affirmed 9 App. Cas. 1; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674; *Shepherd v. Harris*, [1905] 2 Ch. 310; and see pp. 141 *et seq.*, *post*.

(*g*) *Gregory v. Gregory* (1836), 2 Y. & C. (EX.) 313; *Ghost v. Waller, Upton v. Waller* (1846), 9 Beav. 497; *Waugh v. Wyche* (1854), 2 Drew. 318, *per* KINDERSLEY, V.-C., at p. 326; *Browne v. Butter* (1857), 24 Beav. 159; *Robinson v. Harkin, supra*; *Carruthers v. Carruthers*, [1896] A. C. 659; and see pp. 117, 118, *ante*.



SECT. I.  
Duties of  
Trustees.

proper (*h*). Where there are several trustees, one of them cannot safely leave the trust property in the sole possession or under the sole control of another of them (*i*), except where the other is acting in the capacity of broker or agent of the trustees and is dealing with the property in that capacity (*k*), and except as regards title deeds and documents which for the sake of convenience may be kept by one of several co-trustees (*l*).

**263.** Where there is more than one trustee, the concurrence of all is necessary in a transaction affecting the trust property, and a majority cannot bind the minority (*n*). So a receipt for money given by one of two trustees will not be a discharge (*n*). But an *ex post facto* approval by one trustee of the exercise of a discretion by the other seems to be sufficient (*o*); and a notice of intention to renew a lease is good if given to one of two trustees (*p*).

Concurrence  
of all trustees  
necessary.

Notice to  
one of two  
trustees.

**264.** Except where the instrument creating the trust expressly gives him a discretion as to adopting a course which will benefit one beneficiary at the expense of the others (*q*), it is the duty of a

Duty towards  
beneficiaries.

(*h*) See note (*k*), *infra*; and pp. 142, 144, *post*.

(*i*) *Scurfield v. Howes* (1790), 3 Bro. C. C. 90; *Hanbury v. Kirkland* (1829), 3 Sim. 265; *Trutch v. Lamprell* (1855), 20 Beav. 116; *Candler v. Tillet* (1855), 22 Beav. 257; *Thompson v. Finch* (1856), 8 De G. M. & G. 560, C. A.; *Lewis v. Nobbs* (1878), 8 Ch. D. 591; *Re Flower (C.) and Metropolitan Board of Works, Re Flower (M.) and Same* (1884), 27 Ch. D. 592, *per* KAY, J., at p. 596.

(*k*) *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 Ch. 470, C. A.

(*l*) *Cottam v. Eastern Counties Rail. Co.* (1860) 1 John. & H. 243; *Re Sisson's Settlement, Jones v. Trappes*, [1903] 1 Ch. 262. As to allowing securities and documents of title to be held by bankers or solicitors, see pp. 142, 144, *post*.

(*m*) *Leyton v. Sneyd* (1818), 8 Taunt. 532; *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121, C. A., *per* JESSEL, M.R., at pp. 125, 126; *Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A.; *Re Flower (C.) and Metropolitan Board of Works, Re Flower (M.) and Same, supra*; *Astbury v. Astbury*, [1898] 2 Ch. 111, *per* STIRLING, J., at pp. 115, 116; and as to joining in receipts, see note (*p*), p. 140, *post*. But as to lodging funds in court, see pp. 175 *et seq.*, *post*; as to charitable and public trusts, see *Re Whiteley, London (Bishop) v. Whiteley*, [1910] 1 Ch. 600; see also note (*k*), p. 28, *ante*; title CHARITIES, Vol. IV., pp. 230, 275, 276. Where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there is a usage or custom to the contrary (*Blacket v. Blizard* (1829), 9 B. & C. 851, *per* BAYLEY, J., at p. 857). As regards the enfranchisement of copyholds by the trustees of a manor or of a copyhold, see title COPYHOLDS, Vol. VIII., p. 116; as to proof in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 210. Where there is a trust for sale, with discretionary power to postpone the sale, the sale must take place unless all the trustees agree to its postponement (*Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50).

(*n*) *Lee v. Sankey* (1872), L. R. 15 Eq. 204; see *Walker v. Symonds* (1818), 3 Swan. 1, 63; *Hall v. Franck* (1849), 11 Beav. 519. An acknowledgment by one of two trustees will not prevent the Statute of Limitations running (*Richardson v. Younge* (1871), 6 Ch. App. 478).

(*o*) *Messeena v. Carr* (1870), L. R. 9 Eq. 260, 262.

(*p*) *Nicholson v. Smith* (1882), 22 Ch. D. 640.

(*q*) *Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42, C. A.; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752; *Re Crouther, Midgley v. Crouther*, [1895] 2 Ch. 56; *Train v. Clapperton*, [1908] A. C. 342.



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trustee to hold an even hand between the parties interested under the trust, and to look to the interests of all and not to those of any particular beneficiary or class of beneficiaries (*r*). He must not be a partisan of one of several *cestuis que trust* (*a*).

Assigns  
and incum-  
brancers.

**265.** A trustee stands in the same fiduciary relation and has the same duties towards the assigns of a beneficiary or persons in whose favour a beneficiary has given a charge on the trust property as towards the beneficiary himself (*b*). Notwithstanding the statutory power of a mortgagee to give receipts (*c*), a trustee is not bound to hand over to the mortgagee of the share of a beneficiary the whole of the share which the beneficiary was entitled to receive, and does not act unreasonably in refusing to do so where, to his knowledge, a question exists as to the right of the mortgagee to the whole of the share (*d*). He cannot, however, require an assignee of the share of a beneficiary to deliver to him the assignment and other documents of title before handing over the share (*e*).

Payment of  
income and  
*corpus*.

**266.** It is the duty of a trustee to pay the income and the *corpus* of the trust property to the persons who are entitled to them respectively (*f*); when he is in doubt as to who these persons are, he

(*r*) *Howe v. Dartmouth* (*Earl*), *Howe v. Aylesbury* (*Countess*) (1802), 7 Ves. 137; *Mortlock v. Buller* (1804), 10 Ves. 292, per Lord ELDON, L.C., at p. 309; *Burges v. Lamb* (1809), 16 Ves. 174, 178; *Anon.* (1821), Madd. & G. 10, 11; *Davies v. Wescomb* (1828), 2 Sim. 425; *Hutchinson v. Morritt* (1839), 3 Y. & C. (EX.) 547; *Benn v. Dixon* (1840), 10 Sim. 636; *Stuart v. Stuart* (1841), 3 Beav. 430; *Mortimer v. Watts* (1851), 14 Beav. 616, 623; *Raby v. Ridehalgh* (1855), 7 De G. M. & G. 104, C. A., per TURNER, L.J., at p. 109; *Luther v. Bianconi* (1860), 10 I. Ch. R. 194, 205; *Re Tempest* (1866), 1 Ch. App. 485, per TURNER, L.J., at pp. 487, 488; *Re Atkins*, *Newman v. Sinclair* (1899), 81 L. T. 421; and see pp. 136, 138, 156, *post*. As a general rule the rights of *cestuis que trust* cannot be affected by the act of their trustee (*Re Swan* (1864), 2 Hem. & M. 34, per WOOD, V.-C., at p. 37); but a trustee may pay out to one beneficiary his share of the trust property immediately on his becoming entitled thereto in possession, notwithstanding the risk of the shares of the other beneficiaries being reduced by subsequent depreciation or losses (*Fenwick v. Clarke* (1862), 4 De G. F. & J. 240, C. A.; *Re Winslow*, *Frere v. Winslow* (1890), 45 Ch. D. 249; *Re Lepine*, *Dowsett v. Culver*, [1892] 1 Ch. 210, C. A.; *Re Hurst*, *Addison v. Topp* (1892), 67 L. T. 96, C. A., per LINDLEY, L.J., at p. 99).

(*a*) *Simpson v. Bathurst*, *Shepherd v. Bathurst* (1869), 5 Ch. App. 193, per Lord HATHERLEY, L.C., at p. 202; *Ellis v. Barker* (1871), 7 Ch. App. 104.

(*b*) *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561, per Lord COTTENHAM, L.C., at p. 578; *Davis v. Hutchings*, [1907] 1 Ch. 356, 361.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22 (1); see title MORTGAGE, Vol. XXI., pp. 259, 260.

(*d*) *Re Bell*, *Jeffery v. Sayles*, [1896] 1 Ch. 1, C. A.; *Hockey v. Western*, [1898] 1 Ch. 350, C. A.

(*e*) *Re Palmer*, *Lancashire and Yorkshire Reversionary Interest Co. v. Burke*, [1907] 1 Ch. 486.

(*f*) *Watts v. Turner* (1830), 1 Russ. & M. 634; *Angier v. Stannard* (1834), 3 My. & K. 566; *Willis v. Hiscox* (1839), 4 My. & Cr. 197; *Thorby v. Yeats* (1842), 1 Y. & C. Ch. Cas. 438; *Hampshire v. Bradley* (1845), 2 Coll. 34; *Firmin v. Pulham* (1848), 2 De G. & Sm. 99; *Devey v. Thornton* (1851), 9 Hare, 222; *Hutchins v. Hutchins* (1851), 15 Jur. 869; *Warter v. Anderson* (1853), 11 Hare, 301, per WOOD, V.-C., at p. 303; *Eaves v. Hickson* (1861), 30 Beav. 136; *Smith v. Bolden* (1863), 33 Beav. 262; *Sporle v. Barnaby* (1864), 10 Jur. (N. S.) 1142; *Goldsmid v. Heathcote* (1864), 10

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should apply to the court for its direction on the subject (*g*). He is liable if he wilfully or negligently or through a mistake on a point of law pays to the wrong person (*h*), and may be held liable even if he is induced by forgery or fraud to do so (*i*). He is not, however, liable if he pays to a beneficiary originally entitled where he had no notice of the derivative title of the person actually entitled, provided that his ignorance of it is not due to any negligence on his part (*k*), and in other cases ignorance of the true facts may relieve him from liability for payment to the wrong person (*l*).

A trustee paying money or otherwise acting in good faith under or in pursuance of a power of attorney is not liable for any such payment or act by reason of the person who gave the power of attorney being then dead or having done some act to avoid the

Trustee acting  
under power  
of attorney.

L. T. 811; *May v. Armstrong*, [1866] W. N. 233; *Southwell v. Martin* (1869), 21 L. T. 135; *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552; *Re Bennison, Cutler v. Boyd* (1889), 60 L. T. 859; *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY, L.J., at p. 99; *Davis v. Hutchings*, [1907] 1 Ch. 356; *Re Ruddock, Newberry v. Mansfield* (1910), 102 L. T. 89, C. A.; and see note (*l*), p. 115, *ante*. A trustee is entitled to full information as to who are entitled to the trust property (*Burrows v. Greenwood* (1840), 4 Y. & C. (EX.) 251; *Holford v. Phipps* (1841), 3 Beav. 434; *Hurst v. Hurst* (1874), 9 Ch. App. 762, 766). As to the duties of a trustee to whom a trust fund is appointed under a special power for the objects of the power, see title POWERS, Vol. XXIII., p. 54; as to appropriating specific portions of the trust property to individual beneficiaries, see p. 141, *post*; as to paying out their specific shares from time to time as they become entitled in possession, see note (*r*), p. 124, *ante*.

(*g*) *Talbot v. Radnor (Earl)* (1834), 3 My. & K. 252; *Merlin v. Blaggrave* (1858), 25 Beav. 125, *per* ROMILLY, M.R., at pp. 137, 138. A trustee may in some cases be protected by legal advice in paying a trust fund to the wrong person (*Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1, C. A.; but see *Boulton v. Beard* (1853), 3 De G. M. & G. 608, C. A.; *Davis v. Hutchings*, *supra*, at p. 365; and see, generally, p. 121, *ante*, p. 141, *post*).

(*h*) *Hopkins v. Myall* (1830) 2 Russ. & M. 86; *Hodgson v. Hodgson* (1837), 2 Keen, 704; *Hutchins v. Hutchins* (1851), 15 Jur. 869; *Harrison v. Randall* (1852), 9 Hare, 397, 407; *Boulton v. Beard*, *supra*; *Wright v. Chard* (1860), 1 De G. F. & J. 537, C. A.; *Barratt v. Wyatt* (1862), 30 Beav. 442; *Mackechnie v. Marjoribanks* (1870), 39 L. J. (CH.) 604; *Hilliard v. Fulford* (1876), 4 Ch. D. 389; *Re Ward, Bement v. Balls* (1878), 47 L. J. (CH.) 781; *Re Hulkes, Powell v. Hulkes*, *supra*. A trustee is liable if, under a power of advancement, he applies trust money in a manner which results in no real benefit to the infant (*Simpson v. Brown* (1865), 11 L. T. 593).

(*i*) *Ashby v. Blackwell* (1765), 2 Eden, 299, 302; *Eaves v. Hickson* (1861), 30 Beav. 136; *Sporle v. Barnaby* (1864), 10 Jur. (N. S.) 1142; *Bostock v. Floyer* (1865), L. R. 1 Eq. 26; *Sutton v. Wilders* (1871), L. R. 12 Eq. 373; *Re Bennison, Cutler v. Boyd*, *supra*; *Re Neil, Hemming v. Neil* (1890), 62 L. T. 649; *Davis v. Hutchings*, *supra*. This liability is modified by the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3; see pp. 196 *et seq.*, *post*. A trustee who pays trust money to an infant on a false representation by him and his father that he is of age is held not liable to pay it again after the beneficiary has actually come of age (*Overton v. Banister* (1844), 3 Hare, 503).

(*k*) *Cothay v. Sydenham* (1788), 2 Bro. C. C. 391; *Leslie v. Baillie* (1843), 2 Y. & C. Ch. Cas. 91; *Re Cull's Trusts* (1875), L. R. 20 Eq. 561, *per* JESSEL, M.R., at p. 563; *Williams v. Williams* (1881), 17 Ch. D. 437; *Re Long, Lovegrove v. Long*, [1901] W. N. 166; *Davis v. Hutchings*, *supra*. Ignorance does not excuse, if it is due to non-examination of the trust papers (*Hallows v. Lloyd* (1888), 39 Ch. D. 686, *per* KEKEWICH, J., at p. 691).

(*l*) *Cothay v. Sydenham*, *supra*; *Williams v. Williams*, *supra*.



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Gifts.

power, if it was not known to the trustee at the time of his so acting or paying (*m*).

**267.** Unless he is authorised to do so by the instrument creating the trust, a trustee cannot make a gift or voluntary payment out of the trust property (*n*).

Accounts.

**268.** A trustee must keep an accurate account of the trust property (*o*), and must be always ready to render it when required (*p*). He is bound to furnish to a *cestui que trust*, or to a person authorised by him (*q*), on demand, information or the means of obtaining information as to the mode in which the trust property or his share therein has been invested or otherwise dealt with, and as to where it is (*r*) and full accounts respecting it (*s*), whether the *cestui que trust* has a present interest in the trust property or has only a contingent interest in remainder (*t*). If the trustee neglects or fails

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 23. This enactment does not affect the right of any person entitled to the money against the person to whom the payment is made, and he has the same remedy against that person as, but for the enactment, he would have had against the trustee (*ibid.*); see also Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 47; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9.

(*n*) See title GIFTS, Vol. XV., pp. 403, 404; but see *Re Walker, Walker v. Duncombe*, [1901] 1 Ch. 879; *How v. Winterton (Earl)* (1902), 51 W. R. 262; *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179.

(*o*) *Freeman v. Fairlie* (1817), 3 Mer. 24, *per* Lord ELDON, L.C., at pp. 42, 43; *Kemp v. Burn* (1863), 4 Giff. 348, *per* STUART, V.-C., at pp. 349, 350. A trustee who is illiterate and incapable of keeping an account should employ an agent for the purpose (*Wroe v. Seed* (1863), 4 Giff. 425, *per* STUART, V.-C., at p. 429). A trustee is personally liable if he neglects to require annual accounts from the manager of the trust estate, where such accounts are directed by the instrument creating the trust (*Carruthers v. Carruthers*, [1896] A. C. 659). As to preserving a record of the termination of the trust, see p. 116, *ante*.

(*p*) *White v. Lincoln (Lady)*, *Newcastle (Duke) v. Kinderley* (1803), 8 Ves. 363, 369, 370; *Hardwicke (Earl) v. Vernon* (1808), 14 Ves. 504, *per* Lord ELDON, L.C., at p. 510; *Pearse v. Green* (1819), 1 Jac. & W. 135, *per* PLUMER, M.R., at p. 140; *Turner v. Corney* (1841), 5 Beav. 515; *Springett v. Dashwood* (1860), 2 Giff. 521, *per* STUART, V.-C., at p. 526; *Kemp v. Burn*, *supra*, at pp. 349, 350; *Talbot v. Marshfield* (1868), 3 Ch. App. 622; *Jefferys v. Marshall* (1870), 23 L. T. 548; *Re Hayter*, *Re Wallett*, *Hayter v. Wells* (1883), 32 W. R. 26; *Re Skinner*, *Cooper v. Skinner*, [1904] 1 Ch. 289. A trustee who allows a co-trustee to render an incorrect account is personally liable for the default (*Horton v. Brocklehurst* (No. 2) (1858), 29 Beav. 504).

(*q*) *Kemp v. Burn*, *supra*; *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY, L.J., at p. 99.

(*r*) *Walker v. Symonds* (1818), 3 Swan. 1, *per* Lord ELDON, L.C., at p. 58; *Clarke v. Ormonde (Earl)* (1821), Jac. 108, *per* Lord ELDON, L.C., at p. 120; *Newton v. Askew* (1848), 11 Beav. 145, *per* Lord LANGDALE, M.R., at p. 152; *Thompson v. Clive* (1848), 11 Beav. 475, 479; *Springett v. Dashwood*, *supra*, at p. 528; *Talbot v. Marshfield*, *supra*; *Low v. Bouverie*, *supra*, at p. 99; *Re Tillott*, *Lee v. Wilson*, [1892] 1 Ch. 86; *Re Page*, *Jones v. Morgan*, [1893] 1 Ch. 304, 309; *Re Dartnall*, *Sawyer v. Goddard*, [1895] 1 Ch. 474, C. A.

(*s*) *Kemp v. Burn*, *supra*; *Wroe v. Seed*, *supra*, *per* STUART, V.-C., at p. 429. As to reopening accounts on account of error, see title MISTAKE, Vol. XXI., p. 32.

(*t*) *Re Tillott*, *Lee v. Wilson*, *supra*; *Re Dartnall*, *Sawyer v. Goddard*, *supra*.



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to do so, he is liable to the costs of proceedings to compel the information or accounts (*a*). He is also bound to allow a *cestui que trust* to inspect the trust accounts and all documents relating to the trust (*b*), and ought to explain to the *cestui que trust* what his rights are (*c*). A trustee is, however, entitled to receive from the *cestui que trust* the costs of furnishing the information or accounts, and to require the *cestui que trust* either to pay those costs in advance or guarantee their payment (*d*); and indulgence is shown to a trustee from whom an account is demanded after a long lapse of time (*e*).

The *cestui que trust* can always challenge the amount paid to or retained by a trustee out of the trust property in respect of costs, charges, and expenses incurred by himself (*f*).

**269.** A trustee is not bound to tell a *cestui que trust* what incumbrances the *cestui que trust* has himself created, or which of the incumbrancers have given notice of their charges; nor is he bound in any other way to assist the *cestui que trust* in selling or mortgaging his beneficial interest (*g*). A stranger who proposes to buy that interest or lend money on it has no greater right than the *cestui que trust* himself (*h*). If the trustee, as a matter of courtesy, answers the inquiry, he is not bound to have made previous inquiries of his co-trustees or of the solicitor to the trust, or to do anything

Information  
as to incum-  
brances.

(*a*) *Springett v. Dashwood* (1860), 2 Giff. 521; *Kemp v. Burn* (1863), 4 Giff. 348; *Jefferys v. Marshall* (1870), 23 L. T. 548.

(*b*) *Clarke v. Ormonde (Earl)* (1821), Jac. 108; *Gough v. Offley* (1852), 5 De G. & Sm. 653; *Bugden v. Tylee* (1856), 21 Beav. 545; *Simpson v. Bathurst*, *Shepherd v. Bathurst* (1869), 5 Ch. App. 193, per Lord HATHERLEY, L.C., at p. 202; *Re Cowin*, *Cowin v. Gravett* (1886), 33 Ch. D. 179. But a *cestui que trust* cannot claim inspection of a case laid before counsel with a view to resisting his claim (*Thomas v. Secretary of State for India in Council* (1870), 18 W. R. 312).

(*c*) *Burrows v. Walls* (1854), 5 De G. M. & G. 233, C. A., per Lord CRANWORTH, L.C., at p. 253. An executor is not bound to inform a legatee of a legacy (*Re Lewis*, *Lewis v. Lewis*, [1904] 2 Ch. 656, C. A.; *Re Mackay*, *Mackay v. Gould*, [1906] 1 Ch. 25, 33).

(*d*) *Re Bosworth*, *Martin v. Lamb* (1889), 58 L. J. (CH.) 432, per KEKEWICH, J., at p. 433. A legatee under a will has a right to have a satisfactory explanation of the state of the testator's assets and an inspection of the accounts, but he has no right to require a copy of the accounts at the expense of the estate (*Ottley v. Gilby* (1845), 8 Beav. 602, per Lord LANGDALE, M.R., at p. 604).

(*e*) *Banks v. Cartwright*, [1867] W. N. 27; *Payne v. Evens* (1874), L. R. 18 Eq. 356, 363.

(*f*) *Re Fish*, *Bennett v. Bennett*, [1893] 2 Ch. 413, C. A., per BOWEN, L.J., at pp. 423, 424, per KAY, L.J., at pp. 425, 426.

(*g*) *Low v. Bouverie*, [1891] 3 Ch. 82, 99, 100, C. A.; *Ward v. Duncombe*, [1893] A. C. 369, per Lord MACNAGHTEN, at pp. 393, 394; and see title CHOSSES IN ACTION, Vol. IV., pp. 385, 386. It is no part of the duty of a trustee to assist his *cestuis que trust* in selling or mortgaging their beneficial interests or in squandering or anticipating their fortune (*Low v. Bouverie*, *supra*).

(*h*) *Low v. Bouverie*, *supra*, at pp. 99, 100. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*; and although the stranger, in making inquiries, may be regarded as authorised by the *cestui que trust* to make them, this does not give him a right to information which the *cestui que trust* himself is not entitled to demand (*ibid.*).

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more than answer honestly to the best of his actual knowledge and belief (*i*); and if he does this, he exposes himself to no liability, unless he binds himself by a warranty, or so expresses himself as to be estopped from afterwards denying the truth of what he said, or unless in some other way he undertakes a greater responsibility (*k*).

Enforcement  
of duty.

**270.** If a trustee wilfully refuses to do an act which it is his duty to do in his position of trustee, he will be compelled by a court of equity to do it (*l*), and may be ordered to pay the costs of any legal proceedings rendered necessary by his refusal (*m*).

SUB-SECT. 2.—*Conversion of Trust Property.*

Duty to con-  
vert.

**271.** It is the duty of a trustee to sell and convert the trust property (1) where the instrument creating the trust directs that it shall be sold and converted (*n*); (2) where the property consists of hazardous or unauthorised investments (*o*); and (3) where the property cannot be held to the advantage of beneficiaries for life and in

(*i*) *Low v. Bouverie*, [1891] 3 Ch. 82, per LINDLEY, L.J., at p. 100.

(*k*) *Burrowes v. Lock* (1805), 10 Ves. 470; *Derry v. Peek* (1889), 14 App. Cas. 337; *Low v. Bouverie*, *supra*, at p. 100. A trustee who has signed a memorandum to the effect that he has not received notice of any prior charge on the trust property after having in fact received such a notice, which he has forgotten, is not liable under the memorandum to mortgagees of the trust property who induced him to sign it under the impression that his solicitors had approved of it, whereas they were aware that this was not the case (*Porter v. Moore*, [1904] 2 Ch. 367).

(*l*) *Milsington (Viscount) v. Mulgrave (Earl)* (1818), 3 Madd. 491; *Ouchterlony v. Lynedoch (Lord)* (1830), 7 Bl. (N. S.) 448, H. L.; *Mortimer v. Watts* (1852), 14 Beav. 616; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752, per CHITTY, J., at p. 753. But if, under the terms of the trust, the trustee has a discretion as to the time or manner of doing the act, the court does not interfere with the exercise of that discretion (*Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A.; *Re Burrage, Burningham v. Burrage*, *supra*).  
(*m*) *Jones v. Lewis* (1786), 1 Cox, Eq. Cas. 199; *Southwell v. Martin* (1869), 21 L. T. 135; *Re Chapman, Freeman v. Parker* (1895), 72 L. T. 66, C. A.; and see pp. 193, 194, *post*.

(*n*) *Re Atkins, Newman v. Sinclair* (1899), 81 L. T. 421. Where this is the case, the trustee must sell or convert the property within a reasonable period (*Bate v. Hooper* (1855), 5 De G. M. & G. 338, C. A.; *Hughes v. Empson* (1856), 22 Beav. 181; *Grayburn v. Clarkson* (1868), 3 Ch. App. 605), even though the exact time is left in his discretion (*Sculthorpe v. Tipper* (1871), L. R. 13 Eq. 232; *Re Atkins, Newman v. Sinclair*, *supra*). The period is ordinarily twelve months (*Bate v. Hooper*, *supra*; *Grayburn v. Clarkson*, *supra*); but he may be bound to realise the property sooner or be justified in prolonging the period (*Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Paddon v. Richardson* (1855), 7 De G. M. & G. 563, C. A.); and a trust to sell a business with all convenient speed with power to postpone sale has been held to authorise the postponement of the sale for two years (*Re Smith, Arnold v. Smith*, [1896] 1 Ch. 171). A power to postpone sale and conversion authorises the carrying on of a business for a reasonable period (*Re Chancellor, Chancellor v. Brown* (1884), 26 Ch. D. 42, C. A.). As to conversion and reconversion of property generally, see pp. 31, 32, 51, 52, *ante*; title EQUITY, Vol. XIII., pp. 104 *et seq.*

(*o*) *Hughes v. Empson*, *supra*; *Grayburn v. Clarkson*, *supra*; *Sculthorpe v. Tipper*, *supra*; *Marsden v. Kent* (1877), 5 Ch. D. 598, C. A.; *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co., Ltd., Dunning v. Gainsborough (Earl)* (1885), 54 L. J. (CH.) 991, 996, 997.

remainder, whether by reason of its being of a wasting nature (*p*) or of its being in reversion and not yielding a present income (*q*), unless the instrument creating the trust expressly or by implication requires or authorises abstention from sale and conversion (*r*).

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Trustees.

**272.** If the instrument creating the trust expressly gives to the trustee a discretion as to conversion or non-conversion of the property, he may exercise it by refraining from conversion in spite of one *cestui que trust* being thereby benefited at the expense of another (*s*). With such an exercise of the discretion a court of equity does not interfere (*t*).

Discretion as  
to conversion.

SUB-SECT. 3.—*Investment of Trust Funds.*

**273.** Unless a trustee is expressly otherwise authorised or required under the terms of his trust, he must duly and promptly invest all capital trust money coming to his hands (*u*), and all income which cannot be immediately applied for the purposes of the trust (*a*); and he is liable for any loss which may result from its being improperly invested (*b*) or being left uninvested for an

Duty to  
invest.

(*p*) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137; *Pickering v. Pickering* (1839), 4 My. & Cr. 289; *Benn v. Dixon* (1840), 10 Sim. 636; *Hinves v. Hinves* (1844), 3 Hare, 609; *Tickner v. Old* (1874), L. R. 18 Eq. 422; *Porter v. Baddeley* (1877), 5 Ch. D. 542; and see p. 31, *ante*.

(*q*) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)*, *supra*, per Lord ELDON, L.C., at p. 148. Where a reversionary interest is not sold, the tenant for life is entitled to income on the footing of the conversion having taken place (*Wilkinson v. Duncan* (1857), 23 Beav. 469; *Wright v. Lambert* (1877), 6 Ch. D. 649; *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643; and see pp. 30 *et seq.*, *ante*).

(*r*) *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)*, *supra*; *Alcock v. Slopier* (1833), 2 My. & K. 699; *Mills v. Mills* (1835), 7 Sim. 501; *Pickering v. Pickering*, *supra*, per Lord COTTENHAM, L.C., at pp. 298 *et seq.*; *Morgan v. Morgan* (1851), 14 Beav. 72; *Thornton v. Ellis* (1852), 15 Beav. 193; *Macdonald v. Irvine* (1878), 8 Ch. D. 101, C. A., per JAMES, L.J., at p. 124. Abstention from conversion is required where the property in its actual state is specifically settled in trust (*Collins v. Collins* (1833), 2 My. & K. 703; *Daniel v. Warren* (1843), 2 Y. & C. Ch. Cas. 290; *Hinves v. Hinves*, *supra*), or specific directions are given as to the income of it (*Goodenough v. Tremamondo* (1840), 2 Beav. 512; *Cafe v. Bent* (1845), 5 Hare, 24, 33 *et seq.*; *Neville v. Fortescue* (1848), 16 Sim. 333; *Vachell v. Roberts* (1863), 32 Beav. 140; *Re Chancellor, Chancellor v. Brown*, (1884), 26 Ch. D. 42, C. A.; *Re Sherry, Sherry v. Sherry*, [1913] 2 Ch. 508).

(*s*) *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; *Miller v. Miller* (1872), L. R. 13 Eq. 263; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Gray v. Siggers* (1880), 15 Ch. D. 74; *Re Chancellor, Chancellor v. Brown*, *supra*; *Re Crowther, Midgley v. Crowther*, [1895] 2 Ch. 56; *Re Pitcairn, Brandreth v. Colvin*, [1896] 2 Ch. 199; *Re Schneider, Kirby v. Schneider* (1906), 22 T. L. R. 223; and see *Re Marshall, Marshall v. Marshall*, [1914] 1 Ch. 192, C. A.

(*t*) *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752.

(*u*) *Cann v. Cann* (1884), 51 L. T. 770. Six months is the maximum period for which it can reasonably be left uninvested (*ibid.*, per KAY, J., at p. 771).

(*a*) See title PERPETUITIES, Vol. XXII., pp. 373, 374.

(*b*) *Trafford v. Boehm* (1747), 3 Atk. 440; *Hancom v. Allen* (1774), 2 Dick. 498.



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unreasonable length of time (*c*), and for interest during the period of its being so left (*d*). The investment must be made in the name of the trustee (*e*), and, if there are several trustees, in the name of all of them (*f*), except where, under the conditions of the investment, it can only be made in the name of one (*g*).

Mode of  
investment.

**274.** The mode in which a trustee can invest trust moneys is primarily limited by the instrument creating the trust. Subject to any express directions contained in that instrument (*h*), and to any conditions thereby prescribed (*i*), he may invest the moneys in any manner thereby authorised (*k*), provided that in making the selection

(*c*) *Franklin v. Frith* (1792), 3 Bro. C. C. 433; *Moyle v. Moyle* (1831), 2 Russ. & M. 710; *Cann v. Cann* (1884), 51 L. T. 770.

(*d*) *Stafford v. Fiddon* (1857), 23 Beav. 386; *Re Jones, Jones v. Searle* (1883), 49 L. T. 91; *Gilroy v. Stephen* (1882), 30 W. R. 745.

(*e*) *Webb v. Jonas* (1888), 39 Ch. D. 660, *per* KEKEWICH, J., at pp. 666, 667; *Field v. Field*, [1894] 1 Ch. 425, *per* KEKEWICH, J., at p. 429.

(*f*) *Swale v. Swale* (1856), 22 Beav. 584; *Lewis v. Nobbs* (1878), 8 Ch. D. 591, *per* HALL, V.-C., at p. 594.

(*g*) *Consterdine v. Consterdine* (1862), 31 Beav. 330, 334.

(*h*) *Beauclerk v. Ashburnham* (1845), 8 Beav. 322; *Cadogan v. Essex (Earl)* (1854), 2 Drew. 227.

(*i*) A common condition is the consent of one or more of the *cestuis que trust*, which may, generally speaking, be given either before or after the investment (*Stevens v. Robertson* (1868), 37 L. J. (CH.) 499, 502; but see *Bateman v. Davis* (1818), 3 Madd. 98). Where a *cestui que trust* improperly withholds his consent, the court dispenses with it (*Costello v. O'Rourke* (1869), 3 I. R. Eq. 172, 184).

(*k*) *Re Whiteley, Whiteley v. Learoyd* (1886), 33 Ch. D. 347, C. A., *per* LOPES, L.J., at p. 358; S. C., on appeal, *sub nom. Learoyd v. Whiteley* (1887), 12 App. Cas. 727, *per* Lord WATSON, at p. 733. The instrument may authorise an investment in foreign Government bonds passing by delivery (*Arnould v. Grinstead* (1872), 21 W. R. 155). A direction to invest in foreign Government securities authorises an investment in the securities of a subordinate Government, such as that of one of the United States of America (*Cadett v. Earle* (1877), 5 Ch. D. 710); but a power to invest in the stocks or securities of a British colony or dependency does not authorise an investment in the stocks of a province of the Dominion of Canada (*Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55, C. A.). A direction to hold existing Government securities includes Government bonds passing by delivery (*Arnould v. Grinstead* (1872), 21 W. R. 155). A power to leave the fund with a particular firm at interest does not authorise its being so left after a change in the *personnel* of the firm (*Cummins v. Cummins* (1845), 3 Jo. & Lat. 64; *Re Tucker, Tucker v. Tucker*, [1894] 1 Ch. 724; *Smith v. Patrick*, [1901] A. C. 282; and see *Re Morrison, Morrison v. Morrison*, [1901] 1 Ch. 701). An authority to retain shares in a particular company as part of the trust fund does not warrant the acquisition of additional shares in the company (*Re Pugh, Banting v. Pugh*, [1887] W. N. 143), or the acceptance of new shares if the company is reconstructed (*Re Morris, Bucknill v. Morris* (1885), 52 L. T. 462; *Re Anson's Settlement, Lovelace (Earl) v. Anson*, [1907] 2 Ch. 424; but see *Re Smith, Smith v. Lewis*, [1902] 2 Ch. 667). If bonus shares are allotted to the trustee in respect of his holding, he must at once sell them (*Re Pugh, Banting v. Pugh, supra*). In powers of investment, "a public company" includes any company incorporated under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), or the Acts which it replaces (*Re Sharp, Rickett v. Sharp* (1890), 45 Ch. D. 286, C. A.; but see *Re Castlehow, Lamonby v. Carter*, [1903] 1 Ch. 352), and "a company incorporated by statute" includes any company incorporated by charter granted under the authority of a general Act of Parliament (*Elve v. Boyton*,

he uses proper care and caution, and avoids investments which are attended with hazard (*l*).

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**275.** The instrument may authorise investment on personal security (*a*), including the security of the personal undertaking of an individual, as well as the security of personal property (*b*). A loan of trust money on personal security, however, must be made in good faith and in the interests of the *cestuis que trust* and not merely of the borrower (*c*), and cannot be made unless expressly authorised (*d*).

Personal  
security.

**276.** The language of the instrument of trust is strictly construed; and under a direction to trustees to invest the trust fund, or place out the trust fund at interest or on security, at their discretion, they can only invest on proper securities (*e*).

Investment at  
discretion.

Unless a trustee is expressly forbidden to do so by the instrument, if any, creating the trust (*f*), or unless such investment

[1891] 1 Ch. 501, C. A.); but "a company created by statute" means a company expressly incorporated by a special Act of Parliament (*Re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 590). A limited company registered and having its head office in the United Kingdom, where its board of directors meets to manage and control its affairs is "a company in the United Kingdom," although the property of the company is situated abroad and its operations are carried on abroad (*Re Hilton, Gibbes v. Hale-Hinton*, [1909] 2 Ch. 548, *per NEVILLE, J.*, at p. 551). A power to invest in the preference stock of certain companies does not authorise an investment in their fully-paid preference shares (*Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563). "A municipal corporation" does not include incorporated harbour trustees (*Hutton v. Annan*, [1898] A. C. 289; see *Wood v. Middleton* (1898), 79 L. T. 155). As to the meaning of "public stocks of the Bank of England," see *Re Hill, Fettes v. Hill*, [1914] W. N. 132.

(*l*) *Re Whiteley, Whiteley v. Learoyd* (1886), 3 Ch. D. 347, 358, C. A.; S. C., affirmed, *sub nom. Learoyd v. Whiteley* (1887), 12 App. Cas. 727, 733; and see p. 137, *post*.

(*a*) *Re Laing's Settlement, Laing v. Radcliffe*, [1899] 1 Ch. 593. The trustee may lend the trust money to the beneficiary for life if there is a reasonable prospect of repayment by him (*ibid.*; but see note (*p*), p. 121, *ante*). Where under a marriage settlement trustees are empowered with the consent of the wife to lend the trust money to the husband, it has been held that her consent cannot be given retrospectively (*Bateman v. Davis* (1818), 3 Madd. 98), and that her consent is necessary to every loan made to him from time to time and cannot be given prospectively, but that, unless the terms of her consent only authorise a loan for a limited time, the money may remain on loan to him indefinitely (*Child v. Child* (1855), 20 Beav. 50).

(*b*) *Forbes v. Ross* (1788), 2 Bro. C. C. 430; *Pickard v. Anderson* (1872), L. R. 13 Eq. 608.

(*c*) *Langston v. Ollivant* (1807), Coop. G. 33.

(*d*) *Ryder v. Bickerton* (1743), 3 Swan. 80, note (*a*); *Holmes v. Dring* (1788), 2 Cox, Eq. Cas. 1; *Pocock v. Reddington* (1801), 5 Ves. 794, 799; *Walker v. Symonds* (1818), 3 Swan. 1, 63; *Mills v. Osborne* (1834), 7 Sim. 30; *Styles v. Guy* (1849), 1 Mac. & G. 422, 431, C. A.

(*e*) *Dickinson v. Player* (1837), Coop. Pr. Cas. 178, 179, 180; *Harris v. Harris* (No. 1) (1861), 29 Beav. 107; *Bethell v. Abraham* (1873), L. R. 17 Eq. 24, *per JESSEL, M.R.*, at p. 27; *Murphy v. Doyle* (1892), 29 L. R. Ir. 333, C. A.; *Re Brown, Brown v. Brown* (1885), 29 Ch. D. 889, 891). But a power to employ the trust property at discretion has a wider meaning (*Dickinson v. Player, supra*; and see *Re Hargreaves, Hick v. Hargreaves* (1886), [1901] 2 Ch. 547, n.).

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1; *Ovey v. Ovey*, [1900] 2 Ch. 524; and see *Re Othwaite, Othwaite v. Taylor*, [1891] 3 Ch. 494;



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is manifestly improper or imprudent (*g*), he may invest trust funds in his hands, whether at the time in a state of investment or not, in certain stocks, funds and securities authorised by statute, notwithstanding that they are not authorised by the instrument creating the trust (*h*).

*Re Maire, Maire v. De la Batut* (1905), 49 Sol. Jo. 383; *Re Burke, Burke v. Burke*, [1908] 2 Ch. 248; *Re Hill, Fettes v. Hill*, [1914] W. N. 132.

(*g*) See note (*l*), p. 131, *ante*, p. 137, *post*.

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, 4; Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2; Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 17 (4). These enactments apply to funds held by a corporation in trust for a charity (*Re Manchester Royal Infirmary, Manchester Royal Infirmary v. A.-G.* (1889), 43 Ch. D. 420), but not to the trust funds of a building society (*Re National Permanent Mutual Benefit Building Society* (1889), 43 Ch. D. 431); as to capital moneys arising under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and amending Acts, see *Re Mackenzie's Trusts* (1883), 23 Ch. D. 750; title SETTLEMENTS, Vol. XXV., p. 646. The following are the investments of trust funds authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, subject to the conditions mentioned below:—(i.) (1) Parliamentary stocks, public funds and Government securities of the United Kingdom; (2) real and heritable securities in Great Britain and Ireland; (3) stock of the Banks of England and Ireland; (4) India  $3\frac{1}{2}$  and 3 per cent. stock and any other capital stock from time to time issued by the Secretary of State in Council of India under the authority of Act of Parliament and charged on the revenues of India; (5) securities the interest of which is for the time being guaranteed by Parliament; (6) Consolidated Stock created by the Metropolitan Board of Works or by the London County Council and debenture stock created by the receiver for the Metropolitan Police District; (7) debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament and having during each of the years past before the date of the investment paid a dividend of not less than 3 per cent. per annum on its ordinary stock; (8) stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for not less than 200 years at a fixed rental to any such railway company as is mentioned under item (7) either alone or jointly with any other railway company; (9) debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India; (10) "B" annuities of the Eastern Bengal, the East Indian, and the Scinde, Punjaub and Delhi Railways, and any like annuities which may be from time to time created on the purchase of any other railway by the Secretary of State in Council of India and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway (see *Re Mansel, Rhodes v. Jenkin* (1881), 45 L. T. 741); and also deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C of the East Indian Railway Company; (11) stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India or upon the capital of which the interest is so guaranteed (see *ibid.*); (12) debenture and guaranteed and preference stock of any company in Great Britain or Ireland established for the supply of water for profit and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than £5 per cent. on its ordinary stock; (13) nominal or inscribed stock issued from time to time by the corporation of a municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000 (see *Re Druitt, Druitt v. Dehler*, [1903] 1 Ch. 446, C. A.), or by a county council, under the authority of an Act of Parliament or provisional order; (14) nominal or inscribed stock issued



**277.** Investments in or upon the security of mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865 (*i*), may be made by a trustee who has a general power to invest in or upon the security of shares, stock, mortgages, bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament (*k*).

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on mortgage  
debentures.

**278.** Unless expressly otherwise authorised by the instrument creating the trust or by statute, a trustee who has power to invest in real securities (*l*) can only invest on a legal first mortgage (*m*) of freehold or copyhold property, but not on a mortgage of property of

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on mortgage.

from time to time by commissioners incorporated by Act of Parliament for the purpose of supplying water and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000 (see *Re Druitt, Druitt v. Dehler*, [1903] 1 Ch. 446, C. A.), provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded 80 per cent. of the amount authorised by law to be levied; (15) stocks, funds and securities for the time being authorised for the investment of cash under the control of the High Court (see R. S. C., Ord. 22, r. 17; Yearly Practice of the Supreme Court, 1914, p. 319). (ii.) Colonial stock registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 (40 & 41 Vict. c. 59) and 1892 (55 & 56 Vict. c. 35), as amended by the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), and with respect to which there have been observed such conditions, if any, as the Treasury may by order notified in the *London Gazette* prescribe (Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2). The Treasury keeps a list of colonial stocks in respect of which the above-mentioned provisions are for the time being complied with, and publishes the list in the *London* and *Edinburgh Gazettes* and in such other manner as may give the public full information on the subject (*ibid.*). (iii.) Water stock issued by the Metropolitan Water Board (Metropolis Water Act, 1902 (2 Edw. 7 c. 41), s. 17 (4)). A trustee may from time to time vary any of these investments (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1). He may invest in them notwithstanding that they are redeemable and that the price exceeds the redemption value (*ibid.*, s. 2 (1)), and may retain them until redemption (*ibid.*, s. 2 (3)); except that he may not under his statutory power of investment purchase at a price exceeding its redemption value any stock mentioned or referred to under items (7), (9), (11), (12), (13) of clause (i.), *supra*, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to under those items which is liable to be redeemed at par or at some other fixed rate at a price exceeding 15 per cent. above par or such other fixed rate (*ibid.*, s. 2 (2)).

(i) 28 & 29 Vict. c. 78.

(k) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (5).

(l) As to mortgages to trustees generally, see note (*h*), (i.). item (2), p. 132, *ante*; title MORTGAGE, Vol. XXI., pp. 107 *et seq.*, 268, 278. As to keeping notice of the trust off the title, see *ibid.*, pp. 173, 174.

(m) *Norris v. Wright* (1851), 14 Beav. 291, *per* ROMILLY, M.R., at p. 308; *Drosier v. Brereton* (1851), 15 Beav. 221, 226; *Lockhart v. Reilly* (1857), 1 De G. & J. 464, 476, C. A.; *Swaffield v. Nelson*, [1876] W. N. 255, 256; *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood* (1889), 44 Ch. D. 412, *per* STIRLING, J., at p. 459. The dictum of WRIGHT, J., in *Want v. Campain* (1893), 9 T. L. R. 254, that, notwithstanding these authorities, there is no fixed rule that a trustee must never invest on a second mortgage, appears open to question; see *Chapman v. Browne*, [1902] 1 Ch. 785, C. A., *per* ROMER, L.J., at p. 800. As to retaining a second mortgage which is part of the original trust property, see *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, C. A., *per* KNIGHT BRUCE, L.J.,

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a speculative or insecure description (*n*) or of a wasting character (*o*). By statute (*a*) he may, unless expressly forbidden by the instrument creating the trust, invest (1) on mortgage of property held for an unexpired term of not less than two hundred years and not subject to a reservation of rent greater than 1s. a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent (*b*); and (2) on any charge made under the Improvement of Land Act, 1864 (*c*), or on mortgage of any such charge (*d*).

A trustee investing on mortgage must reasonably satisfy himself that the mortgagor can give a good title to the property (*e*). He is not, however, chargeable with breach of trust only upon the ground that he has accepted a shorter title than that to which a purchaser is in the absence of a special contract entitled to require (*f*), if the title accepted is such as a person acting with prudence and caution would have accepted (*g*). Similarly, where he properly lends money on the security of leasehold property, he is not chargeable with breach of trust only upon the ground that in making the loan he dispensed either wholly or partly with the production or investigation of the lessor's title (*h*).

A trustee investing on a real security must not join in a contributory mortgage (*i*) and must not arrange with the mortgagor for the continuance of the loan for a term of years (*j*). The loan should be made under the advice of a surveyor or valuer whom the trustee reasonably believed to be an able, practical surveyor or valuer, and who was instructed and employed, independently of the owner of the property, to report as to its value and propriety as a

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at p. 252. A sub-mortgage is a permissible investment (*Smethurst v. Hastings* (1885), 30 Ch. D. 490).

(*n*) *Wyatt v. Sharratt* (1840), 3 Beav. 498; *Royds v. Royds* (1851), 14 Beav. 54; *Budge v. Gummow* (1872), 7 Ch. App. 719; *Smethurst v. Hastings*, *supra*; *Learoyd v. Whiteley* (1887), 12 App. Cas. 727; *Jones v. Julian* (1890), 25 L. R. Ir. 45; *Re Walker, Walker v. Walker* (1890), 62 L. T. 449, 452; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536. As to whether a trustee authorised to lend on leasehold property may lend on leasehold cottage property let on weekly tenancies, see *Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261, compromised, [1913] 1 Ch. 200, C. A.

(*o*) *Re Boyd's Settled Estates* (1880), 14 Ch. D. 626; *Leigh v. Leigh* (1886), 35 W. R. 121; *Learoyd v. Whiteley*, *supra*; *Re Turner, Barker v. Ivimey*, *supra*. In the absence of express authority a trustee has no power to invest on a mortgage of leaseholds (*Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492, 508, 509, C. A.).

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (1).

(*b*) *Re Chennell, Jones v. Chennell*, *supra*, per JESSEL, M.R., at p. 507.

(*c*) 27 & 28 Vict. c. 114; see title LAND IMPROVEMENT, Vol. XVIII., pp. 276 *et seq.*

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (1).

(*e*) *Waring v. Waring* (1852), 3 I. Ch. R. 331, per BLACKBURN, L.C., at p. 336.

(*f*) See title SALE OF LAND, Vol. XXV., p. 342.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (3), (4).

(*h*) *Ibid.*, s. 8 (2), (4).

(*i*) *Webb v. Jonas* (1888), 39 Ch. D. 660; *Re Massingberd's Settlement, Clark v. Trelawney* (1890), 63 L. T. 296, C. A.; *Stokes v. Prance*, [1898] 1 Ch. 212, 223, 224; *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328, 341, 342.

(*j*) *Vickery v. Evans* (1863), 33 Beav. 376.



trust investment; and the loan should not exceed two-thirds of the value of the property as stated in such report (k).

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Trustees must not lend trust money to one of their number on mortgage (l).

If the mortgaged land becomes by foreclosure or otherwise discharged from the equity of redemption, the trustee holds it on trust for sale (m).

**279.** A power to a trustee to invest in the purchase of land does not authorise him to invest in the purchase of an equity of redemption (n), even though he is the authorised holder of a second mortgage on the property (o). Investment in purchase of land.

In exercising his power he must ascertain to the best of his ability

(k) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (1), (4); *Shaw v. Cates*, [1909] 1 Ch. 389. A trustee lending money on the security of property on which he can lawfully lend is not chargeable with breach of trust by reason only of the proportion borne by the amount of loan to the value of the property at the time when the loan was made, if it appears that the loan does not exceed two-thirds of the value of the property as stated in such a report as mentioned in the text, *supra*, and was made under the advice of the surveyor or valuer expressed in the report (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (1), (4); *Re Walker*, *Walker v. Walker* (1890), 59 L. J. (CH.) 386; *Re Somerset*, *Somerset v. Poulett (Earl)* (1893), 68 L. T. 613; *Re Dive*, *Dive v. Roebuck*, [1909] 1 Ch. 328). The surveyor's fee for the report should not be dependent on the transaction being carried through (*Salisbury (Marquis) v. Keymer* (1909), 25 T. L. R. 278, *per* WARRINGTON, J.). If the trustee neglects to obtain such a report, he may be held liable for a deficiency in the security if he trusted to the mortgagor's valuer (*Waring v. Waring* (1852), 3 L. Ch. R. 331; *Ingle v. Partridge* (No. 2) (1865), 34 Beav. 411; *Fry v. Tapson* (1884), 28 Ch. D. 268; *Walcott v. Lyons* (1886), 54 L. T. 786), or if he did not employ and properly instruct a valuer and surveyor of his own (*Waring v. Waring*, *supra*; *Fry v. Tapson*, *supra*; *Re Olive*, *Olive v. Westerman* (1886), 34 Ch. D. 70; *Re Somerset*, *Somerset v. Poulett (Earl)*, *supra*; *Waite v. Parkinson* (1901), 85 L. T. 456; *Shaw v. Cates*, *supra*; *Re Solomon*, *Nore v. Meyer*, [1912] 1 Ch. 261, compromised, [1913] 1 Ch. 200, C. A.); or if he advanced more than one-half of the value in the case of house property (*Stickney v. Sewell* (1835), 1 My. & Cr. 8; *Stretton v. Ashmall* (1854), 3 Drew. 9; *Fry v. Tapson*, *supra*, at p. 279; *Smethurst v. Hastings* (1885), 30 Ch. D. 490, *per* BACON, V.-C., at p. 498; *Re Olive*, *Olive v. Westerman*, *supra*; *Re Salmon*, *Priest v. Uppleby* (1889), 42 Ch. D. 351, 364 *et seq.*, C. A.); or more than two-thirds in the case of other property (*Stickney v. Sewell*, *supra*; *Re Godfrey*, *Godfrey v. Faulkner* (1883), 23 Ch. D. 483; *Re Medland*, *Eland v. Medland* (1889), 41 Ch. D. 476, C. A., *per* NORTH, J., at p. 481). As to the proper amount to advance in the case of trade property, see *Stretton v. Ashmall*, *supra*; *Budge v. Gummow* (1872), 7 Ch. App. 719; *Walcott v. Lyons*, *supra*; *Learoyd v. Whiteley* (1887), 12 App. Cas. 727; *Palmer v. Emerson*, [1911] 1 Ch. 758.

(l) *Stickney v. Sewell*, *supra*, at pp. 14, 15; *Francis v. Francis* (1854), 5 De G. M. & G. 108, C. A.; *Fletcher v. Green* (1864), 33 Beav. 426.

(m) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 9. He may postpone the sale; and the proceeds of sale and the income until sale are to be applied as the mortgage debt and the interest thereof would have been applicable (*ibid.*).

(n) *Worman v. Worman* (1889), 43 Ch. D. 296. As to power to invest in the purchase of land, see also title SETTLEMENTS, Vol. XXV., pp. 651, 652. As to a vendor's lien for unpaid purchase-money, see title LIEN, Vol. XIX., pp. 15, 16. The land purchased is held on trust for sale unless the instrument of trust otherwise provides (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 10).

(o) *Worman v. Worman*, *supra*.



SECT. 1.  
Duties of  
Trustees.

the value of the property intended to be purchased, and must not purchase it at an excessive price (*p*). He must take care to get the legal estate and a good title with the property, and must not purchase under conditions which preclude him from doing so (*q*), though he may purchase without excluding the application of the Vendor and Purchaser Act, 1874 (*r*), s. 2 (*s*). He can purchase freehold ground rents (*t*). He must not purchase property of such a nature as unduly to benefit or prejudice one beneficiary as compared with another (*u*), and must not purchase property on speculation without having money in hand to pay for it at the time (*w*).

Investment  
on mortgage  
or in purchase  
of land subject  
to charge of  
rent.

**280.** A trustee who has power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of land charged with a rent under the powers of the Public Money Drainage Acts, 1846—1856 (*a*), or the Landed Property Improvement (Ireland) Act, 1847 (*b*), or by an absolute order made under the Improvement of Land Act, 1864 (*c*), unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge (*d*).

Investment in  
debentures  
and debenture  
stock.

**281.** A trustee who has power to invest in the mortgages or bonds of a railway or other company may invest in the debenture stock of the company; and a trustee who has power to invest in the debentures or debenture stock of a railway or other company may invest in nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875 (*e*), unless in either case the contrary is expressed in the instrument creating the trust (*f*).

(*p*) *Ingle v. Partridge* (No. 2) (1865), 34 Beav. 411, *per* ROMILLY, M.R., at p. 412; *Fry v. Tapson* (1884), 28 Ch. D. 268. The trustee must not rely on a valuation by the vendor's valuer (*Ingle v. Partridge* (No. 2), *supra*, at p. 412).

(*q*) *Eastern Counties Rail. Co. v. Hawkes* (1855), 5 H. L. Cas. 331, *per* Lord CAMPBELL, at pp. 363, 364. But he is not chargeable with breach of trust only upon the ground that in effecting the purchase he has accepted a shorter title than the title to which a purchaser is, in the absence of a special contract, entitled to require (as to which see title SALE OF LAND, Vol. XXV., p. 342), if the title accepted is such as a person acting with prudence and caution would have accepted (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (3), (4)).

(*r*) 37 & 38 Vict. c. 78.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 15. For the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, see title SALE OF LAND, Vol. XXV., pp. 337, 338, 343, 344, 422, 429, 434.

(*t*) *Re Peyton's Settlement Trust* (1869), L. R. 7 Eq. 463. Trustees empowered to invest on freehold or leasehold ground rents may purchase such ground rents (*Re Mordan, Legg v. Mordan*, [1905] 1 Ch. 515, C. A.).

(*u*) *Burges v. Lamb* (1809), 16 Ves. 174, 178; and see p. 138, *post*.

(*w*) *Ecclesiastical Commissioners v. Pinney*, [1900] 2 Ch. 736, C. A.

(*a*) 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; see title LAND IMPROVEMENT, Vol. XVIII., p. 303.

(*b*) 10 & 11 Vict. c. 32.

(*c*) 27 & 28 Vict. c. 114; see title LAND IMPROVEMENT, Vol. XVIII., p. 296.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 6.

(*e*) 38 & 39 Vict. c. 83; see title MONEY AND MONEY-LENDING, Vol. XXI., p. 62.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (2), (3). The power of a trustee is only thus enlarged when it exists under the instrument of trust independently of the power (see note (*h*), p. 132, *ante*) conferred by the Act (*Re Tattersall, Topham v. Armitage*, [1906] 2 Ch. 399).

**282.** A trustee who has power to invest in the securities of the Isle of Man or in securities of the Government of a colony may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities created under the Isle of Man Loans Act, 1880 (*g*), by the Government of the Isle of Man (*h*).

**283.** A trustee may not apply for or hold a certificate to bearer issued under the authority of the India Stock Certificate Act, 1863 (*i*), or the National Debt Act, 1870 (*k*), or the Local Loans Act, 1875 (*l*), or the Colonial Stock Act, 1877 (*m*), unless he is authorised to do so by the terms of the trust (*n*).

**284.** A trustee in investing upon an authorised investment must act subject to any consent required by the instrument creating the trust, and must exercise a discretion and not make an investment which in the circumstances it would be imprudent to make (*o*). In making the investment he should take care that the income as well as the capital is properly secured (*p*).

**285.** A trustee may exercise his power of investment by retaining authorised investments which form part of the original trust fund, unless in the circumstances it is imprudent for him to do so (*q*).

**286.** Where a particular investment was originally of a nature authorised by the instrument of trust or by the general law, the mere fact that it has ceased to be so does not render it obligatory on the trustee to cease to hold it, and he is not liable for breach of trust by reason only of his continuing to hold it (*r*).

#### SECT. 1. Duties of Trustees.

Investment in securities of Isle of Man.  
Certificates to bearer.

Consent and discretion as to investment.

Retainer of authorised investment.

Retainer of investment ceasing to be authorised.

(*g*) 43 & 44 Vict. c. 8.

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (4).

(*i*) 26 & 27 Vict. c. 73.

(*k*) 33 & 34 Vict. c. 71.

(*l*) 38 & 39 Vict. c. 83; see title MONEY AND MONEY-LENDING, Vol. XXI., p. 62, note (*a*).

(*m*) 40 & 41 Vict. c. 59.

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 7 (1); *Re Roth, Goldberger v. Roth* (1896), 74 L. T. 50. But the Bank of England or of Ireland and persons authorised to issue certificates to bearer are under no obligation to inquire whether a person applying for a certificate is or is not a trustee, and incur no liability in the event of their granting any such certificate to a trustee; nor is the certificate invalid if granted (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 7 (2)).

(*o*) *Re Whiteley, Whiteley v. Learoyd* (1886), 33 Ch. D. 347, C. A., *per* COTTON, L.J., at p. 350, *per* LOPES, L.J., at p. 358; S. C., affirmed *sub nom. Learoyd v. Whiteley* (1887), 12 App. Cas. 727, 732 *et seq.*; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 3; *Hutton v. Annan*, [1898] A. C. 289; and see note (*i*), p. 130, *ante*. A trustee must not invest on mortgage merely to accommodate the mortgagor, whether a beneficiary or not, where it is of no advantage to the trust estate (*Whitney v. Smith* (1869), 4 Ch. App. 513, 519; *Re Walker, Walker v. Walker* (1890), 62 L. T. 449). As to whether in investing on mortgage a trustee can have regard to the solvency at the time of the mortgagor, see *Re Somerset, Somerset v. Poulett (Earl)*, [1894] 1 Ch. 231, 247, 248, C. A.

(*p*) *Re Somerset, Somerset v. Poulett (Earl)*, *supra*, *per* KEKEWICH, J., at p. 247.

(*q*) *Ames v. Parkinson* (1844), 7 Beav. 379; *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, 262, 263, C. A.; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763, C. A.; *Rawsthorne v. Rowley* (1907), 24 T. L. R. 51, C. A., also reported [1909] 1 Ch. 409, n., C. A.

(*r*) Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 4;

## SECT. 1.

## Duties of Trustees.

## Change of investments.

**287.** A trustee in the exercise of his power of investment may vary the investments from time to time (*s*), and may change a first-class security into another authorised investment yielding a better rate of interest (*t*). A trustee may do this, even at some risk to the capital of the trust estate, in order to provide the parent, who is the beneficiary for life, with a better income for the support and education of his children who are interested in remainder (*a*). Generally speaking, however, except so far as is expressly directed or authorised by the instrument creating the trust, a trustee must not invest with a view to the benefit of one beneficiary at the expense of another (*b*).

## SECT. 2.—Powers and Discretions of Trustees.

## SUB-SECT. 1.—In General.

## Exercise of express powers.

**288.** A trustee may exercise all such lawful powers as are expressly reposed in him by the instrument creating the trust (*c*), and may use such discretion with respect to the time and manner and extent of exercising them as is permitted by the terms of that instrument (*d*). He must, however, exercise the powers

*Robinson v. Robinson* (1851), 1 De G. M. & G. 247, C. A.; *Re Medland, Eland v. Medland* (1889), 41 Ch. D. 476, C. A.; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763, C. A.; *Re Smith, Smith v. Lewis*, [1902] 2 Ch. 667; see *Re Brookes, Brookes v. Taylor*, [1914] 1 Ch. 558. The court may, however, notwithstanding the opposition of the trustees, direct inquiries as to whether investments should be continued (*Re D'Epinoix's Settlement, D'Epinoix v. Fettes*, [1914] 1 Ch. 890).

(*s*) *Re Cooper's Trusts*, [1873] W. N. 87; *Re Pope's Contract*, [1911] 2 Ch. 442. Investments authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1 (see note (*h*), p. 132, *ante*), may be varied from time to time (*ibid.*). As to the law under the earlier statutes, see *Re Warde* (1861), 2 John. & H. 191; *Re Clergy Orphan Corporation* (1874), L. R. 18 Eq. 280; *Re Owthwaite, Owthwaite v. Taylor*, [1891] 3 Ch. 494; *Hume v. Lopes*, [1892] A. C. 112. See also *Re Tapp and London Dock Co.'s Contract*, [1905] W. N. 85; and, under the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), *Re Tuckett's Trusts* (1888), 57 L. J. (CH.) 760.

(*t*) *Cockburn v. Peel* (1861), 3 De G. F. & J. 170, C. A., *per* TURNER, L. J., at p. 174; *Re Walker, Walker v. Walker* (1890), 62 L. T. 449, *per* KEKEWICH, J., at pp. 451, 452.

(*a*) *Cockburn v. Peel*, *supra*, at p. 174; *Re Ingram's Trust* (1863), 11 W. R. 980; *Montefiore v. Guedalla*, [1868] W. N. 87.

(*b*) *Cockburn v. Peel*, *supra*; *Waite v. Littlewood* (1872), 41 L. J. (CH.) 636; and see pp. 123, 124, 136, *ante*.

(*c*) *Costabadie v. Costabadie* (1847), 6 Hare, 410; *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Austin v. Austin, Austin v. Boyce* (1876), 4 Ch. D. 233; *Tabor v. Brooks* (1878), 10 Ch. D. 273; *Re Blake, Jones v. Blake* (1885), 29 Ch. D. 913, C. A.; *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co., Ltd., Dunning v. Gainsborough (Earl)* (1885), 54 L. J. (CH.) 991; see also titles SETTLEMENTS, Vol. XXV., pp. 682 *et seq.*; WILLS, pp. 596, 817, 818, *post*; and, as to powers of maintenance, education and advancement of infants, see title INFANTS AND CHILDREN, Vol. XVII., pp. 85 *et seq.*, 92 *et seq.*

(*d*) *Gisborne v. Gisborne*, *supra*; *Tabor v. Brooks*, *supra*; *Re Weaver* (1882), 21 Ch. D. 615, 618, C. A.; *Re Blake, Jones v. Blake*, *supra*; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752; *Re Atkins, Newman v. Sinclair* (1899), 81 L. T. 421. Where there are two separate discretionary trusts for the benefit of the same beneficiary, each trust requires a separate and independent exercise of the discretion, and there



reasonably and in good faith and for the purposes for which they were created (*e*).

**289.** Subject to any special provisions in the instrument creating the trust, a trustee may do acts which are reasonable and proper for realising the trust property (*f*) or for protecting it (*g*), and may make payments which are necessary for the due execution of the trust (*h*), and would be sanctioned by a court of equity if its sanction were applied for (*i*). As a rule, however, in any case of doubt, the trustee ought to obtain this sanction before so acting (*k*).

**290.** Where a power is discretionary and does not amount to an actual trust or obligation (*l*) the trustee will not be compelled to exercise it (*m*), even though its non-exercise will benefit one *cestui que trust* at the expense of another (*n*). Where the exercise of the power is obligatory, but the time and manner of its exercise are discretionary, the trustee will not be interfered with as regards those particulars (*o*).

## SECT. 2.

## Powers and Discretions of Trustees.

Exercise of inherent powers.

Discretion as to exercise of power.

is no right of contribution or common obligation between the two trusts (*Smith v. Cock*, [1911] A. C. 317, P. C.). A discretionary trust which may possibly last longer than the perpetuity period is void; see title PERPETUITIES, Vol. XXII., p. 319; *English v. Cliff* (1914), *Times*, 17th June. As to the exercise of powers generally, see title POWERS, Vol. XXIII., pp. 1 *et seq.*; as to powers in the nature of trusts, see p. 17, *ante*; and title POWERS, Vol. XXIII., pp. 69 *et seq.*

(*e*) *Ord v. Noel* (1820), 5 Madd. 438, *per* LEACH, M.R., at p. 440; *Molyneux v. Fletcher*, [1898] 1 Q. B. 648; *Re Schneider, Kirby v. Schneider* (1906), 22 T. L. R. 223; *Smith v. Cock*, *supra*.

(*f*) *Waldo v. Waldo* (1835), 7 Sim. 261, 262; *Ward v. Ward* (1843), 2 H. L. Cas. 777, 784, 785; and see pp. 117, 118, *ante*. A trustee may, where an immediate realisation would have caused serious loss to the trust estate, arrange for payment of a debt due to it from one of the beneficiaries by instalments (*Ward v. Ward*, *supra*).

(*g*) *Bright v. North* (1847), 2 Ph. 216; *Stott v. Milne* (1884), 25 Ch. D. 710; and see pp. 117, 118, *ante*. A trustee may, at the cost of the trust estate, oppose a Bill in Parliament which would be prejudicial to it (*Bright v. North*, *supra*). Where the person liable to pay the premiums in respect of a policy of assurance belonging to a trust was unable to pay them, it was held that the trustee might surrender the policy in exchange for a fully paid up policy of a less amount (*Re Steen's Trusts, Steen v. Peebles* (1890), 25 L. R. Ir. 544). As to an acknowledgment by a trustee or his agent of a debt due from the trust estate, see title LIMITATION OF ACTIONS, Vol. XIX., p. 93.

(*h*) *Forshaw v. Higginson* (1857), 8 De G. M. & G. 827, C. A., *per* TURNER, L.J., at p. 834.

(*i*) *Inwood v. Twyne* (1762), 2 Eden, 148, *per* Lord HENLEY, L.C., at p. 153; *Lee v. Brown* (1798), 4 Ves. 362, *per* ARDEN, M.R., at p. 369; *Seagram v. Knight* (1867), 2 Ch. App. 628, *per* Lord CHELMSFORD, L.C., at p. 630.

(*k*) *Forshaw v. Higginson*, *supra*, at p. 834; and see pp. 119, 121, *ante*, p. 182, *post*.

(*l*) As to where this is the case, see p. 17, *ante*.

(*m*) *Camden (Marquis) v. Murray* (1880), 16 Ch. D. 161; *Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A.; *Re Blake, Jones v. Blake* (1885), 29 Ch. D. 913, C. A.; *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.

(*n*) *Re Courtier, Coles v. Courtier, Courtier v. Coles*, *supra*; *Train v. Clapperton*, [1908] A. C. 342.

(*o*) See p. 138, *ante*.

## SECT. 2.

SUB-SECT. 2.—*Particular Powers.***Powers and Discretions of Trustees.**

Power to give receipts.

Power to compound debts.

Adoption of the Conveyancing and Law of Property Act, 1881.

**291.** The receipt in writing of a trustee for money, securities or other personal property or effects, payable, transferable, or deliverable to him under a trust or power, exonerates the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof (*p*).

**292.** If and so far as a contrary intention is not expressed in the instrument creating the trust, and subject to the terms of that instrument, two or more trustees acting together, or a sole acting trustee, where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the trust; and, for any of those purposes, may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as may seem expedient, without being responsible for any loss occasioned by any act or thing so done by them or him in good faith (*q*).

**293.** As regards the powers given by the Conveyancing and Law of Property Act, 1881 (*r*), and the covenants, provisions, stipulations and words which under that Act are deemed to be included or implied in any instrument, or are by the Act made applicable to any contract for sale or other transaction, trustees and other persons in a fiduciary position, whether acting through or without a solicitor, are not guilty of neglect or breach of duty, and do not become in any way liable, by reason of the omission in good faith on the part of themselves or their solicitor to negative, in any such instrument or in connexion with any such contract or transaction, the giving, inclusion, implication or application of any of those powers, covenants, provisions, stipulations or words, or to insert or apply

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20. An earlier statute provided that the *bond fide* payment to and receipt of a person to whom any purchase or mortgage money is payable upon an express or implied trust discharges the person making the payment from seeing to the application or being answerable for the misapplication of the money, unless the contrary is expressly declared by the instrument creating the trust or security (Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 23). Where there are several trustees they must all join in the receipt (*Crewe v. Dicken* (1798), 4 Ves. 97; *Walker v. Symonds* (1818), 3 Swan. 1, 63; *Hall v. Franck* (1849), 11 Beav. 519; *Webb v. Ledsam* (1855), 1 K. & J. 385; *Margetts v. Perks* (1864), 12 W. R. 517; *Lee v. Sankey* (1873), L. R. 15 Eq. 204; *Re Flower (C.) and Metropolitan Board of Works, Re Flower (M.) and Same* (1884), 27 Ch. D. 592). As to the effect of joining in the receipt, see p. 195, *post*.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21; *Blue v. Marshall* (1735), 3 P. Wms. 381; *Ex parte Alecock* (1813), 1 Ves. & B. 176; *Ward v. Ward* (1843), 2 H. L. Cas. 777; *Ratcliffe v. Winch* (1853), 17 Beav. 217; *Forshaw v. Higginson* (1857), 8 De G. M. & G. 827, C. A., *per* TURNER, L.J., at p. 834; *Re Owens, Jones v. Owens* (1882), 47 L. T. 61, C. A.

(*r*) 44 & 45 Vict. c. 41.

any others in place thereof, in any case where the provisions of the Act would allow of their or his doing so (s).

**294.** Where the instrument creating the trust contains a trust for conversion, the trustee may from time to time agree with a beneficiary absolutely entitled to a share of the trust property for the appropriation of a specific portion thereof as his share (t); and it is his duty to appropriate where the instrument creating the trust declares separate trusts of the several shares (u). After the appropriation, neither portion of the trust property is liable to make good a subsequent depreciation in the other portion (a).

**295.** A trustee may take legal advice (b) and other expert advice (c).

SUB-SECT. 3.—*Power to Employ Agents.*

(i.) *Powers under Statute.*

**296.** A trustee may appoint a solicitor to be his agent to receive and give a discharge for money or valuable consideration or property receivable by the trustee under the trust by permitting the solicitor to have the custody of and to produce a deed containing such receipt as is referred to in the Conveyancing and Law of Property Act, 1881 (d), s. 56 (e); and a trustee is not chargeable with breach of trust by reason only of his having made or concurred in making any such

SECT. 2.  
Powers and  
Discretions  
of Trustees.

Appropriation  
of specific  
portions of  
the trust  
property.

Expert  
advice.

Appointment  
of solicitor to  
receive trust  
money or  
property.

(s) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 66. As to these powers and provisions, see titles MORTGAGE, Vol. XXI., pp. 161, 247, 267; SALE OF LAND, Vol. XXV., pp. 321, 338, 339, 344 *et seq.*, 426 *et seq.*

(t) *Re Beverly, Watson v. Watson*, [1901] 1 Ch. 681, where the principles governing appropriation were laid down by BUCKLEY, J., at p. 685. As to appropriation where there is no express trust for conversion, see *Fraser v. Murdoch* (1881), 6 App. Cas. 855; *Re Waters, Preston v. Waters*, [1889] W. N. 39; *Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Nickels, Nickels v. Nickels*, [1898] 1 Ch. 630; *Re Cooke's Settlement, Tarry v. Cooke*, [1913] 2 Ch. 661; *Re Kipping, Kipping v. Kipping*, [1914] 1 Ch. 62, C. A.; but see *Re Owthwaite, Owthwaite v. Taylor*, [1891] 3 Ch. 494. As to the appropriation of unauthorised securities, see *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; *Re Cooke's Settlement, Tarry v. Cooke, supra*; *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; as to appropriation by an executor or administrator, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 302 *et seq.* It seems that a trustee can only appropriate to himself property having a fixed ascertainable value (*Re Bythway, Gough v. Dames* (1911), 80 L. J. (CH.) 246).

(u) *Re Walker, Walker v. Walker* (1890), 62 L. T. 449, *per* KEKEWICH, J., at p. 451.

(a) *Fraser v. Murdoch, supra*, *per* Lord SELBORNE, L.C., at p. 865; *Re Waters, Preston v. Waters, supra*; see *Re Brookes, Brookes v. Taylor*, [1914] 1 Ch. 558.

(b) *Poole v. Pass* (1839), 1 Beav. 600; *Re Tryon* (1844), 7 Beav. 496, 498; *Stephens v. Newborough (Lord)* (1848), 11 Beav. 403; but he is not necessarily protected from liability if he acts wrongly upon a wrong opinion of counsel (*Firmin v. Pulham* (1848), 2 De G. & Sm. 99, 100, 101; *Devey v. Thornton* (1851), 9 Hare, 222, *per* TURNER, V.-C., at p. 232; *Boulton v. Beard* (1853), 3 De G. M. & G. 608, C. A.; *Re Knight's Trusts* (1859), 27 Beav. 45, *per* ROMILLY, M.R., at pp. 49, 50; *Re Jackson, Wilson v. Donald* (1881), 44 L. T. 467; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A., *per* Lord SELBORNE, L.C., at p. 714; and see note (g), p. 125, *ante*).

(c) *Re Pearson, Oxley v. Scarth* (1884), 51 L. T. 692, *per* PEARSON, J., at p. 694; see p. 121, *ante*.

(d) 44 & 45 Vict. c. 41.

(e) See title SALE OF LAND, Vol. XXV., p. 439.



SECT. 2.  
Powers and  
Discretions  
of Trustees.

Appointment  
of banker or  
solicitor to  
receive  
insurance  
money.

appointment (*f*); and the production of any such deed by the solicitor has the same validity and effect under that provision as if the person appointing the solicitor had not been a trustee (*g*).

A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for money payable to him under a policy of assurance, by permitting the banker or solicitor to have the custody of and produce the policy with a receipt signed by him; and a trustee is not chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment (*h*).

In neither case, however, is the trustee exempted from any liability which he would have incurred if the Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor to pay or transfer it to him (*i*). These provisions do not authorise a trustee to do anything which he is expressly forbidden to do, or to omit anything which he is expressly directed to do, by the instrument creating the trust (*j*).

(ii.) *Powers apart from Statute.*

General  
powers to  
appoint  
agents.

**297.** Independently of these statutory provisions and of any provisions in the instrument creating the trust (*k*), a trustee may allow a co-trustee, or employ an accountant, bailiff, banker, broker, solicitor, workman or other agent, to act for him in the affairs of the trust, and to receive and hold trust money and property where he is obliged to do so by common usage, and would if he were a prudent man of business do so in a similar affair of his own (*l*).

(*f*) *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (1). Where there are several trustees, they cannot appoint one of their number, not being a solicitor, to receive and give a discharge for trust money (*Re Flower (C.) and Metropolitan Board of Works, Re Flower (M.) and Same* (1884), 27 Ch. D. 592).

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (2).

(*i*) *Ibid.*, s. 17 (3); *Re Sheppard, De Brimont v. Harvey, supra*.

(*j*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (5).

(*k*) As to provisions in the instrument of trust, see *Doyle v. Blake* (1804), 2 Sch. & Lef. 231, *per* Lord REDESDALE, L.C., at p. 245; *Kilbee v. Sneyd* (1828), 2 Mol. 186, 200; *Shepherd v. Harris*, [1905] 2 Ch. 310.

(*l*) *Bonithon v. Hockmore* (1685), 1 Vern. 316; *A.-G. v. Scott* (1750), 1 Ves. Sen. 413, *per* Lord HARDWICKE, L.C., at pp. 417, 418; *Re Parsons, Ex parte Belchier, Ex parte Parsons* (1754), Amb. 218; *Henderson v. McIver* (1818), 3 Madd. 275; *Clough v. Bond* (1838), 3 My. & Cr. 490, *per* Lord COTTENHAM, L.C., at p. 497; *Wilks v. Groom* (1856), 3 Drew. 584; *Wilkinson v. Bewick* (1858), 4 Jur. (N. S.) 1010; *Benett v. Wyndham* (1862), 4 De G. F. & J. 259, 263, C. A.; *Re Bird, Oriental Commercial Bank v. Savin* (1873), L. R. 16 Eq. 203; *Speight v. Gaunt* (1883), 9 App. Cas. 1; *Re Brier, Brier v. Evison* (1884), 26 Ch. D. 238, C. A.; *Leahey v. Whiteley* (1887), 12 App. Cas. 727, 731, 734; *Shepherd v. Harris*, [1905] 2 Ch. 310. A trustee may execute a deed by attorney, and empower such attorney to receive or join in receiving trust money (*Re Helling's and Merton's Contract* (1893), 42 W. R. 19, C. A., *per* LINDLEY, L.J., at p. 21); and he may appoint an attorney to act for him in a foreign country even in matters involving judgment and discretion (*Stuart v. Norton* (1860), 14 Moo. P. C. C. 17). He may employ an agent to collect small debts (*Re Brier, Brier v. Evison supra*), and may remit or collect money through a bank and keep a

In every case the trustee must select the agent prudently and in good faith (*a*), and must employ him only so far as the matter properly lies within his professional capacity or his position as agent (*b*), and only so long as the matter requires (*c*).

A trustee cannot, however, divest himself of the trust by employing an agent, and cannot, therefore, entrust the agent with duties to any extent which the agent is willing to undertake, or pay to him any remuneration which he sees fit to demand (*d*).

**298.** Trustees may allow one of their number to collect rents (*e*)

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Liability for payment of agent.

Receipt of income by one of several trustees.

banking account for the purpose in his name as a trustee (*Knight v. Plymouth (Earl)* (1747), 1 Dick. 120; *Re Parsons, Ex parte Belchier, Ex parte Parsons* (1754), Amb. 218, per Lord HARDWICKE, L.C., at p. 219; *Wren v. Kirton* (1805), 11 Ves. 377; *Johnson v. Newton* (1853), 11 Hare, 160; *Fenwick v. Clarke* (1862), 4 De G. F. & J. 240, C. A.). Where there are several trustees, the banking account must be in the names of all, and they must not authorise the bank to pay cheques signed by one of their number (*Clough v. Bond* (1838), 3 My. & Cr. 490, 497, 498; *Trutch v. Lamprell* (1855), 20 Beav. 116). But a crossed cheque signed by all may be entrusted to one of them for delivery to a beneficiary (*Re Lake Bathurst Australasian Gold Mining Co., Barnard v. Bagshaw* (1862), 3 De G. J. & Sm. 355, C. A.). A trustee may allow an auctioneer who sells trust property to receive the deposit money (*Edmonds v. Peake* (1843), 7 Beav. 239), and a solicitor to receive money on payment off of a mortgage (*Wyman v. Paterson*, [1900] A. C. 271, per Lord DAVEY, at p. 288), but not to retain it unduly (*ibid.*; *Williams (Evans) v. Byron* (1901), 18 T. L. R. 172; *Re Sheppard, De Brimont v. Harvey*, [1911] 1 Ch. 50). As to a trustee appointing an attorney to transact matters requiring discretion, see pp. 121, 122, *ante*; as to the employment of servants and agents and the liability of the trustee for them, see also title MASTER AND SERVANT, Vol. XX., pp. 262, 263. As to employing an agent to keep the accounts of the trust, see note (*o*), p. 126, *ante*; as to where the *cestui que trust* acts as agent and as to the running of time in such cases, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 72, 73.

(*a*) *Fry v. Tapson* (1884), 28 Ch. D. 268, per KAY, J., at p. 281; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674, 678; *Rochfort v. Seaton*, [1896] 1 I. R. 18, per CHATERTON, V.-C., at pp. 24, 25; *Robinson v. Harkin*, [1896] 2 Ch. 415, 423, 424. Neither the creator of the trust nor the *cestui que trust* may dictate to a trustee what particular person he shall employ (*Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, H. L.; *Foster v. Elsley* (1881), 19 Ch. D. 518; *Re Cleveland's (Duke) Settled Estates*, [1902] 2 Ch. 350). He must select a broker or valuer himself and not leave the choice to his solicitors (*Fry v. Tapson, supra*, at p. 281; *Robinson v. Harkin, supra*).

(*b*) *Rowland v. Witherden* (1851), 3 Mac. & G. 568, 574; *Fry v. Tapson, supra*; *Re Dewar, Dewar v. Brooke* (1885), 33 W. R. 497; *Re Weall, Andrews v. Weall, supra*; *Robinson v. Harkin, supra*; and see p. 122, *ante*.

(*c*) *Matthews v. Brise* (1843), 6 Beav. 239, 244; *Wyman v. Paterson, supra*. A trustee must not leave trust money in a bank for an unduly long time (*Moyle v. Moyle* (1831), 2 Russ. & M. 710; *Matthews v. Brise, supra*; *Challen v. Shippam* (1845), 4 Hare, 555; *Gibbins v. Taylor* (1856), 22 Beav. 344; *Rehden v. Wesley* (1861), 29 Beav. 213; *Cann v. Cann* (1884), 51 L. T. 770).

(*d*) *Re Weall, Andrews v. Weall, supra*, at p. 678. Where a trustee is under an order of court allowed a commission for managing the trust estate and receiving the rents, he cannot pay out of the trust fund a further commission to a rent collector employed by him (*Cox v. Bennett* (No. 1) (1891), 39 W. R. 308, C. A.).

(*e*) *Townley v. Sherborne* (1633), J. Bridg. 35, 37; *Gough v. Smith*, [1872] W. N. 18; though he may not receive remuneration (*Home v. Pringle and*

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and generally to receive the income of trust property (*f*); and in some cases the income of the trust property is only payable to one of them (*g*).

**299.** A trustee is not liable for the default of his agent (*h*) if he employs a properly qualified person (*i*). Moreover, where a trustee observes the above limitations, he is, as a general rule, chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity (*k*), and is accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, or for any banker, broker, or other person with whom any trust moneys or securities may be deposited (*l*).

Personal  
contract with  
agent.

**300.** A trustee who employs a solicitor, auctioneer, broker, or other agent in connexion with the trust estate enters into a personal contract with him and is personally liable thereon (*n*). But if the contract is proper, having regard to the character and terms of the trust, the trustee has a right to be indemnified out of the trust estate in respect not merely of payments actually made, but of his liability under it (*n*). He can, therefore, make any

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*Hunter* (1841), 8 Cl. & Fin. 264, H. L.; compare *Shepherd v. Harris*, [1905] 2 Ch. 310. If there is any fear of misappropriation of the rents by the collecting trustee, the other trustees should notify the tenants to discontinue paying to him (*Gough v. Smith*, [1872] W. N. 18).

(*f*) *Williams v. Nixon* (1840), 2 Beav. 472; *Cottam v. Eastern Counties Rail. Co.* (1860), 1 John. & H. 243.

(*g*) Joint stock companies which do not recognise trusts pay the interest or dividend on stocks or shares to the first of several registered joint holders (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 27, Table A, clause 100). The dividends on funds in court are sometimes ordered to be paid to one or two of several trustees (*Re Coulson's Settlement* (1867), 17 L. T. 27; *Milne v. Gilbert*, [1875] W. N. 128; *Re Pryor's Settlement Trusts* (1876), 35 L. T. 202; but see *Re Carr, Carr v. Carr* (1888), 36 W. R. 688).

(*h*) *Re Parsons, Ex parte Belchier, Ex parte Parsons* (1754), Amb. 218; *Benett v. Wyndham* (1862), 4 De G. F. & J. 259, C. A.; *Speight v. Gaunt* (1883), 9 App. Cas. 1; *Re Weall, Andrews v. Weall* (1889), 42 Ch. D. 674, per KEKEWICH, J., at p. 678.

(*i*) *Re Weall, Andrews v. Weall, supra*, at p. 678; *Re Cleveland's (Duke) Settled Estates*, [1902] 2 Ch. 350, per JOYCE, J., at p. 353.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24; *Fellows v. Mitchell and Owen* (1705), 1 P. Wms. 81; *Brice v. Stokes* (1805), 11 Ves. 319, per Lord ELDON, L.C., at p. 324; *Re Fryer, Martindale v. Piequot* (1857), 3 K. & J. 317.

(*l*) *Re Parsons, Ex parte Belchier, Ex parte Parsons, supra*; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24. As to the scope of the previous identical enactment (Law of Property Amendment Act, 1895 (22 & 23 Vict. c. 35), s. 31), for which this provision was substituted, see *Speight v. Gaunt, supra*, per Lord SELBORNE, L.C., at pp. 4, 5.

(*m*) *Stanier v. Evans, Evans v. Stanier* (1886), 34 Ch. D. 470, per NORTH, J., at pp. 476, 477; *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370, per STIRLING J., at p. 376. A solicitor employed by a trustee has no lien on the trust estate for his costs (*Stanier v. Evans, Evans v. Stanier, supra*, at p. 477).

(*n*) *Stanier v. Evans, Evans v. Stanier, supra*, at p. 477; *Re Blundell, Blundell v. Blundell, supra*, at pp. 376, 377. As to bills of costs of solicitors, see *Macnamara v. Jones* (1784), 2 Dick. 587; *Re Davis, Muckalt v. Davis*,



payments in respect of it out of the trust estate in the first instance (*a*).

SECT. 2.

Powers and Discretions of Trustees.

SUB-SECT. 4.—*Powers as to Real Estate and Chattels Real.*

(i.) *Leases.*

**301.** Independently of, but subject to, any provisions in the instrument, if any, creating the trust, it is the duty of the trustee of a landed estate (*b*) to let the farms upon it from year to year in order to obtain sufficient rent and to keep the farms in a good state of cultivation (*c*). He may not grant a mining lease (*d*) or any lease of excessive length (*e*), or a lease at a premium or in reversion or containing unreasonable provisions (*f*). A person who holds property on trust cannot concur with the owner of adjoining property in letting the two properties together at one rent (*g*).

Duty to let and keep in cultivation.

(ii.) *Insurance.*

**302.** Where there is no express or implied direction on the subject in the instrument creating the trust, a trustee is not bound to insure buildings on the trust estate against loss or damage by fire (*h*); but subject to any express prohibition or direction in the instrument

Insurance against fire.

[1887] W. N. 186; *Re Wellborne*, [1901] 1 Ch. 312, C. A. As to the right of beneficiaries to tax, see *Re Story, Ex parte Marwick* (1859), 1 L. T. 16.

(*a*) *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370, 377. Where a joint retainer is given, one trustee can retain the whole bill of costs out of the trust estate, notwithstanding that his co-trustee is indebted to the trust and is insolvent (*Watson v. Row* (1874), L. R. 18 Eq. 680; *McEwan v. Crombie* (1883), 25 Ch. D. 175; but see *Smith v. Dale* (1881), 18 Ch. D. 516). See also title SOLICITORS, Vol. XXVI., pp. 734, 735.

(*b*) As to the powers of management of landed property held in trust for an infant, see title INFANTS AND CHILDREN, Vol. XVII., pp. 87, 94, 95, 97 *et seq.*; and as to advowsons held on such a trust, *ibid.*, p. 101; as to the power of trustees to redeem land tax, see title LAND TAX, Vol. XVIII., pp. 321, 322, 326; as to trusts of landed property out of the country, see title CONFLICT OF LAWS, Vol. VI., p. 204; as to express powers of management, see title SETTLEMENTS, Vol. XXV., p. 687.

(*c*) *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, *per* JESSEL, M.R., at pp. 475, 476. But a trustee for sale is not authorised to let (*Evans v. Jackson* (1836), 8 Sim. 217); see, however, p. 150, *post*.

(*d*) *Wood v. Pattenon* (1847), 10 Beav. 541, 544. But under a power to let and manage and to grant building and other leases a trustee may grant leases of open but not of unopened mines (*Clegg v. Rowland* (1866), L. R. 2 Eq. 160; *Re Baskerville, Baskerville v. Baskerville*, [1910] 2 Ch. 329; *Re Daniels, Weeks v. Daniels*, [1912] 2 Ch. 90; *Re Harter, Harter v. Harter* (1913), 57 Sol. Jo. 444); and see title MINES, MINERALS, AND QUARIES, Vol. XX., p. 533.

(*e*) *A.-G. v. Green* (1801), 6 Ves. 452; *Evans v. Jackson* (1836), 8 Sim. 217; *Wood v. Pattenon, supra*. As to a trustee's power to grant leases generally, see *A.-G. v. Owen* (1805), 10 Ves. 555, 560; *Naylor v. Arnitt* (1830), 1 Russ. & M. 501; *Micholls v. Corbett* (1865), 34 Beav. 376; *Fitzpatrick v. Waring* (1882), 11 L. R. Ir. 35, C. A.; *Re Shaw's Trusts* (1871), L. R. 12 Eq. 124.

(*f*) *Bowes v. East London Water Works Co.* (1821), Jac. 324. Where the instrument creating the trust contains a power to the trustee to lease, its terms should be strictly adhered to (*ibid.*). See also title LANDLORD AND TENANT, Vol. XVIII., pp. 361 *et seq.*, 392; and as to letting generally, see title POWERS, Vol. XXIII., pp. 56, 57, 74 *et seq.*

(*g*) *Tolson v. Sheard* (1877), 5 Ch. D. 19, C. A.

(*h*) *Bailey v. Gould* (1840), 4 Y. & C. (EX.) 221; *Dobson v. Land* (1850), 8 Hare, 216; *Fry v. Fry* (1859), 27 Beav. 144, 146; *Re McEacharn*,

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creating the trust, he may insure against loss or damage by fire (*i*) any building or other insurable property which he is not bound forthwith, upon being requested to do so, to convey absolutely to a beneficiary, to any amount, including the amount of any insurance already on foot, not exceeding three-fourths of the full value thereof, and may pay the premiums for such insurance out of the income thereof, or out of the income of any other property subject to the same trust, without obtaining the consent of any person entitled wholly or partly to such income (*k*).

(iii.) *Repairs and Improvements.*

Power to  
repair and  
improve.

**303.** The power of a trustee to repair and improve the trust property, and the question whether he is entitled to do so out of capital or income, depend on the terms of the instrument creating the trust (*l*).

Where the income of leasehold trust property is to be received by the trustee during the life of a beneficiary, he ought to keep the property in repair according to the covenants in the lease and retain sufficient income for the purpose (*m*).

Where the instrument expressly authorises a trustee to repair and generally to superintend the management of the trust estate (*n*), or to make such outlay for its improvement as he may think fit, or as may be conducive to its general benefit or to the benefit of the tenants thereof, he has wide powers of effecting repairs and improvements (*o*). In the absence of any such express authority,

*Gambles v. McEacharn*, [1911] W. N. 23. But where a testator devised a house to trustees upon trust to permit his widow if she pleased to occupy it during her life, and after her death to sell it and divide the proceeds of sale among his children, it was held that the widow while she occupied the house was liable to pay the chief rent and rates and taxes, and to maintain it in such repair as a tenant would be bound to do in the absence of express contract; but that it was the duty of the trustees to keep it sufficiently insured against loss by fire (*Kingham v. Kingham*, [1897] 1 L. R. 170).

(*i*) There is no statutory power to insure against burglary (*Re Egmont's (Earl) Trusts*, *Lefroy v. Egmont (Earl)*, [1908] 1 Ch. 821).

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18; see *Re Quicke's Trusts*, *Poltimore v. Quicke*, [1908] 1 Ch. 887. As to insurance against fire by trustees, see also title INSURANCE, Vol. XVII., pp. 372, 520, 523, 524, 547, 563.

(*l*) *Re Fowler*, *Fowler v. Odell* (1881), 16 Ch. D. 723; *Re Courtier*, *Coles v. Courtier*, *Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.; *Re Baring*, *Jeune v. Baring*, [1893] 1 Ch. 61. As to trusts to effect improvements out of income, see title PERPETUITIES, Vol. XXII., pp. 380, 381; as to the powers of trustees to execute or concur in the execution of repairs and improvements under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), and amending Acts, the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and amending Acts, see titles AGRICULTURE, Vol. I., pp. 258 *et seq.*; LAND IMPROVEMENT, Vol. XVIII., pp. 289 *et seq.*; SETTLEMENTS, Vol. XXV., pp. 644, 645; as to the power of trustees to redeem land tax, see title LAND TAX, Vol. XVIII., pp. 321, 322, 326.

(*m*) *Re Fowler*, *Fowler v. Odell*, *supra*; and see p. 100, *ante*. But his duty in this respect does not affect the relative rights as between the beneficiaries for life and in remainder (*Re Courtier*, *Coles v. Courtier*, *Courtier v. Coles*, *supra*, per COTTON, L.J., at p. 140, and per BOWEN, L.J., at p. 141).

(*n*) *Bowes v. Strathmore* (1843), 8 Jur. 92.

(*o*) *Rivers (Lord) v. Fox* (1853), 2 Eq. Rep. 776; *Re Leslie's Settlement Trusts* (1876), 2 Ch. D. 185.

or except where in the case of leasehold property it is required by the covenants in the lease (*p*), the expenditure by a trustee of trust money on the repair (other than current necessary repair) or improvement of property held in trust for a beneficiary for life and remaindermen is only permissible where it comes within the provisions of the Settled Land Act, 1882 (*q*), and the amending Acts (*r*); or where it is in the nature of salvage of the property, or is otherwise evidently as much for the benefit of the remaindermen as of the beneficiary for life (*s*). In the last-mentioned case such expenditure must generally be defrayed out of the *corpus* of the property (*t*), except so far as in the case of leasehold property it is payable out of income (*a*). A power to keep the trust property in repair and make improvements does not authorise the pulling down of a dilapidated mansion house and the building of a new one (*b*); and a trustee is not justified in building a villa on the trust estate to improve its value (*c*), or in making unnecessary improvements or additions to buildings (*d*).

In the absence of any direction or power in the matter under the terms of the instrument creating the trust, the trustee should apply to the court; and the court will direct the execution of necessary or proper repairs (*e*) or improvements (*f*), and in that case may order the cost of them to be charged on or paid out of the capital or income of the property or to be apportioned between the capital and income as the equity of the case may require (*g*).

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Absence of  
express  
authority.

(*p*) *Re Fowler, Fowler v. Odell* (1881), 16 Ch. D. 723; see p. 100, *ante*.

(*q*) 45 & 46 Vict. c. 38.

(*r*) See title SETTLEMENTS, Vol. XXV., pp. 624 *et seq.*. The payment out of capital moneys of the cost of improvements authorised by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts, may be sanctioned, notwithstanding that the terms of the instrument creating the trust would throw it upon the income of the property (*Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319).

(*s*) *Vyse v. Foster* (1872), 8 Ch. App. 309; *Conway v. Fenton* (1888), 40 Ch. D. 512; *Re Hurst, Hurst v. Hurst* (1891), 29 L. R. Ir. 219; *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153.

(*t*) *Gilliland v. Crawford* (1869), 4 I. R. Eq. 35; *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786; *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.; *Re Hurst, Hurst v. Hurst, supra*; *Re De Tabley (Lord), Leighton v. Leighton* (1896), 75 L. T. 328; but see note (*g*), *infra*.

(*a*) See p. 146, *ante*.

(*b*) *Bleazard v. Whalley* (1854), 2 Eq. Rep. 1093.

(*c*) *Vyse v. Foster, supra*.

(*d*) *Bridge v. Brown* (1843), 2 Y. & C. Ch. Cas. 181; *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344, 346.

(*e*) *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C. A., *per* LINDLEY, L.J., at p. 420; *Re Courtier, Coles v. Courtier, Courtier v. Coles, supra*; *Conway v. Fenton* (1888), 40 Ch. D. 512; but see *Re De Teissier's Settled Estates, Re De Teissier's Trusts, De Teissier v. De Teissier, supra*; *Re De Tabley (Lord), Leighton v. Leighton, supra*.

(*f*) *Frith v. Cameron* (1871), L. R. 12 Eq. 169; *Drake v. Trefusis* (1875), 10 Ch. App. 364; *Re Household, Household v. Household* (1884), 27 Ch. D. 553; *Re Verney's Settled Estates*, [1898] 1 Ch. 508; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319; *Re Farnham's Settlement, Law Union and Crown Insurance Co. v. Hartopp*, [1904] 2 Ch. 561, C. A.

(*g*) *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C. A.; *Re Courtier, Coles v. Courtier, Courtier v. Coles, supra*; *Re Redding, Thompson*



## SECT. 2.

(iv.) *Timber.*

## Powers and Discretions of Trustees.

Cutting timber.

**304.** A trustee may cut down timber on the trust property where it requires to be thinned or has arrived at maturity and would degenerate if left standing, and the court, if applied to, would authorise its being cut down (*h*).

(v.) *Renewal of Leases.*

Renewal of leases.

**305.** Subject to any express prohibition or direction in the instrument creating the trust, a trustee of leaseholds for lives or years which are renewable from time to time either under a covenant or contract, or by custom or usual practice, may, if he thinks fit, and must, if thereto required by any person having a beneficial interest, present or future or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease thereof on the accustomed and reasonable terms. Where, however, by the terms of a settlement or will creating the trust the person in possession for his life or other limited interest is entitled to enjoy the leaseholds without any obligation to renew or to contribute to the expense of renewal, the above provision only applies subject to the consent in writing of that person being obtained to the renewal on the part of the trustee. For the purpose of obtaining a renewal a trustee may make or concur in making a surrender of the lease for the time being subsisting and do all other requisite acts (*i*). If money is required to pay for the renewal, the trustee may pay it out of any money in his hands in trust for the persons beneficially interested in the leaseholds to be comprised in the renewed lease; and if he has not in his hands sufficient money for the purpose, he may raise the required amount by mortgage of the leaseholds to be comprised in the renewed lease or of any other hereditaments for the time being subject to the uses or trusts to which those leaseholds are subject (*k*).

*v. Redding*, [1897] 1 Ch. 876; *Kingham v. Kingham*, [1897] 1 I. R. 170; *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28; *Re Farnham's Settlement, Law Union and Crown Insurance Co. v. Hartopp*, [1904] 2 Ch. 561, C. A.; but see *Re De Tabley (Lord)*, *Leighton v. Leighton* (1896), 75 L. T. 328; and title LAND IMPROVEMENT, Vol. XVIII., p. 277. The cost of sanitary works executed under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), is payable out of the corpus of the property (*Re Lever, Cordwell v. Lever*, [1897] 1 Ch. 32).

(*h*) *Waldo v. Waldo* (1835), 7 Sim. 261; *Gent v. Harrison* (1859), John. 517, per WOOD, V.-C., at p. 527; see *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339.

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19 (1).

(*k*) *Ibid.*, s. 19 (2). No person advancing money upon a mortgage purporting to be made under the power conferred by *ibid.*, s. 19, is bound to see that the money is wanted or that no more is raised than is wanted for the purpose (*ibid.*, s. 19 (1)). The enactment does not affect the relative liabilities of beneficiaries for life and in remainder as to the cost of the renewal; and the fines and expenses payable for it ought to be borne by the successive beneficiaries in proportion to their relative enjoyment of the estate as ascertained by an actuarial valuation (*Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61). As to where renewal becomes impossible, see *Morres v. Hodges* (1860), 27 Beav. 625; *Re Wood's Estate* (1870), L. R. 10 Eq. 572. As to renewable leaseholds, see, further, titles LANDLORD AND TENANT, Vol. XVIII., pp. 461 *et seq.*; SETTLEMENTS, Vol. XXV., pp. 699 *et seq.*

(vi.) *Mortgages.*

## SECT. 2.

**306.** A trustee can only mortgage the trust property if and so far as he is authorised by the instrument of trust, or by statute, or by an order of the court (l).

**Powers and Discretions of Trustees.**

Where a trustee is expressly authorised to make outlays out of the income or capital of the trust property in repair or improvements, and has the legal estate in the property, he may mortgage the property in order to raise the necessary sum out of capital (m).

**Power to mortgage.**

(vii.) *Raising Money for Payment of Charges.*

**307.** Where a testator by will charges his real property or a specific portion thereof with payment of his debts or of a legacy or other specific sum of money, and devises the property charged therewith to a trustee for the whole of his estate or interest without making any express provision for the raising thereof out of the property, the trustee has power, notwithstanding any trusts actually declared by the testator, to raise the same by an absolute sale or mortgage of all or any part of the property, or partly by sale and partly by mortgage (n); and a purchaser or mortgagee is not bound to inquire whether the power of sale or mortgage is being duly exercised (o).

**Mortgage or sale to raise debts or legacies.**

(viii.) *Sale.*

**308.** Where a trustee holds the trust property on trust for sale, or exercises a power of sale contained in the instrument creating the trust (p), he must endeavour to sell the property to the best

**Trust or power to sell.**

(l) *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635, 645, C. A.; see title MORTGAGE, Vol. XXI., pp. 70, 102, 103, 270; and see pp. 147, 148, *ante*.

(m) *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786; *Re Bellinger, Durell v. Bellinger*, [1898] 2 Ch. 534.

(n) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 14. The power may be exercised by all persons in whom the devised property is for the time being vested by survivorship, descent, or devise, or who may be appointed under any power, or by the High Court, to succeed to the trusteeship (*ibid.*, s. 15). As to trusts arising under instruments since 1881, see Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 40), s. 8; as to the case where the devise is not in such terms as that the testator's whole estate and interest in the property is vested in a trustee, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 236.

(o) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 17.

(p) A limitation of time within which the power is to be exercised is merely directory, and a subsequent exercise of it is not invalid (*Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Pearce v. Gardner* (1852), 10 Hare, 287; *Cuff v. Hall* (1855), 1 Jur. (N. S.) 972; *Edwards v. Edmunds* (1876), 34 L. T. 522, *per* HALL, V.-C., at p. 524). As to selling property which the trustee had no authority to purchase, see *Re Patten and Edmonton Union* (1883), 52 L. J. (CH.) 787; *Power v. Banks*, [1901] 2 Ch. 487, 496; *Re Jenkins and Randall (H. E.) & Co.'s Contract*, [1903] 2 Ch. 362; as to selling with concurrence of beneficiaries where there is no power of sale, see *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238; as to when the power is at an end, see *Trower v. Knightley* (1821), Madd. & G. 134; *Re Gordon and Adams' Contract*, *Re Pritchard's Settled Estate*, [1914] 1 Ch. 110, C. A.; titles PERPETUITIES, Vol. XXII., p. 318; POWERS, Vol. XXIII., p. 67. A trust for sale subsists, in respect of protection to the purchaser, until the land is conveyed to or under the direction of the beneficiaries (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 10 (3)). As to when power is at an end, see *Trower v. Knightley*, *supra*; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; *Re Gordon and Adams' Contract*, *Re Pritchard's Settled Estate*, *supra*; titles PERPETUITIES, Vol. XXII., p. 318; POWERS, Vol. XXIII., p. 67. As to the inability

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advantage, and must not offer it for sale in a way calculated to depreciate its value or prejudice the sale (a). He ought to ascertain the estimated value of the property, and, unless he is bound to sell in all events, must not sell at an undervalue (b). If the trust or power is to arise on the death of a beneficiary for life, it cannot be exercised previously even with his concurrence (c). It may subsist, for the purposes of division, after all the beneficiaries have become entitled in possession (d). A trustee having a power or trust for sale cannot give to a lessee or other person an option of purchase for a definite sum at a future date, since, if the property increases in value in the meantime, the trust estate will lose the increment, while if it deteriorates the option will not be exercised (e).

By statute (f), if and so far as a contrary intention is not expressed in the instrument creating the trust or power, and subject to the provisions of that instrument, a trustee in whom a trust for sale or a power of sale is vested may sell or concur with any other person in selling all or any part of the property either subject to prior charges or not, and either together or in lots (g), and either by

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of trustees for sale to purchase, see pp. 167 *et seq.*, *post*; as to mortgages by way of trust for sale, see title MORTGAGE, Vol. XXI., pp. 72, 332.

(a) *Pechel v. Fowler* (1795), 2 Anst. 549; *Ord v. Noel* (1820), 5 Madd. 438, 440; *Anon.* (1821), Madd. & G. 10, 11; *Rede v. Oakes* (1864), 4 De G. J. & Sm. 505, 512, 514, C. A.; *Dance v. Goldingham* (1873), 8 Ch. App. 902; *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, *per* JESSEL, M.R., at pp. 815 *et seq.*; *Dunn v. Flood* (1885), 28 Ch. D. 586, C. A.; *Grove v. Search*, *Griffin v. Search* (1906), 22 T. L. R. 290. A trustee in executing a trust for sale is not bound by the wishes of a beneficiary (*Selby v. Bowie* (1863), 9 Jur. (N. S.) 432; *Grove v. Search*, *Griffin v. Search*, *supra*), and may be held liable if, in deference to those wishes, he neglects to sell advantageously to the trust estate (*Taylor v. Tabrum* (1833), 6 Sim. 281). But where he is empowered to sell by private contract, he need not negotiate for a higher bid from persons offering to purchase before closing with one of them (*Harper v. Hayes* (1860), 2 De G. F. & J. 542, C. A.). See also title POWERS, Vol. XXIII., pp. 72 *et seq.*; and as to sales by auction, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 506 *et seq.*; as to the purchaser's lien in certain circumstances, see title LIEN, Vol. XIX., pp. 16 *et seq.*; as to recourse to the land registry, see Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 68; as to conveyances and covenants for title by trustees who sell, see title SALE OF LAND, Vol. XXV., p. 427.

(b) *Campbell v. Walker* (1800), 5 Ves. 678, *per* ARDEN, M.R., at p. 680; *Oliver v. Court* (1820), 8 Price, 127, *per* RICHARDS, C.B., at p. 165; *Re Cooper and Allen's Contract for Sale to Harlech*, *supra*, at p. 815; and see title SALE OF LAND, Vol. XXV., p. 321, note (i).

(c) *Blacklow v. Laws* (1842), 2 Hare, 40; *Johnstone v. Baber* (1845), 8 Beav. 233; *Want v. Stallibrass* (1873), L. R. 8 Exch. 175; *Smith v. Great Northern Rail. Co.* (1874), 23 W. R. 126; *Carlyon v. Truscott* (1875), L. R. 20 Eq. 348; *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, C. A.; *Re Head's Trustees' and Macdonald's Contract* (1890), 38 W. R. 657, C. A.; but see *Mills v. Dugmore* (1861), 30 Beav. 104.

(d) *Peters v. Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, C. A., *per* JESSEL, M.R., at p. 435; *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334; *Re Jump*, *Galloway v. Hope*, [1903] 1 Ch. 129; and see *Talbot v. Scarisbrick*, [1908] 1 Ch. 812; *Re Horsnail, Womersley v. Horsnail*, [1909] 1 Ch. 631; *Re Kaye and Hoyle's Contract* (1909), 53 Sol. Jo. 520.

(e) *Clay v. Rufford* (1852), 5 De G. & Sm. 768, *per* PARKER, V.-C., at p. 780; *Oceanic Steam Navigation Co. v. Sutherland* (1880), 16 Ch. D. 236, C. A.

(f) Trustee Act, 1893 (56 & 57 Vict. c. 53).

(g) In the case of a sale of leaseholds in lots in exercise of a trust for sale



public auction (*h*) or private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, and may vary any contract for sale, and buy in at any auction, and rescind any contract for sale and resell, without being responsible for any consequential loss (*i*).

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Apart from statute, the power of a trustee invested with a power of sale to concur with another person in the sale of trust property jointly with adjacent or other property, or in the sale of a share or interest subject to the trust jointly with the remaining shares or interest in the same property for one entire sum, depends on whether the trust property or share or interest can be so sold advantageously, and whether a proper apportionment of the purchase-money is possible (*k*). The purchaser is entitled to be satisfied that the sale is not disadvantageous to the trust estate and that the purchase-money has been apportioned (*l*); and in a proper case the apportionment, in default of agreement, will be made by the court (*m*).

Joint sale apart from statute.

**309.** On a sale by a trustee a purchaser cannot object to the title on the ground that a condition subject to which the sale was made was unnecessarily depreciatory (*a*). A beneficiary cannot impeach the sale on that ground unless it also appears that the consideration for the sale was thereby rendered inadequate (*b*), nor can he do so after the execution of the conveyance, unless it further appears that the purchaser was acting in collusion with the trustee at the time when the contract for the sale was made (*c*).

Sale subject to depreciatory condition.

**310.** A trustee may sell without excluding the application of the Vendor and Purchaser Act, 1874 (*d*), s. 2 (*e*); and may (*f*) adopt the provisions of the Conveyancing and Law of Property Act, 1881 (*g*).

Title on sale.

the conditions may properly provide for the granting of underleases of lots sold in the event of the whole not being disposed of (*Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684, C. A., overruling *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383).

(*h*) As to sales by auction, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 506 *et seq.*

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13. This provision applies only to a trust or power created by an instrument coming into operation after the 31st December, 1881 (*ibid.*).

(*k*) *Clark v. Seymour* (1834), 7 Sim. 67; *Rede v. Oakes* (1864), 4 De G. J. & Sm. 505, C. A.; *Cavendish v. Cavendish* (1875), 10 Ch. App. 319; *Morris v. Debenham* (1876), 2 Ch. D. 540; *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, *per* JESSEL, M.R., at pp. 814 *et seq.*; *Tolson v. Sheard* (1877), 5 Ch. D. 19, C. A., *per* BAGGALLAY, J. A., at p. 25.

(*l*) *Re Cooper and Allen's Contract for Sale to Harlech*, *supra*, at pp. 815 *et seq.* But the terms of the trust may render it unnecessary that the apportioned parts of the purchase-money should be paid separately (*Re Parker and Beech's Contract* (1887), 56 L. J. (CH.) 358, C. A., *per* LINDLEY, L. J., at p. 359).

(*m*) *Clark v. Seymour*, *supra*; *Cavendish v. Cavendish*, *supra*.

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14 (3).

(*b*) *Ibid.*, s. 14 (1).

(*c*) *Ibid.*, s. 14 (2).

(*d*) 37 & 38 Vict. c. 78.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 15. As to the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, see title SALE OF LAND, Vol. XXV., pp. 337, 338, 343, 344, 422, 429, 434.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 66; see pp. 140, 141, *ante*.

(*g*) 44 & 45 Vict. c. 41.

## SECT. 2.

Powers and Discretions of Trustees.

Sale at request of tenant for life.

Sale at discretion of trustee.

**311.** The exercise by a trustee at the request of the tenant for life of a power of sale of settled land exercisable by him on that request will not be interfered with by a court of equity on the ground of an expected future increase in the value of the land (*h*).

**312.** Where there is a trust for sale at the request of beneficiaries for life, and after their death at the discretion of the trustee, the trustee can sell after the death of the beneficiaries for life without the concurrence of the persons beneficially entitled in remainder, notwithstanding that these persons are all of age and *sui juris* and have now an absolute and immediate interest in the property (*i*).

## (ix.) Severance of Minerals.

Powers as to minerals.

**313.** Where a trustee or other person (*k*) is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, or with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or his so disposing of the minerals with or without such rights or powers, separately from the residue of the land. After having obtained such sanction, he may from time to time, without any further application to the court, so dispose of any such land or minerals, unless he is forbidden to do so by the instrument creating the trust or direction (*l*).

## SUB-SECT. 5.—Retainer against Beneficiaries.

Retainer as against beneficiaries.

**314.** Trustees may retain the capital or income of trust property as against a beneficiary entitled thereto who owes money to them as such trustees (*m*), and as against persons claiming through him (*n*).

(*h*) *Thomas v. Williams* (1883), 24 Ch. D. 558.

(*i*) *Re Tweedie and Miles* (1884), 27 Ch. D. 315.

(*k*) See note (*l*), *infra*. As to the power of a trustee to work mines, minerals, and quarries, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 517.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44; Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 3; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 525. In spite of the generality of the language, these enactments only apply to persons claiming to act under an instrument creating a trust or power, and are not applicable to an executor realising an estate for the benefit of creditors (*Re Cavendish and Arnold's Contract*, [1912] W. N. 83). Nothing in the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, derogates from any power which a trustee may have under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and the amending Acts, or otherwise (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44 (3)). Palatine courts and county courts have the same power of sanction as the High Court in cases within their jurisdiction (*ibid.*, s. 46); see title COUNTY COURTS, Vol. VIII., pp. 443 *et seq.*; COURTS, Vol. IX., pp. 120 *et seq.*

(*m*) *Priddy v. Rose* (1817), 3 Mer. 86; *Smith v. Smith* (1835), 1 Y. & C. (EX.) 338; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164. Compare the case of an executor retaining a legacy to satisfy a debt due from the legatee to the estate; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 268.

(*n*) *Ex parte Mitford* (1784), 1 Bro. C. C. 398; *Woodyatt v. Gresley* (1836), 8 Sim. 180; *Burridge v. Row* (1842), 1 Y. & C. Ch. Cas. 183; *Corr v. Corr* (1879), 3 L. R. Ir. 435, C. A.; *Hallett v. Hallett* (1879), 13

**315.** A beneficiary who is indebted to the trust estate (*o*), or has received from it more than his due share (*p*), or has rendered himself liable in respect of a breach of trust (*q*), can claim nothing from the trust estate until his liability to it is made good.

The trustees cannot, however, so retain money which comes into their hands as such trustees incidentally, and not as part of the trust property (*a*). A trustee of two funds under independent trusts for the same beneficiary cannot retain out of one of them in order to satisfy a claim which he has against the beneficiary in respect of the other fund (*b*).

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Powers and Discretions of Trustees.

Retainer of share of beneficiaries.

SUB-SECT. 6.—*Survivorship and Devolution of Powers.*

**316.** In the case of trusts constituted, or created by instruments coming into operation before, the 1st January, 1882, a bare power given to two or more trustees in whom no estate is vested cannot be exercised by the survivor or survivors unless an intention to that effect is shown by the instrument creating the trust (*c*). On the other hand, a power given to trustees in whom the estate is also

Survivorship.

Ch. D. 232, *per* FRY, J., at p. 234; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

(*o*) *Priddy v. Rose* (1817), 3 Mer. 86; *Smith v. Smith* (1835), 1 Y. & C. (EX.) 338; *Woodyatt v. Gresley* (1836), 8 Sim. 180; *Willes v. Greenhill* (No. 1) (1860), 29 Beav. 376; *Vaughton v. Noble* (1861), 30 Beav. 34, 38, 39; *Corr v. Corr* (1879), 3 L. R. Ir. 435, C. A.; *Re Harrauld, Wilde v. Walford* (1884), 53 L. J. (CH.) 505, C. A.; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212; *Re Taylor, Taylor v. Wade*, [1894] 1 Ch. 671; *Re Weston, Davies v. Tagart*, *supra*; *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66, *per* WARRINGTON, J., at p. 71; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Gold Fields, Ltd.*, [1910] 1 Ch. 239; *Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662; and see title EQUIT, Vol. XIII., p. 163. The share of a beneficiary under a will is not liable to be retained to meet a debt which is payable at a future time (*Re Binns, Lee v. Binns*, [1896] 2 Ch. 584, 588; *Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69), nor to meet a debt due from another testator's estate of which he is executor (*Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682, C. A.), nor to meet a debt owing to a firm in which the testator was a partner (*Jackson v. Yeats*, [1912] 1 I. R. 267).

(*p*) *Downes v. Bullock* (1858), 25 Beav. 54, 62.

(*q*) *Parnell v. Hingston* (1856), 3 Sm. & G. 337; *Irby v. Irby* (No. 3) (1858), 25 Beav. 632; *Hallett v. Hallett* (1879), 13 Ch. D. 232; *Jacobs v. Ryland* (1874), L. R. 17 Eq. 341; *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Doering v. Doering* (1889), 42 Ch. D. 203; *Re Eyton, Bartlett v. Charles* (1890), 45 Ch. D. 458. It makes no difference that his interest in the trust estate is derivative (*Jacobs v. Ryland*, *supra*; *Doering v. Doering*, *supra*), and the principle applies in the case of the assign of a beneficiary who is also a trustee and has committed a breach of trust (*Morris v. Livie* (1842), 1 Y. & C. Ch. Cas. 380). But it does not apply where the breach of trust is committed in respect of another fund (*Re Towndrow, Gratton v. Machen*, *supra*); and circumstances may exempt incumbrancers of the beneficiary's share from the application of the principle (*Re Eyton, Bartlett v. Charles*, *supra*).

(*a*) *Hallett v. Hallett*, *supra*.

(*b*) *Price v. Loaden* (1856), 21 Beav. 508; *Palairt v. Carew* (1863), 32 Beav. 564.

(*c*) *Townsend v. Wilson* (1818), 1 B. & Ald. 608; *Lane v. Debenham* (1853), 11 Hare, 188, 192; see *Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475, 478; and title POWERS, Vol. XXIII., p. 17.



SECT. 2. vested may be exercised by the survivor (*d*), unless a contrary intention is indicated by the creator of the trust (*e*).

**Powers and Discretions of Trustees.** In the case of trusts constituted or created by instruments coming into operation after the 31st December, 1881, any power or trust given to two or more trustees may be exercised or performed by the survivor or survivors unless a contrary intention is expressed in the instrument creating the trust (*f*). The contrary intention must be clearly expressed, and is not indicated by the fact that a wide personal discretion is vested in the trustees (*g*).

Devolution.

**317.** Every new trustee appointed either under the statutory power (*h*) or by a court of competent jurisdiction has the same powers, authorities, and discretions as if he had originally been appointed trustee by the instrument, if any, creating the trust, unless a contrary intention is expressed in such instrument (*i*). New trustees appointed under a power in the trust instrument are often expressly invested with the powers of the original trustees. When this is not so, the principle applicable is that *primâ facie* powers given to trustees are incident to their office and pass to the holders of the office for the time being in the absence of a contrary intention expressed in clear language (*k*). Apart from statute, on the death of a sole or last surviving trustee the trusts and powers vested in him can only be executed by some person pointed out by the creator of the trust as a proper person for that purpose (*l*). In the case of trusts constituted or created by instruments coming

(*d*) *Re Bacon, Toovey v. Turner*, [1907] 1 Ch. 475; see also Co. Litt. 181 b; *Gwilliams v. Rowel* (1661), Hard. 204; *Eyre v. Shaftsbury (Countess)* (1723), 2 P. Wms. 102, 121; *Hudson v. Hudson* (1735), Cas. temp. Talb. 127, 129; *A.-G. v. Glegg* (1738), Amb. 584, 585; *Flanders v. Clark* (1747), 1 Ves. Sen. 9; *Livesey v. Harding*, *Livesey v. Beckett* (1830), Taml. 460; *Warburton v. Sandys* (1845), 14 Sim. 622; *Lane v. Debenham* (1853), 11 Hare, 188; *Re Cookes' Contract* (1877), 4 Ch. D. 454.

(*e*) *Re Bacon, Toovey v. Turner*, *supra*; see also Co. Litt. 113 a, Hargrave's note (2), 181 b; *Mansell (Lady) v. Mansell (Sir E. V.)* (1757), Wilm. 36, 50; *Lancashire v. Lancashire* (1848), 2 Ph. 657, 664; and the cases cited in note (*g*), *infra*.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22, replacing Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 38. A power limited to named trustees or other the trustees of the trust instrument may be treated as two distinct powers (*Attenborough v. Attenborough* (1855), 1 K. & J. 296; *Re De Sommerey, Coelenbier v. De Sommerey*, [1912] 2 Ch. 622, *per PARKER J.*, at p. 631).

(*g*) *Crawford v. Forshaw*, [1891] 2 Ch. 261, 268, C. A.; *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139, 144; *Re Bacon, Toovey v. Turner*, *supra*, at p. 479; compare the earlier cases ——— v. ——— (1564), Moore (K. B.), 61, 62; *Doyley v. A.-G.* (1735), 2 Eq. Cas. Abr. 194; *Cole v. Wade* (1807), 16 Ves. 27, 45; *Foley v. Wontner* (1820), 2 Jac. & W. 245, 246.

(*h*) See pp. 73 *et seq.*, *ante*.

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10 (3), (5), 37. Similar provisions were contained in stat. (1860) 23 & 24 Vict. c. 145, s. 27 (commonly called Lord Cranworth's Act), and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 31 (5), (7), 33; compare Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 33.

(*k*) See *Re Smith, Eastick v. Smith*, *supra*, *per FARWELL, J.*, at p. 144.

(*l*) As, for instance, his heirs or his heirs and assigns (*Re Crunden and Meux's Contract*, [1909] 1 Ch. 690, 695, 696); see *Mortimer v. Ireland* (1847), 11 Jur. 721; *Cooke v. Crawford* (1842), 13 Sim. 91, 96; *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A.; *Re Cunningham and Frayling*, [1891] 2 Ch. 567.

into operation before the 1st January, 1882, the personal representatives of a sole or last surviving trustee who has died since that date can, until new trustees are appointed (*m*), execute trusts and powers in reference to trust estates of inheritance or limited to the heir as special occupant when the heirs or heirs and assigns of the trustees are referred to in the trust instrument (*n*), but not if there is no such reference (*o*), nor in the case of a legal interest in copyholds (*p*). In the case of trusts constituted or created by instruments coming into operation after the 31st December, 1881, the personal representatives of a sole or last surviving trustee can, until the appointment of new trustees, execute any trust or power which was capable of being exercised by such trustee, unless a contrary intention is expressed in the trust instrument (*q*), or the trust relates to a legal estate in copyholds (*r*).

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Powers and Discretions of Trustees.

SUB-SECT. 7.—*Lunacy of Trustee.*

**318.** Where a power is vested in a lunatic in the character of a trustee, or the consent of a lunatic to the exercise of a power is necessary in that character, the committee of his estate, in his name and on his behalf, may, under an order of the judge in Lunacy, if such judge thinks it expedient, made on the application of any person interested, exercise the power or give the consent in such manner as the order directs (*s*).

Exercise of power where trustee is lunatic.

SUB-SECT. 8.—*Restrictions on Exercise of Powers.*

**319.** A trustee must not use the powers which the possession of the legal estate in the trust property confers on him in law except in a proper way for the legitimate purposes of the trust (*t*), and if he is about to do so he may be restrained by injunction (*a*). In exercising or refraining from the exercise of any power he must act honestly (*b*), and must not benefit one *cestui que trust* at the expense

Proper exercise of power.

(*m*) *Re Routledge's Trusts*, *Routledge v. Saul*, [1909] 1 Ch. 280.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30; *Re Pixton and Tong's Contract*, [1897] W. N. 178; *Re Waidanis, Rivers v. Waidanis*, [1908] 1 Ch. 123; see *Osborne to Rowlett* (1880), 13 Ch. D. 774, questioned in *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A.; *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690.

(*o*) *Re Ingleby and Boak and Norwich Union Insurance Co.* (1883), 13 L. R. Ir. 326; *Re Crunden and Meux's Contract*, *supra*.

(*p*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88.

(*q*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8 (1)—(3). "Personal representatives" in *ibid.*, s. 8, means an executor (original or by representation) or administrator; but does not include an executor who has renounced or not proved (*ibid.*, s. 8 (4)).

(*r*) *Ibid.*, s. 8 (5).

(*s*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 128; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 455, 456.

(*t*) *Balls v. Strutt* (1841), 1 Hare, 146, *per* WIGRAM, V.-C., at p. 149.

(*a*) *Re Chertsey Market, Ex parte Walthew* (1819), 6 Price, 261, *per* RICHARDS, C.B., at p. 279; *Reeve v. Parkins* (1820), 2 Jac. & W. 390; *Anon.* (1821), Madd. & G. 10; *Ludlow Corporation v. Greenhouse* (1827), 1 Bli. (N. S.) 17, H. L., *per* Lord ELDON, L.C., at p. 57; *Milligan v. Mitchell* (1833), 1 My. & K. 446; *A.-G. v. Liverpool Corporation* (1835), 1 My. & Cr. 171, 210; *Balls v. Strutt*, *supra*; *Marshall v. Sladden* (1851), 4 De G. & Sm. 468, *per* KNIGHT BRUCE, V.-C., at p. 469; *Dance v. Goldingham* (1873), 8 Ch. App. 902; and see p. 206, *post*.

(*b*) *Camden (Marquis) v. Murray* (1880), 16 Ch. D. 161, *per* MALINS, V.-C., at p. 170; *Tempest v. Camoys (Lord)* (1882), 21 Ch. D. 571, C. A.; *Re*

SECT. 2. of another (c), except so far as the exercise of a discretion expressly Powers and Discretions involves that result (d). If the trustee has only a limited estate of Trustees. or interest in the trust property he cannot exercise the power in such a manner as to prejudice the rights of a legal remainderman (e).

After pay-  
ment into  
court.

**320.** A trustee cannot exercise a discretionary power in reference to a trust fund which has been paid into court (f).

Pending  
administra-  
tion by the  
court.

**321.** Where a trust is being administered by the court (g), the trustee may, with the sanction of the court (h), exercise discretionary powers with respect to it (i); but he cannot act without such sanction (k), and the court will in a proper case control the exercise of his discretion (l).

#### SUB-SECT. 9.—Disclaimer of Powers.

Disclaimer of  
powers.

**322.** A trustee or other person to whom a power is given, whether coupled with an interest or not, may, by deed, disclaim the power, and, after the disclaimer, is not capable of exercising or joining in the exercise of the power (m). After the disclaimer, the power may be exercised by the other or others, if any, of the persons to whom the power is given, or the survivor or survivors of those others, unless the contrary is expressed in the instrument creating the power (n). This power of disclaimer does not, however, enable a trustee to get rid of part of the trusts imposed on him (o).

*Blake, Jones v. Blake* (1885), 29 Ch. D. 913, C. A.; *Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752; *Re Smith, Smith v. Thompson*, [1895] W. N. 144; compare *Re Evans, Jones v. Evans*, [1913] 1 Ch. 23, 33.

(c) *Wood v. Patteson* (1847), 10 Beav. 541, 543, 544.

(d) *Costabadie v. Costabadie* (1847), 6 Hare, 410; *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Tabor v. Brooks* (1878), 10 Ch. D. 273; *Re Lofthouse, an Infant* (1885), 29 Ch. D. 921, C. A.; *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A.; *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324; *Tram v. Clapperton*, [1908] A. C. 342; see pp. 123, 136, *ante*.

(e) *Jesse v. Lloyd* (1883), 48 L. T. 656, 659.

(f) *Re Nettlefold's Trusts* (1888), 59 L. T. 315; *Re Murphy's Trusts*, [1900] 1 I. R. 145; see pp. 175 *et seq.*, *post*.

(g) See pp. 179 *et seq.*, *post*.

(h) *Shewen v. Vanderhorst* (1830), 2 Russ. & M. 75, *per* LEACH, M.R.; affirmed (1831), 1 Russ. & M. 347; *Mitchelson v. Piper* (1836), 8 Sim. 64; *Minors v. Battison* (1876), 1 App. Cas. 428, *per* Lord CHELMSFORD, at p. 438; *Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134, C. A.; *Cecil v. Langdon* (1884), 28 Ch. D. 1, C. A.; *Re Hall, Hall v. Hall* (1885), 51 L. T. 901.

(i) *Jones v. Powell* (1841), 4 Beav. 96; *Gisborne v. Gisborne*, *supra*; *Warren v. Clancy*, [1898] 1 I. R. 127, C. A.

(k) *Walker v. Smalwood* (1768), Amb. 676. Therefore, on a purchase of land from trustees, search must be made for any *lis pendens*; see title SALE OF LAND, Vol. XXV., pp. 350, 359.

(l) *Bethell v. Abraham* (1873), L. R. 17 Eq. 24; *Walker v. Walker* (1820), 5 Madd. 424; see also p. 180, *post*.

(m) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6 (1); see title POWERS, Vol. XXII., p. 64.

(n) *Ibid.*, s. 6 (2).

(o) *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259; *Saul v. Pattinson* (1886), 55 L. J. (CH.) 831; *Re Somes, Smith v. Somes*, [1896] 1 Ch. 250, 255. As to the effect of disclaimer of office by a trustee, see pp. 83 *et seq.*, *ante*.



SECT. 3.—*Rights of Trustees.*SUB-SECT. 1.—*Reimbursement and Indemnity.*

## SECT. 3.

Rights of  
Trustees.Reimburse-  
ment and  
indemnity.

**323.** Where a trustee has properly (*p*) paid or incurred expenses or liabilities in performing a trust, or in respect of the trust property, he is entitled to reimbursement or indemnity in respect thereof out of the trust property (*q*), or from a person *sui juris* who is beneficially entitled thereto (*r*). His right extends to calls on shares which he has been obliged to pay (*s*) and to liabilities incurred by him in properly carrying on a trade or business under the provisions of the instrument creating the trust (*t*), and to

(*p*) *Leedham v. Chawner* (1858), 4 K. & J. 458. He is not allowed expenses which he has incurred unnecessarily (*Malcolm v. O'Callaghan* (1836), 3 My. & Cr. 52, 62, C. A.) or improperly (*Leedham v. Chawner, supra*; *Hosegood v. Pedler* (1896), 66 L. J. (Q. B.) 18).

(*q*) *How v. Godfrey* (1678), Cas. temp. Finch, 361; *Balsh v. Hyham* (1728), 2 P. Wms. 453; *Worrall v. Harford* (1802), 8 Ves. 4, per Lord ELDON, L.C., at p. 8; *Re Ormsby, a Minor* (1809), 1 Ball & B. 189, per Lord MANNERS, L.C., at p. 190; *Dawson v. Clarke* (1811), 18 Ves. 247, per Lord ELDON, L.C., at p. 254; *Brocksopp v. Barnes* (1820), 5 Madd. 90; *Moore v. Frowd* (1837), 3 My. & Cr. 45; *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19, C. A., per TURNER, L.J., at p. 52; *Morison v. Morison* (1855), 7 De G. M. & G. 214, C. A.; *Batten, Proffitt and Scott v. Dartmouth Harbour Commissioners* (1890), 45 Ch. D. 612, per KEKEWICH, J., at p. 621; *Budgett v. Budgett*, [1895] 1 Ch. 202; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24. A trustee is entitled as of right to full indemnity out of the trust property against all his costs, charges, and expenses properly incurred (*Edgecombe v. Carpenter* (1839), 1 Beav. 171; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A., per Lord SELBORNE, L.C., at p. 715; *Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547, C. A., per LINDLEY, L.J., at p. 558; *St. Thomas's Hospital (Governors) v. Richardson*, [1910] 1 K. B. 271, C. A., per FARWELL, L.J., at p. 283), and they are a first charge on both the corpus and the income of the property (*Stott v. Milne, supra*, at p. 715; *Re Exhall Coal Co., Ltd., Re Bleckley* (1866), 35 Beav. 449). A trustee may be allowed interest on sums advanced by him for the benefit of the trust (*Finch v. Pescott* (1874), L. R. 17 Eq. 554).

(*r*) *Balsh v. Hyham, supra*, at p. 455; *Re German Mining Co., Ex parte Chippendale, supra*, at pp. 54 et seq.; *James v. May* (1873), L. R. 6 H. L. 328; *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18, per JESSEL, M.R., at p. 24; *Fraser v. Murdoch* (1881), 6 App. Cas. 855, per Lord BLACKBURN, at p. 872; *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Hardoon v. Belilios*, [1901] A. C. 118, P. C.; see title LANDLORD AND TENANT, Vol. XVIII., p. 593. The right may subsist after the *cestui que trust* has alienated his beneficial interest (*Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194).

(*s*) *Re Universal Banking Corporation, Ex parte Challis* (1868), 17 L. T. 637; *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791; *Castellan v. Hobson* (1870), L. R. 10 Eq. 47; *Hemming v. Maddick* (1872), 7 Ch. App. 395; *James v. May, supra*; *Jervis v. Wolferstan, supra*; *Fraser v. Murdoch, supra*, per Lord SELBORNE, L.C., at p. 866; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561, per FRY, J., at p. 564.

(*t*) *Ex parte Garland* (1804), 10 Ves. 110; *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548; *Strickland v. Symons* (1884), 26 Ch. D. 245, C. A., per Lord SELBORNE, L.C., at p. 248; *Re Evans, Evans v. Evans* (1887), 34 Ch. D. 597, C. A.; *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1, C. A.; and see p. 158, *post*. Creditors of the trade or business have a right to be put in the place of the trustee as against the trust estate

## SECT. 3.

## Rights of Trustees.

damages and costs recovered against him as legal owner of the trust estate, where the injury in respect of which they were recovered was not caused by his neglect or default (*u*). As between the beneficiaries, a trustee's costs and expenses are generally recoverable out of capital (*a*); and the trustee has a lien for them on both the capital and the income of the trust property in priority to the claims of beneficiaries and persons claiming under them (*b*). If, however, he has committed a breach of trust, he cannot recover them until he has made good the breach (*c*). Similarly, where the trustee has either mixed his own money with the trust fund (*d*) or expended his own money together with trust money in the purchase or improvement of property (*e*), the beneficiaries have a first claim in respect of the trust fund, and the trustee has only a subsequent claim in respect of his own money.

Costs incurred  
in reference  
to appoint-  
ment.

**324.** A trustee is entitled to be reimbursed out of the trust estate the costs which he has incurred previously to his appointment in obtaining a statement of the trust property and ascertaining that he is being duly appointed (*f*) and the costs incidental to the appointment (*g*), and also the costs of former trustees paid by him to their personal representatives on obtaining a transfer of the trust property to himself (*h*).

Money  
expended in  
preserving  
trust  
property.

**325.** A trustee has a right to a lien on the trust property and to an indemnity thereout for money expended by him in its preservation (*i*); and a person who at his request advances money for its preservation obtains a similar right by subrogation (*k*).

(*Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548; *Re Evans, Evans v. Evans* (1887), 34 Ch. D. 597, 601, C. A.; *Re Blundell, Blundell v. Blundell* (1890), 44 Ch. D. 1, 11, C. A.).

(*u*) *Benett v. Wyndham* (1862), 4 De G. & F. J. 259, C. A.; *Re Raybould, Raybould v. Turner*, [1900] 1 Ch. 199. The party injured has the same right as the trustee against the trust estate (*ibid.*).

(*a*) *Powys v. Blgrave* (1854), 4 De G. M. & G. 448, C. A.; *Carter v. Seabright* (1859), 26 Beav. 374; *Re Wood's Trusts* (1870), L. R. 11 Eq. 155; *Re Bullock's Settled Estates, Lofthouse v. Haggard* (1904), 91 L. T. 651; but see *Re Mason's Trusts, Ex parte Smithett* (1871), L. R. 12 Eq. 111.

(*b*) *Re Davis, Ex parte James* (1832), 1 Deac. & Ch. 272; *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19, C. A.; *Re Exhall Coal Co., Ltd., Re Bleckley* (1866), 35 Beav. 449; *Walters v. Woodbridge* (1878), 7 Ch. D. 504, C. A.; *Re Knapman, Knapman v. Wreford* (1881), 18 Ch. D. 300, C. A.; *Dodds v. Tuke* (1884), 25 Ch. D. 617; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A.; *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43; and see note (*i*), *infra*.

(*c*) *Re Knott, Bax v. Palmer* (1887), 56 L. J. (CH.) 318.

(*d*) *Lupton v. White, White v. Lupton* (1808), 15 Ves. 432; *Pennell v. Deffell* (1853), 4 De G. M. & G. 372, C. A.; *Re Hallett's Estate, Knatchbull v. Hallett* (1870), 13 Ch. D. 696, C. A.

(*e*) *Re Pumfrey, deceased, Worcester City and County Banking Co. v. Blick* (1882), 22 Ch. D. 255.

(*f*) *Harvey v. Olliver*, [1887] W. N. 149.

(*g*) *Ibid.*

(*h*) *Ibid.*

(*i*) *Clack v. Holland* (1854), 19 Beav. 262, *per* ROMILLY, M.R., at pp. 273, 276, 277; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552, 560; *Re Winchelsea's (Earl) Policy Trusts* (1888), 39 Ch. D. 168; and see titles LIEN, Vol. XIX., pp. 21 *et seq.*; MORTGAGE, Vol. XXI., pp. 107 *et seq.*

(*k*) *Clack v. Holland, supra*, at p. 277; *Todd v. Moorhouse* (1874), L. R. 19 Eq. 69; *Re Leslie, Leslie v. French, supra*.

**326.** Where trust property includes both realty and personalty, the trustee is entitled to a lien upon the realty in respect of sums owing from the realty to the personalty (*l*).

SECT. 3.  
Rights of  
Trustees.

SUB-SECT. 2.—*Set-off*.

**327.** A trustee is ordinarily entitled to set off an amount due to him from the trust estate against an amount due to it from him (*m*); and he can set off an amount due to the estate from a beneficiary against a sum payable out of the estate to such beneficiary (*n*).

Rights in  
respect of  
realty and  
personalty.  
As between  
trustee and  
trust estate.

**328.** Where a trustee sues a debtor to the trust estate, the debtor can set off against the trustee's claim an amount due to him from the *cestui que trust* (*o*); and a person who is sued for debt can set off a sum due from the plaintiff to a trustee for him (*p*).

As between  
trustees and  
debtors to the  
trust estate.

SUB-SECT. 3.—*Costs of Legal Proceedings*.

**329.** A trustee is entitled to be paid out of the trust property his full costs of legal proceedings which he has properly instituted or defended on behalf of the trust (*q*), except where the proceedings result in the whole of the property being held to belong to third

Right to costs  
of legal pro-  
ceedings.

(*l*) *Wheeler v. Tootell* (1903), 51 W. R. 693.

(*m*) *McEwan v. Crombie* (1883), 25 Ch. D. 175 (where, on a sum being found to be due to two trustees from the trust estate and a sum being due to the estate from one of them who was bankrupt, it was held that the portion, if any, of the sum due to the two trustees which, on inquiry, should be found to be due to the bankrupt trustee should be set off against the sum due from him). As to set-off between a loss and a gain by different breaches of trust, see pp. 188, 189, *post*; as to the right of executors and administrators to set-off, see titles EQUITY, Vol. XIII., pp. 161 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 328 *et seq.*; and as to set-off generally, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 211 *et seq.*; EQUITY, Vol. XIII., pp. 161 *et seq.*; SET-OFF AND COUNTERCLAIM, Vol. XXV., pp. 481 *et seq.*, 492, 503.

(*n*) *Re Harrold, Wilde v. Walford* (1884), 53 L. J. (CH.) 505, C. A.; see pp. 152, 153, *ante*.

(*o*) *Thornton v. Maynard* (1875), L. R. 10 C. P. 695, 698, 699; even if the amount due from the *cestui que trust* is in respect of unliquidated damages (*Bankes v. Jarvis*, [1903] 1 K. B. 549). But where trustees of a settlement are creditors of a testator under his covenant in the settlement, a legacy left by him to their *cestui que trust* cannot be set off by way of satisfaction against their claim under the settlement (*Smith v. Smith* (1861), 3 Giff. 263, 272, 273).

(*p*) *Cochrane v. Green* (1860), 9 C. B. (N. S.) 448; but see *Middleton v. Pollock, Ex parte Nugee* (1875), L. R. 20 Eq. 29, *per* JESSEL, M.R., at pp. 35 *et seq.* Trustees of an estate in which they are also beneficiaries cannot set off a debt due to the estate from a person who is insolvent against a debt due from them personally to trustees for that person (*ibid.*).

(*q*) *Fearn v. Young* (1804), 10 Ves. 184; *Jenour v. Jenour* (1805), 10 Ves. 562; *Dunkin v. Ward* (1837), 1 Jur. 735; *York v. Brown* (1844), 1 Coll. 260; *Stephens v. Newborough (Lord)* (1848), 11 Beav. 403; *Muskerry (Lord) v. Skeffington* (1868), L. R. 3 H. L. 144; *Courtney v. Rumley* (1871), 6 I. R. Eq. 99; *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492, C. A.; *Turner v. Hancock* (1882), 20 Ch. D. 303, C. A.; *Re Love, Hill v. Spurgeon* (1885), 29 Ch. D. 348, C. A.; *Easton v. Landor* (1892), 2 R. 176, C. A., *per* LINDLEY, L.J., at p. 177; *Budgett v. Budgett*, [1895] 1 Ch. 202; *Merry v. Pownall*, [1898] 1 Ch. 306; but see *Hearn v. Wells* (1844), 1 Coll. 323. He is not allowed costs which he has incurred in unreasonably defending an action without having obtained the sanction of the court (*Re*



SECT. 3.  
Rights of  
Trustees.

Costs of un-  
necessary  
proceedings.

parties, as in the case where a voluntary settlement is avoided by the settlor's bankruptcy or on any other account, or where the instrument of trust is avoided by prior adverse interests, in which case his costs are in the discretion of the court (r).

**330.** A trustee, however, will not be allowed to charge against the trust property the costs of unnecessary proceedings (s), or of elaborate proceedings where he might have obtained his object by a simpler and less expensive procedure (t).

*Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547, C. A.; but if there is a doubt whether the costs have been properly incurred, he is entitled to the benefit of it (*Easton v. Landor* (1892), 2 R. 176, 177, C. A.). A trustee accepting the office from a defaulting trustee pending a suit for the latter's removal has been deprived of his costs (*Peatfield v. Benn* (1853), 17 Beav. 522). A trustee's right to costs is not affected by the absence of a co-trustee (*Storer v. Storer* (1894), 71 L. T. 704).

(r) *Mohun v. Mohun* (1818), 1 Swan. 201; *Edenborough v. Canterbury (Archbishop)* (1826), 2 Russ. 93, per Lord ELDON, L.C., at p. 112; *Townsend v. Westacott* (1841), 4 Beav. 58; *Hearn v. Wells* (1844), 1 Coll. 323; *Elsev v. Lutyens* (1850), 8 Hare, 159, 165; *Heap v. Tonge* (1851), 9 Hare, 90, 105; *Everitt v. Everitt* (1870), L. R. 10 Eq. 405; *Mackay v. Douglas* (1872), L. R. 14 Eq. 106, 123; *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588, C. A.; *Dutton v. Thompson* (1883), 23 Ch. D. 278, C. A.; *James v. Couchman* (1885), 29 Ch. D. 212; *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43; *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157, 174 *et seq.*; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 91, 106. As to the variation of settlements where a marriage is annulled or dissolved, see title HUSBAND AND WIFE, Vol. XVI., pp. 571 *et seq.*

(s) *Norris v. Norris* (1785), 1 Cox, Eq. Cas. 183; *Penfold v. Bouch* (1844), 4 Hare, 271; *Firmin v. Pulham* (1848), 2 De G. & Sm. 99; *Cockroft v. Sutcliffe* (1856), 2 Jur. (N. S.) 323; *Horner v. Wheelwright* (1856), 2 Jur. (N. S.) 367; *Smith v. Bolden* (1863), 33 Beav. 262; *Re Cull's Trusts* (1875), L. R. 20 Eq. 561; *Patterson v. Wooler* (1876), 2 Ch. D. 586; *Re Chapman, Freeman v. Parker* (1895), 72 L. T. 66, C. A. Where a trustee unnecessarily brought an action to have his trust administered by the court, alleging difficulties of construction and administration which were held by the court not to exist, the suit was dismissed with costs to be paid by the trustee personally (*Re Cabburn, Gage v. Rutland* (1882), 46 L. T. 848). Counsel's opinion does not always and necessarily justify a trustee in bringing or defending an action (*Devey v. Thornton* (1851), 9 Hare, 222, per TURNER, V.-C., at p. 232; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A., per Lord SELBORNE, L.C., at p. 714; and see p. 121, *ante*). Where a trustee institutes or defends proceedings in order to have a point relating to his private interest decided at the expense of the trust estate, he will be ordered to pay the costs of them (*Henley v. Phillips* (1740), 2 Atk. 48; *Irwin v. Rogers* (1848), 12 I. Eq. R. 159). In proceedings in which trustees are merely neutral, they are liable, if they appear on an appeal by separate counsel, to be refused their costs (*Carroll v. Graham*, [1905] 1 Ch. 478, C. A.; *Re Barry's Trusts, Barry v. Smart*, [1906] 2 Ch. 358, C. A.; but see *Catterson v. Clark* (1906), 95 L. T. 42, C. A.). A trustee ought, in a proper case, to join with the *cestui que trust* in instituting proceedings if requested to do so, instead of being made a defendant thereto (*Reade v. Sparkes* (1827), 1 Mol. 8). Trustees who appeared in proceedings between beneficiaries without having been served were not allowed their costs (*Bennett v. Biddles* (1846), 10 Jur. 534).

(t) *Thomas v. Walker* (1854), 18 Beav. 521 (where a suit was instituted for the appointment of a new trustee instead of recourse being had to the statutory mode of procedure (see pp. 76 *et seq.*, *ante*)); *Wells v. Malbon* (1862), 31 Beav. 48 (where a trustee instituted a suit instead of paying the trust fund into court (see pp. 175 *et seq.*, *post*)); *Re Cabburn, Gage v. Rutland, supra*.

**331.** The costs of legal proceedings occasioned by the misconduct of a trustee are in the discretion of the court (*a*).

SECT. 3.  
Rights of  
Trustees.

Misconduct of  
trustee.

Action for  
account or  
administra-  
tion.

**332.** Where a *cestui que trust* brings an action against the trustee for an account or for the administration of the trust estate, the trustee bears his own costs if and so far as the proceedings have been occasioned by his neglect or default (*b*), and may be ordered to pay the costs of the *cestui que trust* (*c*). On the other hand, the trustee is allowed his costs out of the trust estate, or the *cestui que trust's* share of it, if his conduct has been honest and correct (*d*), even though it may have been mistaken (*e*); and the *cestui que trust* or his solicitor may be ordered to bear the costs of the proceedings personally, if they have been commenced wrongfully or too hastily (*f*). Where the action was necessary independently of a breach of trust committed by the trustee, he is liable to pay the special costs attributable to the breach of trust, but may be allowed his general costs of the action (*g*) after he has made good the loss occasioned by the breach (*h*).

(*a*) *Dawson v. Parrot* (1791), 3 Bro. C. C. 236; *Ankers v. Sandford* (1840), 4 Jur. 817; *Frost v. Hamilton* (1842), 6 Jur. 525; *Turquand v. Knight* (1845), 14 Sim. 643; *Wilson v. Parker* (1846), 10 Jur. 979; *Byrne v. Norcott* (1851), 13 Beav. 336, per Lord LANGDALE, M.R., at p. 346; *Marshall v. Sladden* (1851), 4 De G. & Sm. 468; *A.-G. v. Murdoch* (1856), 2 K. & J. 571; *Kendall v. Masters* (1860), 2 De G. F. & J. 200; *Grierson v. Astle* (1860), 3 L. T. 288; *Palairot v. Carew* (1863), 32 Beav. 564; *Hemry v. Macdonald* (1866), 15 W. R. 165; *Naylor v. Smith* (1867), 15 W. R. 528; *Birks v. Micklethwait* (1864), 34 L. J. (CH.) 364; *Gough v. Ettly* (1869), 20 L. T. 358; *Griffin v. Brady* (1869), 39 L. J. (CH.) 136; *Easton v. Landor* (1892), 2 R. 176, C. A.; *Re Hodgkinson, Hodgkinson v. Hodgkinson*, [1895] 2 Ch. 190, C. A.; *Re Knox's Trusts*, [1895] 2 Ch. 483, C. A.; and see notes (*b*), (*c*) and (*g*), *infra*, pp. 182, 193, *post*. Trustees are not relieved from liability to pay the costs of an action which their misconduct has occasioned by a direction in the instrument of trust that if a beneficiary institutes proceedings for the administration of the trust estate, the costs of all parties shall be paid out of his share (*Re Williams, Williams v. Williams*, [1912] 1 Ch. 399).

(*b*) *Simpson v. Bathurst, Shepherd v. Bathurst* (1869), 5 Ch. App. 193, per Lord HATHERLEY, L.C., at p. 202; *Payne v. Evens* (1874), L. R. 18 Eq. 356; *Re Page, Jones v. Morgan*, [1893] 1 Ch. 304; and see p. 193, *post*.

(*c*) *Newton v. Askew* (1848), 11 Beav. 145, 152; *Springett v. Dashwood* (1860), 2 Giff. 521; *Eglin v. Sanderson* (1862), 3 Giff. 434; *Hilliard v. Fulford* (1876), 4 Ch. D. 389, 394; *Re Hayter, Re Walleth, Hayter v. Wells* (1883), 32 W. R. 26; *De Burgh v. McClinton* (1883), 11 L. R. Ir. 220; *Re Knox's Trusts, supra*; *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289.

(*d*) *Otley v. Gilby* (1845), 8 Beav. 602; *Thompson v. Olive* (1848), 11 Beav. 475; *Re Andrews, Edwards v. Dewar* (1885), 34 W. R. 62.

(*e*) *Whitmarsh v. Robertson* (1842), 1 Y. & C. Ch. Cas. 715; *Smith v. Cremer* (1875), 24 W. R. 51.

(*f*) *Aylmer v. Winterbottom* (1857), 4 Jur. (N. S.) 19; *Fane v. Fane* (1879), 13 Ch. D. 228; *Re Andrews, Edwards v. Dewar, supra*; *Re Dartnall, Sawyer v. Goddard*, [1895] 1 Ch. 474, C. A.

(*g*) *Pride v. Fooks* (1840), 2 Beav. 430; *Campbell v. Bainbridge* (1868), L. R. 6 Eq. 269, 274; *Bell v. Turner* (1877), 47 L. J. (CH.) 75. As to apportioning the costs of a defaulting and insolvent trustee and a solvent trustee who appear together, see *McEwan v. Crombie* (1883), 25 Ch. D. 175.

(*h*) *Lewis v. Trask* (1882), 21 Ch. D. 862; *Re Basham, Hannay v.*



## SECT. 3.

Rights of  
Trustees.Joinder of  
several  
trustees.

Appeal.

**333.** Where there is more than one trustee, both or all ought to sue or defend jointly, and are only allowed one set of costs (*i*), except where a severance is necessary or proper owing to one of them being a beneficiary (*k*), or being attacked hostilely (*l*), or for some other good reason (*m*).

**334.** Where a trustee is allowed his costs, charges, and expenses, or is deprived of costs, or is ordered to pay costs, an appeal lies against the decision (*n*), notwithstanding the general rule against appeals in respect of costs (*o*).

## SUB-SECT. 4.—Remuneration.

Trustee not  
generally  
entitled to  
remuneration.

**335.** Except under an express or implied direction in the instrument creating the trust (*a*) or an express order of court (*b*), or by an express stipulation on the subject which he has made with the *cestui que trust* before he accepted the trust (*c*), or where the trust

*Basham* (1883), 23 Ch. D. 195; *Re Knott, Bax v. Palmer* (1887), 56 L. J. (CH.) 318.

(*i*) *Nicholson v. Falkiner* (1830), 1 Mol. 555; *Holcombe v. Jones* (1831), 1 L. J. (CH.) 46; *Young v. Scott* (1834), 1 Jo. Ex. Ir. 71; *Gaunt v. Taylor* (1840), 2 Beav. 346; *Allen v. Thorp* (1843), 7 Beav. 72; *Cooke v. Courtown (Lord)* (1844), 6 I. Eq. R. 266, 279; *Farr v. Sheriffe, Dykes v. Farr* (1845), 4 Hare, 512, 528; *Wiles v. Cooper* (1846), 9 Beav. 294, 298; *Hughes v. Key* (1855), 20 Beav. 395; *Hodson v. Cash* (1855), 1 Jur. (N. S.) 864; *Course v. Humphrey* (1859), 26 Beav. 402; *Prince v. Hine* (No. 2) (1859), 27 Beav. 345; *A.-G. v. Wyville* (1860), 28 Beav. 464; *Gompertz v. Kensit* (1872), L. R. 13 Eq. 369, 381; *Hosegood v. Pedler* (1896), 66 L. J. (Q. B.) 18; *Re Isaac, Cronbach v. Isaac*, [1897] 1 Ch. 251, 255, 256, C. A. As to where one trustee is solvent and the other is insolvent and in default, see *McEwan v. Crombie* (1883), 25 Ch. D. 175.

(*k*) *Re Love, Hill v. Spurgeon* (1885), 29 Ch. D. 348, C. A.

(*l*) *Webb v. Webb* (1847), 16 Sim. 55; *Cummins v. Bromfield* (1857), 3 Jur. (N. S.) 657; *Re Maddock, Butt v. Wright*, [1899] 2 Ch. 588. In such a case he may appear by two counsel at the hearing (*Re Maddock, Butt v. Wright, supra*).

(*m*) *Kampf v. Jones* (1837), Coop. Pr. Cas. 13; *Aldridge v. Westbrook* (1841), 4 Beav. 212; *Dudgeon v. Cormley* (1843), 2 Con. & Law. 422; *Woods v. Woods* (1846), 5 Hare, 229; *Re Isaac, Cronbach v. Isaac, supra*, at p. 255.

(*n*) *Re Chennell, Jones v. Chennell* (1878), 8 Ch. D. 492, C. A.; *Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A.; *Re Love, Hill v. Spurgeon* (1885), 29 Ch. D. 348, C. A.; *Charles v. Jones* (1886), 33 Ch. D. 80, C. A.; *Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547, C. A.

(*o*) See title PRACTICE AND PROCEDURE, Vol. XXIII., p. 180.

(*a*) *Ellison v. Airey* (1748), 1 Ves. Sen. 111, 115; *Webb v. Shaftesbury (Earl), Shaftesbury (Earl) v. Arrowsmith* (1802), 7 Ves. 480; *Willis v. Kibble* (1839), 1 Beav. 559; *Re Sherwood* (1840), 3 Beav. 338; *Re Thorley (J.), Thorley v. Massam, Re Thorley (W. R.), Thorley v. Massam*, [1891] 2 Ch. 613, C. A.; *Jobson v. Palmer*, [1893] 1 Ch. 71, C. A. As to the remuneration of trustees for debenture-holders, see *Re Piccadilly Hotel, Ltd., Paul v. Piccadilly Hotel, Ltd.*, [1911] 2 Ch. 534; *Re Locke and Smith, Ltd., Wigan v. The Co.*, [1914] 1 Ch. 687.

(*b*) *Brocksopp v. Barnes* (1820), 5 Madd. 90, per LEACH, V.-C., at pp. 90, 91; *Marshall v. Holloway* (1820), 2 Swan. 432, 453, 454; *Bainbrigge v. Blair* (1845), 8 Beav. 588, per Lord LANGDALE, M.R., at pp. 596, 597; *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148; *Re Bignell, Bignell v. Chapman*, [1892] 1 Ch. 59, C. A.

(*c*) *Ayliffe v. Murray* (1740), 2 Atk. 58, per Lord HARDWICKE, L.C., at pp. 59, 60; *Re Accles, Ltd., Hodgson v. Accles, Ltd.*, [1902] W. N. 164. if a trustee before accepting the office openly tells the *cestui que trust*



property is in another country in which he is allowed remuneration by the local law (*d*), a trustee is not entitled to a salary (*e*), or compensation for personal trouble and loss of time (*f*).

SECT. 3.  
Rights of  
Trustees.

Remuneration  
of solicitor-  
trustees and  
other pro-  
fessional  
trustees.

**336.** The disability to receive remuneration exists even where the trustee acts as a solicitor or in some other professional capacity (*g*), or where he carries on or transacts a trade or business in connexion with and for the benefit of the trust (*h*); and it extends to the firm of the professional trustee and to his partners individually (*i*),

that he will not act unless the *cestui que trust* will give him a remuneration not contemplated by the terms of the trust, and the *cestui que trust* contracts that he shall have it, the transaction may be upheld (*Ayliffe v. Murray* (1740), 2 Atk. 58). But a bargain of this kind ought to be discouraged; and the remuneration was disallowed where the trustee died before he had completely performed the trust (*Gould v. Fleetwood* (1732), 3 P. Wms. 251, note (A)). A trustee who has accepted the office without any stipulation on the subject cannot afterwards refuse to continue to act unless he is remunerated, even though, by performing his duties, he has greatly benefited the *cestui que trust* (*Bainbrigge v. Blair* (1845), 8 Beav. 588, 596; *Barrett v. Hartley* (1866), L. R. 2 Eq. 789, *per* STUART, V.-C., at p. 796).

(*d*) *Chambers v. Goldwin* (1804), 9 Ves. 254, 267 *et seq.*, C. A.

(*e*) *Taylor v. Taylor* (1843), 4 Dr. & War. 124; *Re Beddingfield, Beddingfield v. D'Eye* (1887), 57 L. T. 332.

(*f*) *How v. Godfrey* (1678), Cas. temp. Finch, 361; *Bonithon v. Hockmore* (1685), 1 Vern. 316; *Robinson v. Pett* (1734), 3 P. Wms. 249; *Re Ormsby, a Minor* (1809), 1 Ball & B. 189, 190; *Pince v. Beattie* (1863), 9 Jur. (N. S.) 1119; *Barrett v. Hartley*, *supra*, at p. 796; *Re Accles, Ltd., Hodgson v. Accles, Ltd.*, [1902] W. N. 164. The fact that the trustee has benefited the trust property to the prejudice of his own affairs cannot be taken into consideration (*Robinson v. Pett*, *supra*). He cannot charge or take a commission or other remuneration for performing any duty in connexion with the trust unless he is specially authorised to do so by the instrument creating the trust (*Arnold v. Garner* (1847), 2 Ph. 231, C. A., *per* Lord COTTENHAM, L.C., at p. 235; *Nicholson v. Tutin* (No. 2) (1857), 3 K. & J. 159); as to a trustee who is an auctioneer, see *Matthison v. Clarke* (1854), 3 Drew. 3; *Douglas v. Archbutt* (1858), 2 De G. & J. 148, C. A.; and title AUCTION AND AUCTIONEERS, Vol. I., p. 516. As to the right of a constructive trustee to remuneration in some cases, see p. 165, *post*. A director of a company who holds his qualification shares as trustee for another company is not accountable to that company for his director's fees (*Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.). As to where a person who acted as salesman for a firm at a salary was appointed trustee of a share in the firm, see *Re Lewis, Lewis v. Lewis* (1910), 103 L. T. 495.

(*g*) *New v. Jones* (1833), 1 Mac. & G. 668, note (d); *Moore v. Frowd* (1837), 3 My. & Cr. 45; *Fraser v. Palmer* (1841), 4 Y. & C. (EX.) 515; *Bainbrigge v. Blair*, *supra*; *Stanes v. Parker* (1846), 9 Beav. 385, *per* Lord LANGDALE M.R., at p. 389; *Todd v. Wilson* (1846), 9 Beav. 486; *Gomley v. Wood* (1846), 3 Jo. & Lat. 678; *Re Wyche* (1848), 11 Beav. 209; *Cradock v. Piper* (1850), 1 Mac. & G. 664, C. A.; *Lincoln v. Windsor* (1851), 9 Hare, 158; *Broughton v. Broughton* (1855), 5 De G. M. & G. 160, C. A.; *Re Barber, Burgess v. Vinicombe* (1886), 34 Ch. D. 77.

(*h*) *Burden v. Burden* (1813), 1 Ves. & B. 170; *Stocken v. Dawson* (1843), 6 Beav. 371; *Barrett v. Hartley*, *supra*; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654, C. A., *per* BACON, V.-C., at pp. 662, 663.

(*i*) *Christophers v. White* (1847), 10 Beav. 523; *Broughton v. Broughton*, *supra*; *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675, C. A. But where the partner of a solicitor-trustee is appointed steward of a manor

SECT. 3.  
Rights of  
Trustees.

unless the trustee arranges that the partner employed shall alone be entitled to the remuneration (*k*). The rule also extends to executors and to trustees of implied trusts (*l*). It does not, however, apply to the costs of a solicitor-trustee acting in legal proceedings for himself and his co-trustees jointly, or for himself and his *cestui que trust* (*m*), or where he acts separately for a person to whom trust money is lent on mortgage (*n*), or as between him and a stranger who unsuccessfully brings an adverse action against the trust (*o*).

Express  
declaration as  
to remunera-  
tion.

**337.** The creator of a trust may, however, expressly declare that a trustee who is a solicitor or acts in some other professional character shall receive his usual professional remuneration for so acting (*a*). Such a declaration in a will amounts to a legacy to the trustee; it is, therefore, void if he is an attesting witness to the will (*b*), and does not take effect if the testator's estate is insolvent (*c*), though it operates notwithstanding the bequest of a legacy to the trustee conditionally upon his accepting the trust (*d*). The declaration does not authorise charges for services not strictly professional (*e*) unless expressly so worded (*f*).

Amount of  
remuneration.

**338.** The trustees, unless specially authorised to do so, cannot bind the beneficiaries as to the amount of the remuneration to be paid to a solicitor-trustee, or to an independent solicitor (*g*), and a

forming part of the trust estate, the firm is not accountable to the trust estate for fees received by him for manorial business and brought into the partnership accounts, since they were received by him as steward and not as a solicitor (*Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675, C. A.).

(*k*) *Clack v. Carlon* (1861), 7 Jur. (N. S.) 441.

(*l*) *Pollard v. Doyle, Kearns v. Doyle* (1860), 1 Drew. & Sm. 319; *Carmichael v. Willson* (1830), 4 Bl. (N. S.) 145, H. L.; *Macartney v. Dickey* (1865), 16 I. Ch. R. 409.

(*m*) *Cradock v. Piper* (1850), 1 Mac. & G. 664, C. A.; *Lincoln v. Windsor* (1851), 9 Hare, 158; *Re Barber, Burgess v. Vinicome* (1886), 34 Ch. D. 77; *Re Corsellis, Lawton v. Elwes, supra*. But where a trustee-solicitor employs another solicitor to act for him in proceedings on behalf of the trust on agency terms, the benefit of the contract accrues to the trust estate and not to himself (*Re Taylor* (1854), 18 Beav. 165).

(*n*) *Whitney v. Smith* (1869), 4 Ch. App. 513.

(*o*) *Pince v. Beattie* (1863), 9 Jur. (N. S.) 1119.

(*a*) *Christophers v. White* (1847), 10 Beav. 523, *per* Lord LANGDALE, M.R., at p. 524; *Douglas v. Archbutt* (1858), 2 De G. & J. 148, C. A.; *Re Fish, Bennett v. Bennett*, [1893] 2 Ch. 413, C. A.; *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73, C. A. For various forms of a declaration for this purpose, see 47 Sol. Jo. 6, 25; *Encyclopædia of Forms and Precedents*, Vol. II., p. 412; Vol. XIII., p. 440; Vol. XV., p. 409.

(*b*) *Re Pooley* (1888), 40 Ch. D. 1, C. A.; see title WILLS, p. 556, note (s), *post*.

(*c*) *Re White, Pennell v. Franklin*, [1898] 1 Ch. 297.

(*d*) *Re Fish, Bennett v. Bennett, supra*.

(*e*) *Harbin v. Darby* (No. 1) (1850), 28 Beav. 325; *Re Chapple, Newton v. Chapman* (1884), 27 Ch. D. 584; *Re Chalinder and Herington*, [1907] 1 Ch. 58.

(*f*) *Re Ames, Ames v. Taylor* (1883), 25 Ch. D. 72; *Clarkson v. Robinson*, [1900] 2 Ch. 722.

(*g*) *Re Fish, Bennett v. Bennett, supra*; *Re Wellborne*, [1901] 1 Ch. 312, C. A.

solicitor-trustee ought to inform the beneficiaries of their right to have his bill taxed (*h*).

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Trustees.

**339.** A constructive trustee may be entitled to an allowance or remuneration in respect of the time and trouble expended by him on property of which he is rightfully in possession, but of which he is in equity a constructive trustee (*i*).

Constructive  
trustee.

SUB-SECT. 5.—*Protection of the Court.*

**340.** Where a trustee is in doubt as to his right course of action, he is entitled to take the opinion of the court (*k*); and, generally, a trustee is entitled to the reasonable protection and direction of a court of equity in the exercise of his trust (*l*). If, however, he obstinately, capriciously, or unreasonably refuses to act without that protection, he will be ordered to pay the costs of the proceedings for obtaining it (*m*). The decision of a court of first instance completely protects and indemnifies him in respect of what he does in accordance with it (*n*). If he appeals from it to a higher tribunal, he does so at his own risk (*o*); and, if he fails, he will be ordered to pay the costs of the appeal (*p*).

Power to  
apply to the  
court.

(*h*) *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73, C. A.; see *Allen v. Jarvis* (1869), 4 Ch. App. 616; title SOLICITORS, Vol. XXVI., p. 753.

(*i*) *Brown v. Litton* (1711), 1 P. Wms. 140; *Brown v. De Tastet* (1821), Jac. 284; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84.

(*k*) *Talbot v. Radnor (Earl)* (1834), 3 My. & K. 252, per LEACH, M.R., at p. 253; *Iredell v. Iredell* (1854), 18 Beav. 202; *King v. King* (1857), 1 De G. & J. 663, C. A.; *Rose v. Sharrod* (1863), 11 W. R. 356; *Re Radnor's (Earl) Will Trusts* (1890), 45 Ch. D. 402, C. A., per Lord ESHER, M.R., at p. 423; R. S. C., Ord. 54A; Ord. 55, r. 3. A trustee invested with an absolute discretion may obtain the direction of the court as to its exercise (*Law Guarantee Trust and Accident Society v. Munich Re-insurance Co.*, [1912] 1 Ch. 138, per WARRINGTON, J., at p. 156).

(*l*) *Taylor v. Glanville* (1818), 3 Madd. 176, per LEACH, V.-C., at p. 178; *Goodson v. Ellisson* (1827), 3 Russ. 583, per Lord GIFFORD, M.R., at p. 589; *Gardiner v. Downes* (1856), 22 Beav. 395, per ROMILLY, M.R., at p. 397; *King v. King* (1857), 1 De G. & J. 663, C. A.; *Merlin v. Blaggrave* (1858), 25 Beav. 125, per ROMILLY, M.R., at pp. 137, 138; *Cook v. Harvey*, [1874] W. N. 69; and see p. 182, *post*. Where the matter is in doubt a trustee has a right to take proceedings to ascertain whether any amount is due from or to him or from his *cestui que trust* (*Singleton v. Selwyn* (1863), 9 L. T. 408, per WOOD, V.-C., at p. 409. As to the right of a trustee to a release, see pp. 116, 117, *ante*).

(*m*) *Taylor v. Glanville*, *supra*, at p. 178; *Goodson v. Ellisson*, *supra*, at p. 589; *Re Cabburn, Gage v. Rutland* (1882), 46 L. T. 848. He cannot throw the expense of obtaining the protection upon the trust property where no responsibility on his part is involved, or where his motive is obviously vexatious (*Curteis v. Candler* (1821), Madd. & G. 123).

(*n*) *Underwood v. Hatton* (1842), 5 Beav. 36; *Foster v. M' Mahon* (1847), 11 L. Eq. R. 287; *Rowland v. Morgan* (1848), 13 Jur. 23, per Lord COTTENHAM, L.C., at p. 26; *Smith v. Smith* (1861), 1 Drew. & Sm. 384, per KINDERSLEY, V.-C., at p. 387; *Re Radnor's (Earl) Will Trusts*, *supra*, at p. 423.

(*o*) *Rowland v. Morgan*, *supra*, at p. 26; *Tucker v. Hernaman* (1853), 4 De G. M. & G. 395, 404, C. A.

(*p*) *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588, C. A.; *Re Radnor's (Earl) Will Trusts*, *supra*, at p. 423.



SECT. 4.  
Dealings  
with Bene-  
ficiaries and  
Their  
Interests.

How far gift  
valid.

SECT. 4.—*Dealings with Beneficiaries and Their Interests.*

SUB-SECT. 1.—*Gifts to Trustees.*

**341.** As a trustee is not entitled to remuneration for his services (*q*), so a gift to him from a *cestui que trust* is liable to be set aside (*r*), especially if it is made out of or with respect to the capital or income of the trust property (*s*). Such a gift may, however, stand if the trustee can prove that he has placed himself in exactly the same position as a stranger would have been in, and that he has taken no advantage of his influence or knowledge, or of his relation to the *cestui que trust*, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation, and that he has put the *cestui que trust* on his guard, and has brought everything to the knowledge of the *cestui que trust* which he himself knew (*t*).

SUB-SECT. 2.—*Bargains with Beneficiaries.*

Bargains.

**342.** A bargain or arrangement between a trustee and a *cestui que trust* with reference to the trust property, by which the interest of the *cestui que trust* therein is in any way prejudiced, is liable to be set aside, unless it can be shown that the *cestui que trust*, in concurring in it, was fully aware of all the circumstances of the case, and had not been subjected to any pressure or undue influence (*a*).

(*q*) See pp. 162 *et seq.*, *ante*.

(*r*) *Hylton v. Hylton* (1754), 2 Ves. Sen. 547; *Billage v. Southee* (1852), 9 Hare, 534, *per* TURNER, V.-C., at p. 540. It is almost impossible that, where the relation of trustee and *cestui que trust* exists, a transaction purporting to be a bounty for the execution of antecedent duty can stand, however moral and creditable the action may be (*Hatch v. Hatch* (1804), 9 Ves. 292, *per* Lord ELDON, L.C., at pp. 296, 297). A *cestui que trust* cannot give a benefit to a trustee (*Vaughton v. Noble* (1861), 30 Beav. 34, *per* ROMILLY, M.R., at p. 39; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 109, 110). A gift from a *cestui que trust* to a trustee, even where the parties are in the relation of wife and husband, can only be supported by very strong and clear evidence (*Re Blake, Blake v. Power* (1889), 37 W. R. 441, *per* KAY, J., at p. 442).

(*s*) *Barrett v. Hartley* (1866), L. R. 2 Eq. 789; see title GIFTS, Vol. XV., p. 405.

(*t*) *Hunter v. Atkins* (1834), 3 My. & K. 113, C. A., *per* Lord BROUGHAM, L.C., at p. 135. No one standing in a fiduciary relation to a person can retain a gift made to him by that person if the donor impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever (*Powell v. Powell*, [1900] 1 Ch. 243, *per* FARWELL, J., at p. 245).

(*a*) *Hylton v. Hylton*, *supra*; *Aberdeen Rail. Co. v. Blakie Brothers* (1854), 1 Macq. 461, H. L.; *Ellis v. Barker* (1871), 7 Ch. App. 104; *Costa Rica Rail. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 760, 761. The transaction, in order to be impeachable, must be connected with the trust (*Knight v. Marjoribanks* (1849), 2 Mac. & G. 10, C. A.), and the rule does not extend to dealings between a mortgagee and mortgagor (*ibid.*). A dealing of a trustee with a *cestui que trust* may be upheld if it is fair in all respects and no advantage has been taken of the *cestui que trust*, and it is clear that he knew his rights and that the facts were correctly represented to him (*Luther v. Bianconi* (1860), 10 I. Ch. R. 194, *per* BRADY, L.C., at p. 200).

Where, however, the terms of the trust authorise the raising of money on the security of trust property, one of several trustees may lend money on a mortgage thereof by the trustees, and may exercise the powers of a mortgagee over it adversely to the trust (b).

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Dealings  
with Beneficiaries and  
Their  
Interests.

SUB-SECT. 3.—*Purchases by Trustees.*

**343.** Except under an express authority contained in the instrument creating the trust or under an order of a court of competent jurisdiction (c), a person who is invested with a trust or power to sell property cannot purchase it from himself, since he cannot at the same time occupy the two positions of vendor and purchaser (d); and one of several such persons cannot purchase it from the others (e). If such a person desires to purchase such property he must first be discharged from his trusteeship (f); and even then, in order that the transaction may be unimpeachable, it must be clear that, in purchasing it, he is not taking an advantage of knowledge which he has acquired in respect of it during his trusteeship (g). Nor can he sell the property to himself jointly with others, or to a trustee for himself (h), or to another person with a view to its resale to himself (i), though if the sale is in all respects *bonâ fide* he may sell to the trustees of his marriage settlement (k) or to a joint stock company in which he is a shareholder (l). After selling it to an

Loans on  
security of  
the trust  
property.  
Disability of  
trustee.

(b) *A.-G. v. Hardy* (1851), 1 Sim. (N. S.) 338; *Re Mason's Orphanage and London and North Western Rail. Co.*, [1896] 1 Ch. 54, per STIRLING, J., at p. 59; and see p. 171, *post*.

(c) *Campbell v. Walker* (1800), 5 Ves. 678, per ARDEN, M.R., at p. 681; *Farmer v. Dean* (1863), 32 Beav. 327; *Tennant v. Trenchard* (1869), 4 Ch. App. 537, per Lord HATHERLEY, L.C., at p. 547.

(d) *Whelpdale v. Cookson* (1747), 1 Ves. Sen. 9; *Mackreth v. Fox* (1791), 4 Bro. Parl. Cas. 258; *Ex parte Lacey* (1802), 6 Ves. 625, per Lord ELDON, L.C., at p. 626; *Ex parte James* (1803), 8 Ves. 337; *Randall v. Errington* (1805), 10 Ves. 423; *Downes v. Grazebrook* (1817), 3 Mer. 200; *Re Bloye's Trust* (1849), 1 Mac. & G. 488, C. A., per Lord COTTENHAM, L.C., at pp. 495 *et seq.*; *Knight v. Marjoribanks* (1849), 2 Mac. & G. 10, 12, C. A.; *Lewis v. Hillman* (1852), 3 H. L. Cas. 607; *Denton v. Donner* (1856), 23 Beav. 285, per ROMILLY, M.R., at p. 290; *Plowright v. Lambert* (1885), 52 L. T. 646, per FIELD, J., at p. 652; *Beningfield v. Baxter* (1886), 12 App. Cas. 167, P. C.; *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(e) *Whichcote v. Lawrence* (1798), 3 Ves. 740; *Ex parte Reynolds* (1800), 5 Ves. 707; *Morse v. Royal* (1806), 12 Ves. 355, per Lord ERSKINE, L.C., at p. 372; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654, C. A.

(f) *Campbell v. Walker*, *supra*, per ARDEN, M.R., at p. 681; *Ex parte Lacey*, *supra*, at pp. 626, 627; *Ex parte James*, *supra*, at p. 348; *Downes v. Grazebrook*, *supra*, per Lord ELDON, L.C., at p. 208; *Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244. If the trustee desires to purchase, and is willing to give more for the property than anyone else, he should apply to a court of equity, which would then take the conduct of sale, divesting him of his character of trustee in respect of it, and authorising him to bid at it (*Campbell v. Walker*, *supra*, at p. 681).

(g) *Ex parte Lacey*, *supra*, at pp. 626, 627.

(h) *Downes v. Grazebrook*, *supra*; *Robertson v. Norris* (1858), 1 Giff. 421; *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A., per LINDLEY, L.J., at p. 409.

(i) *Sanderson v. Walker, Campbell v. Walker* (1807), 13 Ves. 601; *Cook v. Collingridge* (1823), Jac. 607.

(k) *Hickley v. Hickley* (1876), 2 Ch. D. 190.

(l) *Farrar v. Farrars, Ltd.*, *supra*.

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with Bene-  
ficiaries and  
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independent person under the trust for sale, he cannot repurchase it for himself, so long as the contract for sale to that person remains executory, and he has power either to enforce it or to rescind or alter it (*m*). A subsequent repurchase by the trustee after a *bonâ fide* sale to a third party and the lapse of a considerable period will not, however, be set aside on the ground that when he sold the property he hoped to repurchase it for himself at some future time (*n*). Moreover, subject to the same principles as regulate purchases by other trustees from their *cestui que trust* (*o*), he may purchase the beneficial interest of a *cestui que trust* in property which he holds on trust for sale (*p*), and may purchase the property itself where the *cestui que trust* has assumed the conduct of the sale and arranges for the purchase (*q*), or where the *cestui que trust* urges the purchase on the trustee (*r*) or agrees to it (*s*).

Solicitor or  
agent of  
trustee for  
sale.

**344.** The disability to purchase the trust property extends to the solicitor or agent of a trustee for sale employed by him in connexion with the sale (*t*).

Trustee other-  
wise than for  
sale.

**345.** A trustee for other purposes than for sale cannot purchase the property, where the purchase would conflict with his duties respecting it or his position in regard to it (*a*). There is, however,

(*m*) *Parker v. McKenna* (1874), 10 Ch. App. 96, *per* MELLISH, L.J., at p. 125; *Williams v. Scott*, [1900] A. C. 499, P. C.; *Delves v. Gray*, [1902] 2 Ch. 606. He cannot, of course, do so if there has been some previous agreement or understanding between himself and the purchaser as to the subsequent purchase (*Parker v. McKenna, supra*, at p. 126).

(*n*) *Baker v. Pack* (1861), 9 W. R. 472, C. A.; *Re Postlethwaite, Postlethwaite v. Rickman* (1888), 37 W. R. 200, C. A.; compare *Hurrell v. Littlejohn*, [1904] 1 Ch. 689 (sale under the Settled Land Acts).

(*o*) See pp. 169, 170, *post*.

(*p*) *Randall v. Errington* (1805), 10 Ves. 423, *per* GRANT, M.R., at p. 427.

(*q*) *Coles v. Trecothick* (1804), 9 Ves. 234.

(*r*) *Morse v. Royal* (1806), 12 Ves. 355, 375.

(*s*) *Clarke v. Swaile* (1762), 2 Eden, 134; *Coles v. Trecothick, supra*; *Dover v. Buck* (1865), 5 Giff. 57, *per* STUART, V.-C., at p. 63; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, *per* BYRNE, J., at p. 313.

(*t*) *Twining v. Morrice* (1788), 2 Bro. C. C. 326; *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; *Ex parte Bennett* (1805), 10 Ves. 381; *Whitcomb v. Minchin* (1820), 5 Madd. 91; *Re Bloye's Trust* (1849), 1 Mac. & G. 488, *per* Lord COTTENHAM, L.C., at pp. 494 *et seq.*; *Lewis v. Hillman* (1852), 3 H. L. Cas. 607; *Cookson v. Lee* (1853), 23 L. J. (CH.) 473, C. A.; *Spring v. Pride* (1864), 4 De G. J. & Sm. 395, C. A.; *King v. Anderson* (1874), 8 I. R. Eq. 625, C. A.; *Martinson v. Clowes* (1882), 21 Ch. D. 857; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A., *per* LINDLEY, L.J., at p. 409. Where a sale by trustees for sale to their solicitors is set aside, a mortgage of the property by the solicitors to persons who have constructive notice of the circumstances of the sale is also set aside (*Cookson v. Lee, supra*).

(*a*) *Parkes v. White* (1805), 11 Ves. 209, 232 *et seq.*; see title EQUITY, Vol. XIII., pp. 156 *et seq.* In connexion with trust property trustees must put their own interest entirely out of the question; and this is so difficult in a transaction in which they are dealing with themselves that the court at once, and without inquiry, decides that such a transaction cannot stand (*Cook v. Collingridge* (1823), Jac. 607, *per* Lord ELDON, L.C., at p. 621). The disability to purchase extends to a trustee who has completed



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no absolute rule against his purchasing the trust property from his *cestui que trust* (b), and if he purchases the whole of it the relation between them is terminated (c). Such a transaction is always regarded by courts of equity with the utmost jealousy (d), and in order that it may stand, if it is impeached within a reasonable time by the *cestui que trust* or a person claiming through him (e), the trustee must show (1) that there has been no fraud or concealment

his active duties in respect of the property and has become a bare trustee (see p. 86, *ante*) in relation to it (*Ex parte Bennett* (1805), 10 Ves. 381); but it does not extend to a trustee who has had no active duties in connexion with the property, such as a trustee to preserve contingent remainders (*Pooley v. Quilter* (1858), 4 Drew. 184, *per* KINDERSLEY, V.-C., at p. 189), or a person who was named as a trustee but who disclaimed or never acted (*Stacey v. Elph* (1833), 1 My. & K. 195; *Mackintosh v. Barber* (1822), 1 Bing. 50; *Clark v. Clark* (1844), 9 App. Cas. 733, P. C.); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 298. As to obtaining an order of court permitting a trustee to purchase, see note (f), p. 167, *ante*.

(b) *Campbell v. Walker* (1800), 5 Ves. 678, *per* ARDEN, M.R., at p. 681; *Gibson v. Jeyes* (1801), 6 Ves. 266, *per* Lord ELDON, L.C., at p. 271; *Ex parte Lacey* (1802), 6 Ves. 625, 626; *Parkes v. White* (1805), 11 Ves. 209, *per* Lord ELDON, L.C., at p. 226; *Morse v. Royal* (1806), 12 Ves. 355; *Sanderson v. Walker, Campbell v. Walker* (1807), 13 Ves. 601, *per* Lord ELDON, L.C.; *Knight v. Marjoribanks* (1849), 2 Mac. & G. 10, *per* Lord COTTENHAM, L.C., at p. 12; *Denton v. Donner* (1856), 23 Beav. 285, *per* ROMILLY, M.R., at p. 290; *Luff v. Lord* (1864), 34 Beav. 220; *Dover v. Buck* (1865), 11 Jur. (N. S.) 580; *Plowright v. Lambert* (1885), 52 L. T. 646, *per* FIELD, J., at p. 652; *Thomson v. Eastwood* (1877), 2 App. Cas. 215, *per* Lord CAIRNS, L.C., at p. 236.

(c) *Gibson v. Jeyes, supra*, at pp. 271, 277; *Morse v. Royal, supra*, *per* Lord ERSKINE, L.C., at p. 373. In purchases by a trustee from his *cestui que trust* an act is done which, though open to inquiry, puts an end in form to the relation between them. If the purchase stands, he is no longer a trustee, since the *cestui que trust* has permitted him to become the beneficial owner (*Chalmer v. Bradley* (1819), 1 Jac. & W. 51, *per* PLUMER, M.R., at p. 68).

(d) *Morse v. Royal, supra*, at p. 372; *Watson v. Toone* (1820), Madd. & G. 153. The mischiefs of a purchase by a trustee from his *cestui que trust* are great (*Chalmer v. Bradley, supra*, at p. 68). The same principle applies to constructive trustees or trustees *de son tort* (*Plowright v. Lambert, supra*), and to solicitors and agents and other persons in a fiduciary position to the vendor (*Gibson v. Jeyes, supra*; *Holman v. Loynes* (1854), 4 De G. M. & G. 270, C. A.; *Spencer v. Topham* (1856), 22 Beav. 573; *Johnson v. Fesemeyer* (1858), 3 De G. & J. 13; *Tate v. Williamson* (1866), 2 Ch. App. 55; *Cockburn v. Edwards* (1881), 18 Ch. D. 449, C. A., *per* JESSEL, M.R., at p. 455; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Barron v. Willis*, [1900] 2 Ch. 121, C. A.), including counsel in relation to their clients (*Carter v. Palmer* (1842), 8 Cl. & Fin. 657, H. L.); but purchases by them will be upheld if the vendor is separately advised and fully cognisant of the circumstances (*Edwards v. Meyrick* (1842), 2 Hare, 60, 68 *et seq.*; *Holman v. Loynes, supra*, at pp. 281 *et seq.*; *Barnard v. Hunter* (1856), 5 W. R. 92). The principle does not apply to purchases by a mortgagee from a mortgagor (*Knight v. Marjoribanks, supra*), or by a partner from the representatives of a deceased partner (*Chambers v. Howell* (1847), 11 Beav. 6; *Knox v. Gye* (1872), L. R. 5 H. L. 656, *per* Lord WESTBURY, at p. 675).

(e) *Campbell v. Walker, supra*, at p. 680; *Randall v. Errington* (1805), 10 Ves. 423, *per* GRANT, M.R., at p. 427. Lapse of time does not begin to prejudice the *cestui que trust* on the ground of laches or acquiescence, until he has knowledge that the trustee has become the purchaser of the property (*Randall v. Errington, supra*, at p. 427).

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with Bene-  
ficiaries and  
Their  
Interests.

Setting aside  
of purchase.

or advantage taken by him of information acquired by him in the character of trustee (*f*); (2) that the *cestui que trust* had independent advice (*g*), and every kind of protection (*h*), and the fullest information with respect to the property (*i*); and (3) that the consideration was adequate (*k*).

**346.** A purchase by a trustee is set aside against a subsequent purchaser from him with notice (*l*). A purchase by a trustee is not set aside by a court of equity, however, if there has been delay or acquiescence on the part of the *cestui que trust* or subsequent dealings by him on the footing of its having taken place (*m*). Where it is set aside at the instance of the *cestui que trust*, the property will be ordered to be reconveyed to him in consideration of the payment by him of the price at which the trustee bought, with interest thereon at 4 per cent.; while, on the other hand, the trustee, or any purchaser from the trustee with notice, accounts for the rents and profits since the purchase by the trustee, but without interest thereon, or, if he has been in actual possession, is charged with an occupation rent (*n*). The trustee will be entitled, in addition to his purchase-money, to an allowance with interest for improvements and repairs made by him which are substantial and lasting (*o*), or tend to enhance the price of the property on a resale (*p*); and, on the other hand, if he has done anything to deteriorate its value, the amount of the deterioration will be deducted from what he receives (*q*).

The *cestui que trust* may, in the alternative, require the property to be resold (*r*). In this case it is put up at a sum representing

(*f*) *Dougan v. Macpherson*, [1902] A. C. 197, 200, 201, 204 *et seq.*

(*g*) *Luff v. Lord* (1864), 34 Beav. 220, 228; *Plowright v. Lambert* (1885), 52 L. T. 646, 651. But independent legal advice is not absolutely essential (*Readdy v. Pendergast* (1886), 55 L. T. 767, *per* KEKEWICH, J., at p. 768).

(*h*) *Denton v. Donner* (1856), 23 Beav. 285, 290; *Smedley v. Varley* (1857), 23 Beav. 358, *per* ROMILLY, M.R., at p. 359.

(*i*) *Luff v. Lord* (1864), 34 Beav. 220, 228, 230; *Williams v. Scott*, [1900] A. C. 499, P. C.; *Dougan v. Macpherson*, *supra*, *per* Lord HALSBURY, L.C., at p. 202.

(*k*) *Killick v. Flexney* (1792), 4 Bro. C. C. 161; *Morse v. Royal* (1806), 12 Ves. 355, 373; *Luff v. Lord*, *supra*, at pp. 231, 233; *Plowright v. Lambert*, *supra*; *Williams v. Scott*, *supra*; *Dougan v. Macpherson*, *supra*, at p. 202.

(*l*) *Cookson v. Lee* (1853), 23 L. J. (CH.) 473, C. A.

(*m*) *Randall v. Errington* (1805), 10 Ves. 423, *per* GRANT, M.R., at p. 427; *Gregory v. Gregory* (1815), Coop. G. 201, 205, affirmed (1821), Jac. 631, C. A.; *Roberts v. Tunstall* (1845), 4 Hare, 257; *Re Worssam, Hemery v. Worssam* (1882), 51 L. J. (CH.) 669.

(*n*) *York Buildings Co. v. Mackenzie* (1795), 8 Bro. Parl. Cas. 42; *Macartney v. Blackwood* (1795), Ridg. L. & S. 602; *Ex parte James* (1803), 8 Ves. 337, 351; *Smedley v. Varley* (1857), 23 Beav. 358, *per* ROMILLY, M.R., at p. 359; *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(*o*) *York Buildings Co. v. Mackenzie*, *supra*, at p. 71; *Re Dumbell*, *Ex parte Hughes*, *Ex parte Lyon* (1802), 6 Ves. 617; *Ex parte Bennett* (1805), 10 Ves. 381, 400; *King v. Anderson* (1874), 8 I. R. Eq. 625, 639, C. A.

(*p*) *Ex parte Bennett*, *supra*, at p. 400.

(*q*) *Ibid.*, at p. 401.

(*r*) *Campbell v. Walker* (1800), 5 Ves. 678, 682; *Lister v. Lister* (1802), 6 Ves. 631.

the price at which the trustee purchased it(s), together with the value of any repairs and improvements made by him (t), and if a higher sum is offered it is sold for that figure; but, if not, the trustee is held to his purchase (u).

If, before the transaction is impeached, the trustee has resold the property to a purchaser for valuable consideration without notice (a), the *cestui que trust* may require the trustee to account for the difference in the price, with interest at 4 per cent. (b), or the difference between the sum paid by the trustee for the property and its real value (c).

SUB-SECT. 4.—*Other Acquisitions by Trustees.*

**347.** A trustee cannot, as a general rule, alone or jointly with others, take a lease of the trust property from himself or from his co-trustees (d). A trustee may, however, take from his co-trustees a mortgage of the trust estate (e), and he may take from a beneficiary to whom he lends money a mortgage of the equitable share or interest of such beneficiary in the trust property (f).

SECT. 4.  
Dealings  
with Benefi-  
ciaries and  
Their  
Interests.

Leases and  
mortgages to  
trustees.

SECT. 5.—*Litigation with Third Parties.*

**348.** A trustee can generally sue and be sued on behalf of or as representing the property of which he is trustee without joining any *cestui que trust*, and is considered as representing all his *cestuis que trust* (g). In some cases, however, the *cestuis que trust* ought

Institution  
and defence  
of proceed-  
ings.

(s) *Lister v. Lister* (1802), 6 Ves. 631.

(t) *Re Dumbell, Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617, 625; *Robinson v. Ridley* (1821), Madd. & G. 2.

(u) *Ex parte Reynolds* (1800), 5 Ves. 707; *Ex parte Lacey* (1802), 6 Ves. 625; *Lister v. Lister, supra*.

(a) See pp. 89, 90, *ante*.

(b) *Hall v. Hallet* (1784), 1 Cox, Eq. Cas. 134, 138; *Mackreth v. Fox* (1791), 4 Bro. Parl. Cas. 258; *Whickcote v. Lawrence* (1798), 3 Ves. 740; *Ex parte Reynolds, supra*; *Baker v. Carter* (1835), 1 Y. & C. (ex.) 250, 252.

(c) *Mackreth v. Fox, supra*; *Hardwicke (Lord) v. Vernon* (1799), 4 Ves. 411; *Baker v. Carter, supra*, at p. 252.

(d) *Re Dumbell, Ex parte Hughes, Ex parte Lyon, supra, per Lord ELDON, L.C.*, at p. 622.

(e) See p. 167, *ante*.

(f) *Phipps v. Lovegrove, Prosser v. Phipps* (1873), L. R. 16 Eq. 80, *per JAMES, L.J.*, at p. 88; *Newman v. Newman* (1885), 28 Ch. D. 674.

(g) R. S. C., Ord. 16, r. 8; *White v. Morris* (1852), 11 C. B. 1015; *Robertson v. Wait* (1853), 8 Exch. 299; *Stace v. Gage* (1878), 8 Ch. D. 451; *Simpson v. Denny* (1878), 10 Ch. D. 28; *Lloyd's v. Harper* (1880), 16 Ch. D. 290, 315, 317, C. A.; *Jennings v. Jordan* (1881), 6 App. Cas. 698; *Re Brown's Will* (1884), 27 Ch. D. 179; *Mellor v. Daintree* (1886), 33 Ch. D. 198, 205; *Re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444; *Barker v. Furlong*, [1891] 2 Ch. 172; *Re Hodge's Settled Estates*, [1895] W. N. 69; *Merry v. Pownall*, [1898] 1 Ch. 306, 310. The rule applies to partition actions (*Simpson v. Denny, supra*), and to trustees sued in proceedings to enforce a security by foreclosure or otherwise (R. S. C., Ord. 16, r. 8; *Wilkins v. Reeves* (1855), 3 W. R. 305; *Re Mitchell, Wavell v. Mitchell* (1892), 65 L. T. 851; *Re Booth and Kettlewell's Contract* (1892), 67 L. T. 550); see also titles MORTGAGE, Vol. XXI., pp. 268, 278, 280; PARTITION, Vol. XXI., p. 841. A covenant by a person "as trustee" does not render the trust estate liable; it is a covenant by himself, and the addition of



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with Third  
Parties.

Effect of valid  
defence.

Procedure  
where trustees  
do not take  
proceedings.

to be separately made parties (*h*); and the court or a judge may at any stage of the proceedings order any of the *cestuis que trust* to be made parties either in addition to or in lieu of the previously existing parties (*i*).

**349.** Where a trustee brings an action to enforce his legal right as against a third party, a defence which is valid against him generally bars the equitable right of his *cestui que trust* (*k*).

**350.** If one of several trustees refuses to join as plaintiff in a proper action or has a special interest which precludes him from doing so, he should be made a co-defendant (*l*). If no trustee is willing to institute a proper action, the *cestui que trust* must

the proviso "but not so as to create any personal liability" is repugnant and void (*Watling v. Lewis*, [1911] 1 Ch. 414, *per* WARRINGTON, J., at p. 423; *Shep. Touch*. 273; and see *Furnivall v. Coombes* (1843), 5 Man. & G. 736; *Farhall v. Farhall* (1871), 7 Ch. App. 123; *Re Tewkesbury Gas Co., Tysoe v. The Co.*, [1911] 2 Ch. 279, *per* PARKER, J., at p. 285; but compare *Williams v. Hathaway* (1877), 6 Ch. D. 544; *Gordon v. Campbell* (1842), 1 Bell, Sc. App. 428; *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337; *Re Robinson's Settlement, Gant v. Hobbs*, [1912] 1 Ch. 717, C. A., *per* BUCKLEY, L.J., at p. 729). Proceedings do not abate on a change of trustees, and a trustee may be made a party in lieu of an absolute owner to whose interest he has succeeded (R. S. C., Ord. 17, rr. 1, 3). A person claiming adversely to a trust should not be made a party to a suit for its execution (*A.-G. v. Avon, otherwise Aberavon Corporation* (1863), 3 De G. J. & Sm. 637, C. A.). As between the trustee and the third parties, the costs of litigation are not affected by the existence of the trust, but follow the ordinary rules (*Brodie v. St. Paul* (1791), 1 Ves. 326; *Edward v. Harvey* (1810), Coop. G. 40). Trustees suing on behalf of their *cestuis que trust* are not required to give security for costs, as nominal plaintiffs, in case of their poverty (*White v. Butt*, [1909] 1 K. B. 50, C. A.). In certain cases *cestuis que trust*, though unnecessary, may not be improper parties (*Merry v. Pownall*, [1898] 1 Ch. 306, *per* KEKEWICH, J., at p. 312). Where *cestuis que trust* ought not to have been parties to an action, their costs are not allowed (*Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611, C. A.). As to the duty of trustees in reference to instituting and defending actions and their power to compromise, see pp. 118, 140, *ante*; as to interpleader by or against trustees, see title INTERPLEADER, Vol. XVII., pp. 587, 591, 595, 596, 136, 614.

(*h*) *Re Smith, Ex parte London and North Western Rail. Co. and Midland Rail. Co.* (1888), 40 Ch. D. 385, C. A.; *Re Pigginn, Ex parte Mansfield Rail. Co.*, [1913] 2 Ch. 326.

(*i*) R. S. C., Ord. 16, r. 8; *Gas Light and Coke Co. v. Towse* (1887), 35 Ch. D. 519, 526.

(*k*) *Gibson v. Winter* (1833), 5 B. & Ad. 96; *Evans v. Edmonds* (1853), 13 C. B. 777. As to the effect of pleading the Statutes of Limitation, see title LIMITATION OF ACTIONS, Vol. XIX., p. 138. Where a person by fraud obtains a deed whereby another covenants to pay him an annual sum of money in trust for a third party, the fraud is a defence to an action on the covenant, although the *cestui que trust* is not shown to have been privy to it (*Evans v. Edmonds, supra*). But a defence which would be good against an action by a *cestui que trust* is not necessarily available against an action by his trustees (*Britten v. Perrott* (1834), 2 Cr. & M. 597; *May v. Taylor* (1843), 6 Man. & G. 261; *Re Hayward, Tweedie v. Hayward*, [1901] 1 Ch. 221), unless the *cestui que trust* is absolutely entitled to the whole of the trust property (*May v. Taylor, supra*, at pp. 264, 265). As to set-off, see p. 159, *ante*.

(*l*) *Adams v. Paynter* (1844), 1 Coll. 530, 534; *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121, C. A., *per* JESSEL, M.R., at p. 126.

ordinarily take proceedings for the administration of the trust by the court and obtain an order for liberty to use the trustee's name, or for a receiver who will use the trustee's name, in the institution of a proper action (*m*). In special circumstances, however, a *cestui que trust* may himself institute the action (*n*), adding as defendants every trustee (*o*) and every other *cestui que trust* (*p*), unless the trustees will allow their names to be used as plaintiffs on receiving a proper indemnity (*q*).

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Parties.

**351.** *Cestuis que trust* may, in some cases, themselves take independent proceedings against a person in respect of a contract entered into by that person with a trustee for them (*r*). They may even sue a company which, by its constitution, is not to be affected by notice of a trust (*s*).

Proceedings  
by *cestui que*  
*trust*.

#### SECT. 6.—*Receivers*.

**352.** A receiver of trust property is appointed (*t*) in the case of the trustees refusing to act if all the acting trustees and *cestuis*

When  
receiver  
appointed.

(*m*) *Doe d. Prosser v. King* (1834), 2 Dowl. 580; *Davies v. Davies* (1837), 2 Keen, 534; *Fletcher v. Fletcher* (1844), 4 Hare, 67, *per* WIGRAM, V.-C., at p. 78; *Travis v. Milne, Milne v. Milne* (1851), 9 Hare, 141, *per* TURNER, V.-C., at pp. 149, 150; *Stainton v. Carron Co.* (1854), 18 Beav. 146; *Jerdein v. Bright* (1861), 2 John. & H. 325, 332; *Touche v. Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671, *per* Lord HATHERLEY, L.C., at p. 677; *Sharpe v. San Paulo Rail. Co.* (1873), 8 Ch. App. 597, *per* JAMES, L.J., at pp. 609, 610; *Yeatman v. Yeatman* (1877), 7 Ch. D. 210; *Meldrum v. Scorer* (1887), 56 L. T. 471, *per* KAY, J., at p. 473.

(*n*) *Davies v. Davies, supra*; *Lancaster v. Evors* (1841), 4 Beav. 158 (refusal by trustee to sue); *Consett v. Bell* (1842), 1 Y. & C. Ch. Cas. 569; *Travis v. Milne, Milne v. Milne, supra*; *Stainton v. Carron Co., supra*, at p. 157; *Hilliard v. Eiffe* (1874), L. R. 7 H. L. 39, 43, note (2); *Gandy v. Gandy* (1885), 30 Ch. D. 57, 73 *et seq.*, C. A.; *Beningfield v. Baxter* (1886), 12 App. Cas. 167, 178, 179, P. C.; *Meldrum v. Scorer, supra*.

(*o*) *Harrison v. Pryse* (1740), Barn. (CH.) 324; *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308, 341, 345, C. A.

(*p*) *Meldrum v. Scorer, supra*, at p. 474.

(*q*) *Annesley v. Simeon* (1819), 4 Madd. 390; *Reade v. Sparkes* (1827), 1 Mol. 8; *Gandy v. Gandy, supra*, at pp. 69, 72; *Re Genese, Ex parte Kearsley* (1886), 17 Q. B. D. 1.

(*r*) *Pollard v. Downes* (1682), 2 Cas. in Ch. 121; *Tomlinson v. Gill* (1756), Amb. 330; *Gregory v. Williams* (1817), 3 Mer. 582, 589, 590; *Wilson v. Moore* (1833), 1 My. & K. 126, 337, C. A.; *Fletcher v. Fletcher, supra*; *Touche v. Metropolitan Railway Warehousing Co., supra*, at p. 677, and see notes (*n*)—(*p*), *supra*. As to a wife suing under a contract for separation, see title HUSBAND AND WIFE, Vol. XVI., p. 451. In some cases the right of the *cestui que trust* to take proceedings may subsist notwithstanding that the right of the trustee is barred by lapse of time (*Williams v. Papworth*, [1900] A. C. 563, P. C.); see title LIMITATION OF ACTIONS, Vol. XIX., pp. 138, 139.

(*s*) *Binney v. Ince Hall Coal and Cannel Co.* (1866), 35 L. J. (CH.) 363, 368.

(*t*) See title EQUITY, Vol. XIII., pp. 54 *et seq.*; and as to the procedure for the appointment, see title RECEIVERS, Vol. XXIV., pp. 343 *et seq.* The appointment is, where the circumstances so require, accompanied by an injunction restraining the trustee from intermeddling with the trust-property (*Everett v. Prythergch* (1841), 12 Sim. 363, 367, 368).

SECT. 6.  
 Receivers.

*que trust* consent to the appointment (a), but not otherwise (b). He is also appointed on the application of any *cestui que trust* (c), if the appointment is required for the safety of the trust property or the due administration of the trust (d), but not otherwise (e). The safety of the trust property and the due administration of the trust are deemed to be imperilled where the trustee has been guilty of wasting or neglecting the trust property (f) or of improperly disposing of it (g), or of some other breach of trust (h), or becomes a bankrupt (i) or insolvent (k), or is out of the jurisdiction (l), or has been guilty of gross misconduct (m); or where he shows undue

(a) *Beaumont v. Beaumont* (undated), cited in *Brodie v. Barry* (1811), 3 Mer. 695, 696; *Brodie v. Barry*, *supra*. A receiver appointed by consent must enter into the usual recognisances (*Manners v. Furze* (1847), 11 Beav. 30; *Tylee v. Tylee* (1853), 17 Beav. 583; see title RECEIVERS, Vol. XXIV., pp. 371 *et seq.*).

(b) *Browell v. Reed* (1842), 1 Hare, 434.

(c) *Middleton v. Dodswell* (1806), 13 Ves. 266; *Richards v. Perkins* (1838), 3 Y. & C. (EX.) 299; *Smith v. Smith* (1853), 10 Hare, Appendix, p. lxxi.; *Swale v. Swale* (1856), 22 Beav. 584. As to his appointment at the instance of one of the trustees, see *Re Fowler*, *Fowler v. Odell* (1881), 16 Ch. D. 723.

(d) *Havers v. Havers* (1740), Barn. (CH.) 22, 24; *Middleton v. Dodswell*, *supra*; *Wilson v. Wilson* (1838), 2 Keen, 249; *Tait v. Jenkins* (1842), 1 Y. & C. Ch. Cas. 492; *Cole v. Muddle* (1852), 10 Hare, 186, *per* TURNER, V.-C., at p. 190.

(e) *Dyot v. Morgan* (1806), cited in *Middleton v. Dodswell*, *supra*, at p. 268; *Barkley v. Reay* (Lord) (1843), 2 Hare, 306, 308; compare *Re Wells*, *Molony v. Brooke* (1890), 45 Ch. D. 569, 575 (executor). It is not a sufficient ground for appointing a receiver that an insolvent debtor has been deliberately named as a trustee by the creator of the trust (*Stainton v. Carron Co.* (1854), 18 Beav. 146, *per* ROMILLY, M.R., at p. 161); or that the trustees are in poor circumstances (*Hathornthwaite v. Russel* (1741), 2 Atk. 126; *Anon.* (1806), 12 Ves. 4; *Howard v. Papera* (1815), 1 Madd. 142); or that one of several co-trustees has disclaimed the trust (*Browell v. Reed*, *supra*), or has gone abroad or otherwise takes no part in administering the trust (*ibid.*, *per* WIGRAM, V.-C., at p. 435). The fact of trustees for sale letting a purchaser into possession before receiving his purchase-money is not sufficient ground for appointing a receiver (*ibid.*).

(f) *Anon.*, *supra*, *per* GRANT, M.R., at p. 5; *Middleton v. Dodswell*, *supra*, *per* LORD ERSKINE, L.C., at p. 269; *Richards v. Perkins* (1838), 3 Y. & C. (EX.) 299; *Evans v. Coventry* (1854), 5 De G. M. & G. 911, C. A.

(g) *Anon.*, *supra*, *per* GRANT, M.R., at p. 5.

(h) *Evans v. Coventry*, *supra*, *per* KNIGHT BRUCE, L.J., at p. 918.

(i) *Gladdon v. Stoneman* (1808), cited in *Howard v. Papera*, *supra*, at p. 143, note (a); *Langley v. Hawk* (1820), 5 Madd. 46; *Shore v. Shore* (1859), 4 Drew. 501, 502; *Re Hopkins*, *Dowd v. Hawlin* (1881), 19 Ch. D. 61, C. A.; and see p. 207, *post*.

(k) *Havers v. Havers*, *supra*; *Scott v. Becher* (1817), 4 Price, 346; *Mansfield v. Shaw* (1818), 3 Madd. 100; *Middleton v. Dodswell*, *supra*; *Stainton v. Carron Co.*, *supra*, at p. 161.

(l) *Taylor v. Allen* (1741), 2 Atk. 213; *Noad v. Backhouse* (1843), 2 Y. & C. Ch. Cas. 529; *Smith v. Smith*, *supra*. A receiver was appointed where one of four trustees was dead, another was abroad, the third had not actively interfered in the trust, and the fourth consented to the appointment (*Tidd v. Lister* (1820), 5 Madd. 429; see *Browell v. Reed*, *supra*, at p. 435).

(m) *Anon.*, *supra*, *per* GRANT, M.R., at p. 5; *Middleton v. Dodswell*, *supra*;



partiality towards any one of several *cestuis que trust* who have conflicting interests (*n*), or undertakes an obligation inconsistent with his duty as trustee (*o*); or where co-trustees disagree among themselves (*p*) or act separately (*q*).

SECT. 6.  
Receivers.

**353.** Where there is a co-trustee able and willing to act alone, an injunction restraining the defaulting or unfit trustee from intermeddling in the trust may be sufficient without the appointment of a receiver (*r*). Injunction in lieu of receiver.

**354.** One of the trustees may be appointed a receiver (*s*); but a solicitor-trustee cannot properly act as solicitor to the receiver (*t*). Capacity of trustees.

**355.** The commission of the receiver and other expenses of the receivership (*a*) are payable out of the income of the trust property (*b*). Expenses of receivership.

**356.** The receiver is appointed for the benefit of all parties interested, and will not be discharged merely on the application of the party at whose instance he was appointed (*c*). He will be discharged when the circumstances which led to his appointment no longer exist (*d*). Discharge of receiver.

#### SECT. 7.—Lodgment of Trust Fund in Court.

**357.** Trustees having in their hands or under their control moneys or securities (*e*) belonging to a trust (*f*) may, in a proper Payment into court.

*Everett v. Prythergch* (1841), 16 Sim. 363, 367, 368; *Bainbrigge v. Blair* (1841), 3 Beav. 421.

(*n*) *Talbot (Earl) v. Hope Scott* (No. 2) (1858), 4 K. & J. 139.

(*o*) *Ibid.*

(*p*) *Swale v. Swale* (1856), 22 Beav. 584; *Hart v. Denham*, [1871] W. N. 2. Where trustees have to carry on a business which they are not themselves qualified to manage, they usually agree in appointing a manager; and, if they fail to do so, the appointment by the court of a receiver and manager of the business is a matter of course (*Hart v. Denham, supra*).

(*q*) *Swale v. Swale, supra*.

(*r*) *Bowen v. Phillips*, [1897] 1 Ch. 174.

(*s*) *Tait v. Jenkins* (1842), 1 Y. & C. Ch. Cas. 492; *Nicholson v. Tutin* (1857), 3 Jur. (N. S.) 235; *Talbot (Earl) v. Hope Scott* (No. 2), *supra*, at p. 141; *Re Bignell, Bignell v. Chapman*, [1892] 1 Ch. 59, C. A.; and see title RECEIVERS, Vol. XXIV., p. 363.

(*t*) *Re Corsellis, Lawton v. Elwes* (1887), 34 Ch. D. 675, C. A.

(*a*) See title RECEIVERS, Vol. XXIV., pp. 403 *et seq.*

(*b*) *Shore v. Shore* (1859), 4 Drew. 501, 510; *Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; *Ramsay v. Simpson*, [1899] 1 I. R. 69.

(*c*) *Bainbrigge v. Blair, supra, per Lord LANGDALE*, M.R., at p. 423.

(*d*) *Ibid.*

(*e*) "Securities" include any annuities, Exchequer bonds, Exchequer bills, and other parliamentary securities of the Government of the United Kingdom, and any security of any foreign State, any part of the British dominions out of the United Kingdom or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom, and all stock, funds, and effects (Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 3; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50).

(*f*) The trustees for the time being can make the lodgment (*Re Parry*

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of Trust  
Fund in  
Court.

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case, pay the same into the High Court, or, in cases within their respective jurisdictions, into a palatine court or county court (*g*), and the receipt or certificate of the proper officer (*h*) is a sufficient discharge to trustees for the money or securities so paid into court (*i*). Where moneys or securities are vested in trustees, and the majority are desirous of paying the same into court, but the concurrence of the other trustees or trustee cannot be obtained, the court may order the payment into court to be made by the majority without that concurrence; and where any such moneys or securities are deposited with a banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court; and every transfer, payment and delivery made in pursuance of any such order is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid or delivered (*j*).

Payment into  
court, when  
justifiable.

**358.** A trustee is justified in lodging a trust fund in court where he has a *bonâ fide* doubt as to the persons entitled to it (*k*), or

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(1848), 6 Hare, 306). Trustees of a charitable fund can lodge it in court without the consent of the Charity Commissioners (*Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543). The procedure can be resorted to by life assurance companies (Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict. c. 8); see title INSURANCE, Vol. XVII., pp. 565, 566), but cannot be resorted to by purchasers from trustees (*Re Buckley's Trust* (1853), 17 Beav. 110), or bankers (*Re Thakeham Sequestration Moneys* (1871), L. R. 12 Eq. 494; *Re Sutton's Trusts* (1879), 12 Ch. D. 175; see p. 59, *ante*), or other persons or bodies holding money otherwise than as trustees (*Matthew v. Northern Assurance Co.* (1878), 9 Ch. D. 80; *Re Sutton's Trusts, supra*). As to the procedure, see pp. 177, 1 8 *post*.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 42, 46; see County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 67, 70, 71; and titles COUNTY COURTS, Vol. VIII., pp. 692, 693; COURTS, Vol. IX., pp. 122, 123, 125, 126. Where a fund which has been lodged in the Lancaster Palatine Court is claimed by a person residing out of the jurisdiction of that court who desires his claim to be decided by the High Court, he must apply to the Palatine Court for a transfer of the fund to the High Court (*Re Heywood* (1887), 58 L. T. 292, C. A.).

(*h*) See Supreme Court Funds Rules, 1905, rr. 29, 30, 37, 38; County Court Rules, 1903, Ord. 37, r. 1; Ord. 38, rr. 15, 16.

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (replacing the Trustee Relief Acts, stat. (1847) 10 & 11 Vict. c. 96, and stat. (1849) 12 & 13 Vict. c. 74). The trustee ought to lodge in court the fund itself and not merely a dividend thereon (*Re Glendenning*, [1867] W. N. 191). The trustee is entitled to deduct and retain the costs and expenses of the lodgment of the fund before lodging it in court, and any question as to the propriety of his doing so must be challenged by a separate proceeding (*Re Parker's Will* (1888), 39 Ch. D. 303, C. A.); or he can obtain payment of these costs and expenses out of the fund in court (*Bealy v. Curson* (1868), L. R. 7 Eq. 194; *Re Whitton's Trusts* (1869), L. R. 8 Eq. 352).

(*j*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.

(*k*) *Re Lane's Trust* (1854), 3 W. R. 134; *Re Headington's Trust* (1857), 6 W. R. 7; *Re Wright's Trusts* (1857), 3 K. & J. 419; *Re Wyll's Trusts* (1860), 28 Beav. 458; *Re Brocklesby* (1861), 29 Beav. 652; *Re Metcalfe's Trusts* (1864), 2 De G. J. & Sm. 122, C. A.; *Hockey v. Western*, [1898] 1

where, owing to the *cestuis que trust* not being *sui juris*, or for any other reason, he cannot otherwise get an effectual discharge for it (*l*).

**359.** If a trustee lodges in court a trust fund where the persons entitled to it can be clearly ascertained, he may be refused his costs in connexion therewith and may be ordered to pay the costs of proceedings for obtaining payment of the fund out of court (*m*). When a difficulty can be conveniently dealt with by an application to the court on summons, that course should be taken (*n*).

**360.** If the fund to be lodged in court is, or represents, a legacy or residue of a deceased person's estate to which an infant or person beyond the seas is absolutely entitled and on which the trustee has paid the legacy duty or on which no duty is chargeable, the trustee may make the lodgment, without an affidavit, on production of the

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of Trust  
Fund in  
Court.

Costs where  
payment  
unjustifiable.

Procedure  
for payment  
into court.

Ch. 350, C. A. Payment into court is justified where a beneficiary has incumbered his interest in the trust property and there is a question as to the amount due to the incumbrancer (*Hockey v. Western, supra*). The fact of the person entitled being a married woman does not of itself justify payment of the fund into court (*Re Waring* (1852), 16 Jur. 652; *Re Roberts's Trusts* (1869), 38 L. J. (CH.) 708; but see *Re Swan* (1864), 2 Hem. & M. 34). Where there was a doubt whether money held in trust for a married woman had been agreed to be settled, the trustee was held to be justified in paying it into court instead of paying it to her and her husband (*Re Bendyshe* (1857), 3 Jur. (N. S.) 727).

(*l*) *Re Cawthorne* (1848), 12 Beav. 56; *Re Upfull's Trust* (1851), 3 Mac. & G. 281; *Re Biddulph's Trusts*, *Re Poole's Trusts* (1852), 5 De G. & Sm. 469; *Re Irby* (1853), 17 Beav. 334; *Re Jones* (1857), 3 Drew. 679; *Re Coulson's Trust* (1857), 4 Jur. (N. S.) 6; *Re Beauchlerk* (1862), 11 W. R. 203; *Re Richards* (1869), L. R. 8 Eq. 119; *Re Parker's Will* (1888), 39 Ch. D. 303, C. A.; *Re Salaman, De Pass v. Sonnenthal*, [1907] 2 Ch. 46, 51.

(*m*) *Re Fagg's Trust* (1850), 19 L. J. (CH.) 175; *Re Lane's Trust, supra*; *Re Heming's Trust* (1856), 3 K. & J. 40; *Re Woodburn's Will* (1857), 1 De G. & J. 333, C. A.; *Re Bendyshe, supra, per KINDERSLEY, V.-C.*, at p. 728; *Re Knight's Trusts* (1859), 27 Beav. 45; *Re Foligno's Mortgage* (1863), 32 Beav. 131; *Re Leake's Trusts* (1863), 32 Beav. 135; *Re Pearson's Trusts* (1869), 17 W. R. 365; *Re Wise's Trusts* (1869), 3 I. R. Eq. 599; *Re Cull's Trusts* (1875), L. R. 20 Eq. 561, 564. As to the costs of lodging the fund in court, see note (*i*), p. 176, *ante*. The mere threat of an action or an unfounded claim made on a trust fund does not justify its being paid into court (*Re Waring, supra*; *Re Maclean's Trusts* (1874), L. R. 19 Eq. 274, *per* JESSEL, M.R., at p. 282). A trustee cannot pay money into court merely to get rid of the liability of a trust which he has undertaken to perform (*Re Knight's Trusts, supra, per* ROMILLY, M.R., at p. 49; *Re Elliot's Trusts* (1873), L. R. 15 Eq. 194), or because he cannot get a release from trustees who are entitled to receive it from him (*Re Cater's Trusts* (No. 2) (1858), 25 Beav. 366), or a release from the persons beneficially interested when there are executors who have a legal right to receive the money (*Re Hoskin's Trusts* (1877), 5 Ch. D. 229), or because, being an executor, he cannot get a release and indemnity, but only a receipt (*Re Roberts's Trusts, supra*; *Re Fortune's Trusts, Ex parte Brennan* (1870), 4 I. R. Eq. 351).

(*n*) R. S. C., Ord. 55, r. 3; *Re Giles* (1886), 55 L. J. (CH.) 695; and see *Re Birkett* (1878), 9 Ch. D. 576; and pp. 165, *ante*, 182, *post*; but see *Re Parker's Will* (1888), 39 Ch. D. 303, C. A., *per* COTTON, L.J., at p. 305). The institution of interpleader proceedings is another alternative; see title INTERPLEADER, Vol. XVII., p. 584.



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of Trust  
Fund in  
Court.

Inland Revenue certificate respecting the legacy or residue (*o*). In all other cases the trustee must make and file an affidavit stating briefly (1) the trust and the instrument creating it; (2) to the best of his belief, the names and addresses of the persons interested in the fund (3); his submission to answer inquiries respecting its application; and (4) his address for service of any proceeding in relation thereto; and he must also give notice of the lodgment to the persons named in his affidavit as interested therein (*p*).

Payment out  
of court.

**361.** Payment out of court is obtained on petition or summons by a person who proves his title to the fund (*q*). The petition or summons is served on such persons as the court or judge directs (*r*), including in most cases the trustee who lodged the fund in court, and whose duty it is to appear and protect the fund (*s*). The trustee is not, however, served where the lodgment is made without an affidavit (*t*), and he need not be served where in his affidavit he has stated that a named person, then an infant, was absolutely entitled to the fund (*u*), or where the portion of the fund sought to be paid out has been carried to the separate account of a named person (*a*). Where a fund has been lodged in court to the credit of infants as the next of kin of a person then supposed to have died

(*o*) R. S. C., Ord. 54B, r. 4 (1); Supreme Court Funds Rules, 1905, r. 41 (*a*).

(*p*) R. S. C., Ord. 54B, r. 4 (1), (2); Supreme Court Funds Rules, 1905, r. 41 (*b*); County Court Rules, 1903, Ord. 38, rr. 9—22.

(*q*) R. S. C., Ord. 54B, rr. 4 (2) (*b*), 4A; County Court Rules, 1903, Ord. 38, rr. 23 *et seq.* A person not named in the trustee's affidavit may apply (*Re Puttrell's Trusts* (1877), 7 Ch. D. 647; *Pelling v. Goddard* (1878), 9 Ch. D. 185). A person entitled to a definite share in the fund may apply, independently of the other beneficiaries, for payment out of that share (*Re Befford's Will* (1853), 21 L. T. (O. S.) 164; *Re Hawke's Trust* (1854), 18 Jur. 33; *Winkworth v. Winkworth* (1863), 32 Beav. 233; *Re Tracey's Trusts* (1872), 6 I. R. Eq. 271). As to rectifying a mistake in the instrument of trust, see title MISTAKE, Vol. XXI., p. 28. An applicant may be allowed his costs, although his claim fails (*Re Birch's Legacy under Bissell's Will* (1856), 2 K. & J. 369; compare *Ex parte Stevens* (1848), 2 Ph. 772, *per* Lord COTTENHAM, L.C., at p. 774). The fund will be distributed on the application of the trustee (*Re Cooper's Legacy Trusts, Ex parte Sparks* (1853), 4 De G. M. & G. 757, C. A.; *Re Trower's Trust* (1859), 1 L. T. 54; *Re Partington's Trust* (1861), 3 Giff. 378); but he is not generally the proper person to apply, and he runs the risk of not being allowed his full costs of doing so (*Re Cazneau's Legacy under Housman's Will* (1856), 2 K. & J. 249; *Re Hutchinson's Trusts* (1860), 1 Drew. & Sm. 27; *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543). As to the costs of the trustee on applications by beneficiaries for payment out of court, see *Re Sutton* (1882), 21 Ch. D. 855; *Re Vardon's Trusts* (1884), 33 W. R. 297.

(*r*) R. S. C., Ord. 54B, r. 4 (2) (*c*). As to proceedings in a county court, see County Court Rules, 1903, Ord. 38, r. 24. Where a person appeared and unreasonably opposed the application for payment out, he was ordered to pay the costs of the proceedings (*Re Armston's Trusts* (1864), 4 De G. J. & Sm. 454, C. A.).

(*s*) *Re Cawthorne* (1848), 12 Beav. 56; *Lowe v. Moore* (1906), 22 T. L. R. 640. As to proceedings in a county court, see County Court Rules, 1903, Ord. 38, r. 28.

(*t*) Annual Practice, 1914, p. 952; note on R. S. C., Ord. 54B, r. 4 (2) (*c*).

(*u*) *Re Beauchlerk* (1862), 11 W. R. 203.

(*a*) *Re Young (a Lunatic)* (1857), 5 W. R. 400, C. A.

intestate, but afterwards discovered to have left a will, the fund can be ordered to be paid out to the executor on his petition (*l*).

**362.** An order may be made for payment of the income of the fund to a person entitled thereto, while the fund itself is retained in court (*c*).

**363.** Payment into court by a trustee does not discharge him from his office (*d*), or relieve him from liability to account for trust money misapplied or not applied by him (*e*), or from liability to be sued in respect of any other breach of trust (*f*). He thereby expresses that he desires to be discharged within the meaning of a power authorising the appointment of a new trustee in that event (*g*); and he is no longer able to exercise any powers or discretions previously vested in him over or in reference to the trust property (*h*).

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of Trust  
Fund in  
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Payment of  
income.  
Effect of  
payment into  
court.

#### SECT. 8.—Administration by the Court.

**364.** A court of equity (*i*) interferes in the management and administration of a trust (*j*) where there is no trustee to carry it on (*k*),

Interference  
by court in  
administra-  
tion of trust.

(*b*) *Re Hood's Trusts*, [1896] 1 Ch. 270.

(*c*) *Re Leake's Trusts* (1863), 32 Beav. 135; *Re Gordon's Trusts* (1868), L. R. 6 Eq. 335; *Re Whitton's Trusts* (1869), L. R. 8 Eq. 352; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374; *Re Munton's Trusts* (1870), 39 L. J. (CH.) 764; *Re Evans' Trusts* (1872), 7 Ch. App. 609; *Re Battell's Trusts* (1872), 21 W. R. 138. Where the person entitled to the fund was deaf, dumb and blind, the fund was retained in court, and the income was ordered to be paid for the person's benefit (*Re Biddulph's Trusts*, *Re Poole's Trusts* (1852), 5 De G. & Sm. 469).

(*d*) *Thompson v. Tomkins* (1862), 2 Drew. & Sm. 8, 21, 22; *Barker v. Peile* (1865), 2 Drew. & Sm. 340, *per* KINDERSLEY, V.-C., at p. 342. Notice of any dealing with an interest in the fund in court should be given to him as trustee of the fund (*Thompson v. Tomkins*, *supra*).

(*e*) *Goode v. West* (1851), 9 Hare, 378; *Beaty v. Curson* (1868), L. R. 7 Eq. 194.

(*f*) *Re Waring* (1852), 16 Jur. 652; *Thorp v. Thorp* (1855), 1 K. & J. 438; *A.-G. v. Alford* (1855), 4 De G. M. & G. 843, C. A. But he is relieved as against claimants on the fund (*Re Jephson* (1859), 1 L. T. 5).

(*g*) *Re Bailey's Trust* (1854), 3 W. R. 31; *Re Williams' Settlement* (1858), 4 K. & J. 87.

(*h*) *Re Coe's Trust* (1858), 4 K. & J. 199; *Re Tegg's Trusts* (1866), 15 W. R. 52; *Re Mulqueen's Trusts*, *Ex parte Mulqueen* (1881), 7 L. R. Ir. 127; *Re Ashburnham's Trust* (1885), 54 L. T. 84; *Re Nettlefold's Trusts* (1888), 59 L. T. 315; *Re Poplar and Blackwall Free School* (1878), 8 Ch. D. 543; but see *Re Landon's Trusts* (1871), 40 L. J. (CH.) 370. Where, under the terms of the trust, trustees had a discretion as to the mode of applying the capital and income of the trust fund for the benefit of the *cestui que trust*, it was held that payment of the fund into court put an end to their discretion, but that the court could deal with the fund in the way that it considered best in his interest; and on his application the fund was ordered to be paid out to the trustees of a proper settlement executed by him (*Re Murphy's Trusts*, [1900] 1 I. R. 145).

(*i*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34, causes and matters for the execution of trusts, charitable or private, are assigned to the Chancery Division of the High Court. As to the jurisdiction of the county courts, palatine courts, and Mayor's Court of London, see titles COUNTY COURTS, Vol. VIII., pp. 443 *et seq.*; COURTS, Vol. IX., pp. 120 *et seq.*; MAYOR'S COURT, LONDON, Vol. XX., p. 286.

(*j*) As to the effect of administration by the court on the powers of a trustee, see p. 156, *ante*.

(*k*) See p. 67, *ante*.

SECT. 8.  
Adminis-  
tration by  
the Court.

or where the trustee wrongfully declines to act (*l*), or is acting improperly (*m*), or where difficulties have arisen which cannot be removed without its assistance (*n*), or where the decision of the court on a doubtful question connected with the trust or on the proper administration thereof is sought by the trustee (*o*) or by the *cestui que trust* (*p*). The court does not, however, interfere, (1) to enforce the exercise of a power by the trustee where he has been given an absolute discretion respecting it and he is not exercising that discretion wrongly or unreasonably (*q*), or (2) to control his action or discretion in any other way, unless he acts improperly (*r*), or (3) where the proceedings for obtaining administration by the court are vexatiously or unnecessarily instituted (*s*).

Departure  
from terms  
of trust.

**365.** In administering a trust the court has no power to alter its terms and substitute other provisions merely because it would be beneficial to the trust estate and the beneficiaries interested in it (*t*). In some cases the court authorises dealings with the trust property

(*l*) *Tempest v. Camoys* (Lord) (1882), 21 Ch. D. 571, C. A., *per* BRETT, L.J., at p. 579, and *per* COTTON, L.J., at p. 580. The court will compel a trustee to exercise in one way or another a discretion committed to him, where he declines to do so (*Milsington* (Viscount) *v. Mulgrave* (Earl) (1818), 3 Madd. 491; *Mortimer v. Watts* (1851), 14 Beav. 616; *Luther v. Bianconi* (1860), 10 L. Ch. R. 194).

(*m*) *Tempest v. Camoys* (Lord), *supra*; *Re Radnor's* (Earl) *Will Trusts* (1890), 45 Ch. D. 402, C. A., *per* CHITTY, J., at p. 405. As to an injunction against a trustee exercising his powers improperly, see p. 155, *ante*.

(*n*) *Re De Quetteville*, *De Quetteville v. De Quetteville* (1903), 19 T. L. R. 383, C. A.

(*o*) *Talbot v. Radnor* (Earl) (1834), 3 My. & K. 252; *Barker v. Peile* (1865), 2 Drew. & Sm. 340; *Hurst v. Hurst* (1874), 9 Ch. App. 762; R. S. C., Ord. 55, rr. 3 *et seq.*; and see p. 165, *ante*, p. 182, *post*.

(*p*) *Smallwood v. Rutter* (1851), 9 Hare, 24; R. S. C., Ord. 55, rr. 3 *et seq.*; and see p. 182, *post*; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 333 *et seq.*

(*q*) *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Tabor v. Brooks* (1878), 10 Ch. D. 273; *Camden* (Marquis) *v. Murray* (1880), 16 Ch. D. 161; *Tempest v. Camoys* (Lord), *supra*; *Re Bryant*, *Bryant v. Hickley*, [1894] 1 Ch. 324. Giving "a free discretion" to a trustee means, "Do as you like" (*Re Norrington*, *Brindley v. Partridge* (1879), 13 Ch. D. 654, 657, C. A.).

(*r*) *Brophy v. Bellamy* (1873), 8 Ch. App. 798; *Bethell v. Abraham* (1873), L. R. 17 Eq. 24; *Gisborne v. Gisborne*, *supra*; *Re Blake*, *Jones v. Blake* (1885), 29 Ch. D. 913, C. A.; *Re Bryant*, *Bryant v. Hickley*, *supra*; *Train v. Clapperton*, [1908] A. C. 342; *Re Knollys' Trusts*, *Saunders v. Haslam*, [1912] 2 Ch. 357, C. A.

(*s*) *Re Cabburn*, *Gage v. Rutland* (1882), 46 L. T. 848. If a trustee institutes proceedings for administration when he might have paid the fund into court or adopted some other less costly procedure, he may be deprived of or ordered to pay the extra costs occasioned by the course which he has taken (*Wells v. Malbon* (1862), 31 Beav. 48).

(*t*) *Johnstone v. Baber* (1845), 8 Beav. 233; *Land v. Land* (1874), 43 L. J. (CH.) 311; *Fitzpatrick v. Waring* (1882), 11 L. R. Ir. 35, C. A.; *Re Crawshay*, *Dennis v. Crawshay* (1888), 60 L. T. 357; *Re De Teissier's Settled Estates*, *Re De Teissier's Trusts*, *De Teissier v. De Teissier*, [1893] 1 Ch. 153; *Re Montagu*, *Derbshire v. Montagu*, [1897] 2 Ch. 8, C. A.; *Re Morrison*, *Morrison v. Morrison*, [1901] 1 Ch. 701, 704; *Re Willis*, *Willis v. Willis*, [1902] 1 Ch. 15, C. A.; *Re Legh's Settled Estate*, [1902] 2 Ch. 274, 280; *Re Tollemache*, [1903] 1 Ch. 955, C. A.; *Re Hazeldine's Trusts*, [1908] 1 Ch. 34, C. A., *per* FARWELL, L.J., at pp. 40, 41; but see *Re Household*, *Household v. Household* (1884), 27 Ch. D. 553.



which are not authorised by the terms of the trust, where they are imperatively required for the preservation or salvage of the trust property (*a*) or are warranted by their having secured that object (*b*); or where they are merely a slight extension of the terms and will permanently benefit the property (*c*); or where they are needed to meet an unexpected emergency (*d*) or the special and unforeseen exigencies of a *cestui que trust* (*e*).

SECT. 8.  
Adminis-  
tration by  
the Court.

**366.** Where it is necessary or expedient for the preservation of the trust estate or the due performance of the trust, the court orders the trust fund to be paid into court (*f*).

Order for  
payment.  
into court.

(*a*) *Frith v. Cameron* (1871), L. R. 12 Eq. 169; *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786; *Ferguson v. Ferguson* (1886), 17 L. R. Ir. 552, 570, C. A.; *Conway v. Fenton* (1888), 40 Ch. D. 512; *Re Montagu, Derbshire v. Montagu*, [1897] 1 Ch. 685, *per* KEKEWICH, J., at pp. 691 *et seq.*; *Re Legh's Settled Estate*, [1902] 2 Ch. 274, *per* KEKEWICH, J., at p. 280; *Neill v. Neill*, [1904] 1 I. R. 513. Where the terms of the trust disposition require the consent of a beneficiary to an act which is required for the safety or benefit of the trust property, the court may direct it to be performed without that consent (*Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, *per* JEKYLL, M.R., at p. 220; *Costello v. O'Rorke* (1869), 3 I. R. Eq. 172, 184).

(*b*) In proper cases the court orders costs incurred in proceedings for the preservation of the trust property to be charged on or paid out of the capital of the property (*Re Rivers' (Lord) Estate* (1874), 16 Ch. D. 588, note (2); *Re De La Warr's (Earl) Estates* (1881), 16 Ch. D. 587; *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318, 325, 326; *Hamilton v. Tighe*, [1898] 1 I. R. 123).

(*c*) *De la Salle v. Moorat* (1870), L. R. 11 Eq. 8; *Re Leigh's Estate* (1871), 6 Ch. App. 887, 892, C. A.; *Drake v. Trefusis* (1875), 10 Ch. App. 364; *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C. A. Money directed by the terms of a trust, or even by Act of Parliament, to be laid out in the purchase of land may be authorised by the court to be expended on the erection of new buildings on the trust estate, but not on the repair or improvement of existing buildings (*Drake v. Trefusis, supra, per* JAMES, L.J., at pp. 366, 367). In a proper case the court authorises trustees to expend money out of an unincumbered portion of trust property on the repair of a portion of the property which is in mortgage (*Re Hotchkys, Freke v. Calmady, supra, per* COTTON, L.J., at p. 417, *per* LINDLEY, L.J., at p. 420).

(*d*) *Clough v. Bond* (1838), 3 My. & Cr. 490, 497; *Harrison v. Randall* (1852), 9 Hare, 397, 407; *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534, 544, 545, C. A.; *Re Tollemache*, [1903] 1 Ch. 955, C. A.

(*e*) Where a person absolutely entitled to a trust fund was of unsound mind and in an asylum abroad, the court ordered the fund to be brought into court and the income to be paid to one of the trustees who undertook to apply it for the person's maintenance and benefit (*Re Carr's Trusts, Carr v. Carr*, [1904] 1 Ch. 792, C. A.).

(*f*) *Freeman v. Fairlie* (1817), 3 Mer. 29; *Whitmarsh v. Robertson* (1840), 4 Beav. 26; *Bartlett v. Bartlett* (1845), 4 Hare, 631; *Ross v. Ross* (1849), 12 Beav. 89; *Wilton v. Hill* (1852), 2 De G. M. & G. 807, C. A.; *Marryat v. Marryat* (1854), 23 L. J. (CH.) 876; *Hamond v. Walker* (1857), 3 Jur. (N. S.) 686; *Whatmore v. Turquand* (1860), 1 John. & H. 296; *Talbot v. Marshfield* (1864), 2 Drew. & Sm. 285; *Symonds v. Jenkins* (1876), 34 L. T. 277; *Porrett v. White* (1885), 31 Ch. D. 52, C. A. (but see *Re Wright, Kirke v. North*, [1895] 2 Ch. 747); *Re Carr's Trusts, Carr v. Carr, supra*; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 339, 340; and p. 207, *post*. A trust fund lent under a power in the instrument of trust was ordered to be paid into court on the representation of the trustee that it was in danger (*Payne v. Collier* (1790), 1 Ves. 170); and see *Foster v. Hewitt* (1837), 1 Jur.

## SECT. 8.

Adminis-  
tration by  
the Court.

Procedure  
for obtaining  
intervention  
of court; and  
costs of  
parties.

**367.** The intervention of the court is obtained by an action (*g*) or, in suitable cases, by an originating summons (*h*). Any trustee or *cestui que trust* has a right to seek or require the intervention of the court (*i*); but he may be refused his costs, or may be condemned to pay the costs of the proceedings, if he does so vexatiously or needlessly, or if he vexatiously or needlessly renders their institution necessary (*k*). The creator of the trust may, by appropriate

**839.** The existence of a discretionary power in the trustee is not a bar to an order for the payment of the trust fund into court, but the circumstance that such a power is on the point of being exercised may cause the court to refrain from directing such payment (*Talbot v. Marshfield* (1864), 2 Drew. & Sm. 285). Payment into court will not be ordered where the fund will be sufficiently protected by a *distringas* (*Ross v. Ross* (1849), 12 Beav. 89).

(*g*) *Borthwick v. Ransford* (1884), 28 Ch. D. 79. In proceedings against trustees for wilful default accounts will be directed against them on that footing on proof of a single instance of wilful default and at any stage of the proceedings (*Shepherd v. Towgood* (1823), Turn. & R. 379; *Garrett v. Noble* (1834), 6 Sim. 504; *Booth v. Purser* (1838), 1 I. Eq. R. 33; *Green v. Badley* (1844), 7 Beav. 274; *Coope v. Carter, Coope v. Townsend* (1852), 2 De G. M. & G. 292, C. A.; *Blakeley v. Blakeley* (1855), 1 Jur. (N. S.) 368; *Re Strahan, Ex parte Geaves* (1856), 8 De G. M. & G. 291, C. A.; *Sleight v. Lawson* (1857), 3 K. & J. 292; *Vernon v. Wright* (1858), 7 H. L. Cas. 35; *Lambert v. Lambert* (1860), 10 I. Ch. R. 500; *Massey v. Massey* (1862), 2 John. & H. 728; *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173, C. A.; *Cary v. Knowles* (1868), 19 L. T. 482; *Williams v. Higgins* (1868), 16 W. R. 390; *Nash v. Howell* (1869), 21 L. T. 743; *Job v. Job* (1877), 6 Ch. D. 562, where no wilful default was proved; *Re Symons, Luke v. Tonkin* (1882), 21 Ch. D. 757; *Smith v. Armitage* (1883), 24 Ch. D. 727; *Re Brier, Brier v. Evison* (1884), 26 Ch. D. 238, C. A.; *Re Anstice, Anstice v. Hibbell* (1885), 54 L. J. (CH.) 1104; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674. But this rule does not apply to cases of active breach of trust, in which relief is only given in respect of those specific breaches of trust which are alleged and proved (*Re Wrightson, Wrightson v. Cooke*, [1908] 1 Ch. 789). Accounts on the footing of wilful default cannot be obtained on an originating summons (*Re Hengler, Frowde v. Hengler*, [1893] W. N. 37; *Dowse v. Gorton*, [1891] A. C. 190, 202; *Re Newland, Bush v. Summers*, [1904] W. N. 181). See also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 338, 339; and as to taking executorship and trusteeship accounts separately, see *Armitage v. Elworthy* (1879), 13 Ch. D. 91, C. A.

(*h*) R. S. C., Ord. 55, r. 3; *Re Carlyon, Carlyon v. Carlyon* (1886), 56 L. J. (CH.) 219, *per* NORTH, J., at p. 220; *Re Davies (William)*, *Davies v. Davies* (1888), 38 Ch. D. 210, *per* NORTH, J., at p. 212; *Re Royle, Royle v. Hayes* (1889), 43 Ch. D. 18, C. A., *per* FRY, L.J., at p. 22. As to proof by a *cestui que trust* or a co-trustee in the bankruptcy of a defaulting trustee, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 210, 281, note (*g*).

(*i*) *Taylor v. Glanville* (1818), 3 Madd. 176; *Curteis v. Candler* (1821), Madd. & G. 123; *Angier v. Stannard* (1834), 3 My. & K. 566; *Merlin v. Blagrove* (1858), 25 Beav. 125; *Barker v. Peile* (1865), 2 Drew. & Sm. 340; *Cook v. Harvey*, [1874] W. N. 69; *Allen v. Norris*, [1884] W. N. 118; R. S. C., Ord. 55, r. 3. A *cestui que trust* under a voluntary trust has the same right to institute proceedings as if it had been created for valuable consideration (*Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89, C. A., *per* COTTON, L.J., at p. 102). A beneficiary interested in remainder in part of a trust fund may institute proceedings for administering the trust and require the fund to be brought into court (*Bartlett v. Bartlett* (1845), 4 Hare, 631; *Governesses' Benevolent Institution v. Rusbridger* (1854), 18 Beav. 467). A person claiming adversely to a trust cannot be made a party to a suit for its execution (*A.-G. v. Avon, otherwise Aberavon Corporation* (1863), 3 De G. J. & Sm. 637, C. A.).

(*k*) *Knight v. Martin* (1829), 1 Russ. & M. 70; *Angier v. Stannard*,



language, restrain him from doing so, on pain of forfeiting his interest in the trust property (*l*).

SECT. 8.  
Adminis-  
tration by  
the Court.

**368.** Where in an action the court is satisfied that diligent search has been made for any person who, in the character of a trustee, is made a defendant in order to serve him with a process of the court and that he cannot be found, the court may hear and determine the action and give judgment therein against him in his character of a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character (*m*).

Proceedings  
against  
trustee in his  
absence.

**369.** Where a beneficiary institutes proceedings against a surviving trustee for a general account and administration of the trust, the representative of a deceased trustee is not generally a necessary party (*n*). Where all the trustees are dead, an action for breach of trust and the recovery of trust property cannot be brought against the representatives of one who was not the last surviving trustee, unless the trust estate is represented by adding as co-defendants either the representatives of the last surviving trustee, or new trustees after they have been duly appointed (*o*).

Proceedings  
against last  
surviving  
trustee or his  
representa-  
tives.

**370.** A trustee who has no beneficial interest and an interested beneficiary ought not, as a general rule, to be represented at the hearing of the case by the same counsel (*p*). Where one of several trustees is also a beneficiary, he ought to appear separately from the other trustees (*q*).

Representa-  
tion of  
conflicting  
interests.

**371.** Absent parties are bound by the proceedings where they

Effect on  
absent parties.

(1834), 3 My. & K. 566, 572; *Campbell v. Home* (1842), 1 Y. & C. Ch. Cas. 664, 670; *Adams v. Adams*, [1892] 1 Ch. 369, C. A. As to apportioning the costs of administration proceedings between two estates, see *Re Allen, Wheeler v. Foster*, [1889] W. N. 132. As to the costs of trustees in connexion with the payment out of court of funds paid in under an administration action, see *Lowe v. Moore*, [1906] W. N. 142. As to the costs of administration proceedings generally, see *Day v. Croft* (1854), 19 Beav. 518; *Re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, C. A., per COTTON, L.J., at p. 33; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 347 *et seq.*

(*l*) *Adams v. Adams*, *supra*; *Re Allan, Havelock v. Havelock-Allan* (1896), 12 T. L. R. 299; but see *Powell v. Morgan* (1688), 2 Vern. 90; *Rhodes v. Muswell Hill Land Co.* (1861), 29 Beav. 560; *Re Williams, Williams v. Williams*, [1912] 1 Ch. 399.

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 43. Palatine courts and county courts have the same power in cases within their jurisdiction (*ibid.*, s. 46); see titles COUNTY COURTS, Vol. VIII., pp. 443 *et seq.*; COURTS, Vol. IX., pp. 120 *et seq.*

(*n*) *London Gas-Light Co. v. Spottiswoode* (1851), 14 Beav. 264; *Moore v. Morris* (1871), L. R. 13 Eq. 139; *Re Harrison, Smith v. Allen*, [1891] 2 Ch. 349. He can, however, be added as a defendant if there is good reason for that being done (*A.-G. v. Newbury Corporation* (1838), Coop. Pr. Cas. 72, 77, 78; *Coppard v. Allen* (1864), 2 De G. J. & Sm. 173, C. A.; *Re Harrison, Smith v. Allen*, *supra*, per CHITTY, J., at pp. 352 *et seq.*).

(*o*) *Re Jordan, Hayward v. Hamilton*, [1904] 1 Ch. 260.

(*p*) *Re Burton, Danby v. Burton*, [1901] W. N. 202.

(*q*) *Re Richards, Uglow v. Richards* (1901), 50 W. R. 90, 91.



SECT. 8.  
Adminis-  
tration by  
the Court.

are directed to be served with notice of the judgment or order, or an order is made appointing a party to the proceedings to represent them (*r*).

## Part IV.—Breaches of Trust.

### SECT. 1.—*Liability of Trustees.*

#### SUB-SECT. 1.—*Breach of Trust by Act or Omission.*

Acts or  
omissions.

**372.** Any act by a trustee in reference to the trust property in contravention of the duties imposed on him by the trust (*s*), or in excess of those duties (*t*), and any neglect or omission on his part to fulfil those duties (*a*), and the concurrence or acquiescence by one of several trustees in a similar act, neglect, or omission on the part of a co-trustee (*b*), constitutes a breach of trust (*c*); and if

(*r*) *May v. Newton* (1887), 34 Ch. D. 347; see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 208, 209.

(*s*) *Pye v. Gorges* (1710), Prec. Ch. 308; *Mansell v. Mansell* (1732), 2 P. Wms. 678; *Charitable Corporation v. Sutton* (1742), 9 Mod. Rep. 349; *Clough v. Bond* (1838), 3 My. & Cr. 490, per Lord COTTENHAM, L.C., at p. 496; *Harrison v. Randall* (1852), 9 Hare, 397, per TURNER, V.-C., at p. 407; *Reid v. Thompson* (1851), 2 I. Ch. R. 26; *Dance v. Goldingham* (1873), 8 Ch. App. 902, per JAMES, L.J., at pp. 909, 910.

(*t*) *Adair v. Shaw* (1803), 1 Sch. & Lef. 243, per Lord REDESDALE, L.C., at p. 274; *Collier v. McBean* (1865), 34 Beav. 426.

(*a*) *Charitable Corporation v. Sutton*, *supra*; *Montford (Lord) v. Cadogan (Lord)* (1810), 17 Ves. 485; *Moyle v. Moyle* (1831), 2 Russ. & M. 710, per Lord BROUGHAM, L.C., at p. 715; *Taylor v. Tabrum* (1833), 6 Sim. 281; *Clough v. Bond*, *supra*, at p. 496; *Fenwick v. Greenwell* (1847), 10 Beav. 412; *Dix v. Burford* (1854), 19 Beav. 409, 413; *Stone v. Stone* (1869), 5 Ch. App. 74; *Jefferys v. Marshall* (1870), 19 W. R. 94; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546, C. A., per COTTON, L.J., at pp. 567, 568. A trustee who at the request of one beneficiary neglects to sell the trust property when it can be sold advantageously, and afterwards sells it at a reduced price, is liable to make good the loss to the trust estate (*Taylor v. Tabrum*, *supra*; *Fry v. Fry* (1859), 27 Beav. 144; compare *Re Evans, Jones v. Evans*, [1913] 1 Ch. 23, 33).

(*b*) *Chambers v. Minchin* (1802), 7 Ves. 186; *Brice v. Stokes* (1805), 11 Ves. 319; *Munch v. Cockerell* (1839), 5 My. & Cr. 178; *Brumridge v. Brumridge* (1858), 27 Beav. 5; *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co., Ltd.*, *Dunning v. Gainsborough (Earl)* (1885), 54 L. J. (CH.) 991, 996; *Re Bennison, Cutler v. Boyd* (1889), 60 L. T. 859.

(*c*) *Adair v. Shaw*, *supra*, at p. 272. It is a breach of trust, notwithstanding that the trust was voluntarily created by the trustee himself without any valuable consideration (*Drosier v. Brereton* (1851), 15 Beav. 221, 225, 226), and notwithstanding that the trustee derives no personal advantage from it (*Adair v. Shaw*, *supra*, at p. 272; *Montford (Lord) v. Cadogan (Lord)*, *supra*, at p. 489). The fact of the trustee being remunerated for his services does not generally increase his liability (*Jobson v. Palmer*, [1893] 1 Ch. 71, per ROMER, J., at p. 76), but may in some circumstances do so (*National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373, 381, P. C.). As to breaches of trust in case of public and charitable trusts, see title CHARITIES, Vol. IV., pp. 271, 272, 276, 277, 330; as to breaches of official trust under the Official Secrets Act, 1911 (1 & 2 Geo. 5, s. 28), see titles CONSTITUTIONAL LAW, Vol. VII., p. 32; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 480, 481.

such breach of trust entails a loss on the trust estate, the trustee, and, after his decease or bankruptcy, the trustee's estate, are, as a general rule, liable (*d*). A trustee may, however, be relieved from such liability by the provisions of the instrument creating the trust (*e*) or by statute (*f*), or by the fact that the breach of trust has been occasioned by necessity or some other adequate cause (*g*), or has been authorised or condoned by the *cestui que trust* injured thereby (*h*), or has been due to an innocent mistake (*i*). A mere error of judgment does not in itself constitute a breach of trust (*k*); and a trustee is presumed to have dealt honestly and properly with the trust estate until the contrary is shown (*l*).

**373.** Liability for a breach of trust extends to a tenant for life in respect of matters as to which he is by the Settled Land Act, 1882 (*m*), placed in the position of a trustee (*n*), and to a constructive trustee and trustee *de son tort* (*o*), and to a trustee who retires

SECT. 1.  
Liability of  
Trustees.

Persons liable.

(*d*) *Scurfield v. Howes* (1790), 3 Bro. C. C. 90; *Kearnan v. FitzSimon* (1793), 3 Ridg. Parl. Rep. 1; *Adair v. Shaw* (1803), 1 Sch. & Lef. 243, 272; *Moons v. De Bernales*, *Kaison v. De Bernales* (1826), 1 Russ. 301; *Knatchbull v. Fearnhead* (1837), 3 My. & Cr. 122; *Jenkins v. Robertson* (1853), 1 Eq. Rep. 123; *Lander v. Weston* (1855), 3 Drew. 389; *Re Franklyn*, *Franklyn v. Franklyn* (1913), 30 T. L. R. 187, C. A.

(*e*) *Birls v. Betty* (1821), Madd. & G. 90; *Wilkins v. Hogg* (1861), 10 W. R. 47, C. A.; *Pass v. Dundas* (1880), 43 L. T. 665. But the indemnity clause usually inserted in settlements and wills does not protect a trustee against a breach of trust committed by himself (*Mucklow v. Fuller* (1821), Jac. 198; *Fenwick v. Greenwell* (1847), 10 Beav. 412; *Drosier v. Brereton* (1851), 15 Beav. 221; *Dix v. Burford* (1854), 19 Beav. 409; *Brumridge v. Brumridge* (1857), 27 Beav. 5; *Rehden v. Wesley* (1861), 29 Beav. 213).

(*f*) See pp. 141, 142, *ante*, pp. 195 *et seq.*, 200 *et seq.*, *post*.

(*g*) See p. 120, *ante*.

(*h*) See pp. 198 *et seq.*, *post*.

(*i*) *Crookshanks v. Turner* (1724), 7 Bro. Parl. Cas. 255; *Re Biddulph*, *Ex parte Norris* (1869), 4 Ch. App. 280, *per* GIFFARD, L.J., at p. 287. A mistake is not innocent where it could have been avoided by proper care or diligence, even when made under legal advice (*National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373, P. C.); and a trustee may be liable for a breach of trust though not aware that he has committed it (*Walker v. Symonds* (1818), 3 Swan. 1, *per* Lord ELDON, L.C., at p. 69).

(*k*) *Wilkinson v. Stafford* (1789), 1 Ves. 32, *per* Lord THURLOW, L.C., at p. 41; *Garrett v. Noble* (1834), 6 Sim. 504; *Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Selby v. Bowie* (1863), 9 Jur. (N. S.) 425, C. A., *per* TURNER, L.J., at p. 426; *Stott v. Milne* (1884), 25 Ch. D. 710, C. A., *per* Lord SELBORNE, L.C., at pp. 713, 714; *Re Hurst*, *Addison v. Topp* (1892), 67 L. T. 96, C. A., *per* LINDLEY, L.J., at p. 100; *Re Beddoe*, *Downes v. Cottam*, [1893] 1 Ch. 547, C. A., *per* BOWEN, L.J., at p. 562; *Re Chapman*, *Cocks v. Chapman*, [1896] 2 Ch. 763, C. A., *per* LOPES, L.J., at p. 778; *Re Kensit*, [1908] W. N. 235.

(*l*) *Taylor v. Millington* (1858), 4 Jur. (N. S.) 204, *per* WOOD, V.-C., at p. 205.

(*m*) 45 & 46 Vict. c. 38; see *ibid.*, s. 53; title SETTLEMENTS, Vol. XXV., pp. 635, 636.

(*n*) *Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50, *per* WARRINGTON, J., at pp. 55, 56.

(*o*) *Rackham v. Siddall* (1850), 1 Mac. & G. 607, *per* Lord COTTENHAM, L.C., at p. 621; *Pearce v. Pearce* (1856), 22 Beav. 248; *Lee v. Sankey* (1873), L. R. 15 Eq. 204, *per* BACON, V.-C., at p. 211; *Wassell v. Leggatt*, [1896] 1 Ch. 554; and see pp. 187, 188, *post*. As to constructive trustees and trustees *de son tort*, see pp. 8, 47 *et seq.*, 58 *et seq.*, 87 *et seq.*, *ante*.

SECT. 1. with a view to or with knowledge of an intended breach of Liability of trust (p).  
Trustees.

Married woman.

**374.** The respective liabilities of husband and wife for a breach of trust committed by the wife depend on the general law as to wrongs committed by a married woman (q). Where a husband is liable for his wife's breaches of trust, the liability extends to the case of a negative breach of trust by negligence as well as to a breach of trust by active misconduct (r).

Bare trustee.

**375.** Where a bare legal estate in property is vested in a person in trust for an equitable trustee who is interested in it upon trust for beneficiaries, if the bare trustee so deals with the legal estate as to sanction an act done by the equitable trustee to the prejudice of the beneficiaries, he thereby becomes a party to the breach of trust and is answerable accordingly (s). Where the equitable trust is for the purpose of sale, the bare trustee is, in the interests of the beneficiaries, bound to convey it to the equitable trustee to enable him to execute his trust. If, however, in parting with it he goes beyond the mere purpose of conveying it to the equitable trustee and so deals with it as to facilitate a breach of trust by the equitable trustee, he is deemed a party to the breach of trust and is responsible for it (t).

#### SUB-SECT. 2.—*Nature of Liability.*

##### (i.) *Civil Liability.*

Nature of liability.

**376.** A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction (a). A breach of trust is, in equity, regarded as giving rise to a simple contract debt (b), unless the trustee has covenanted under his

(p) See p. 113, *ante*.

(q) *Palmer v. Wakefield* (1840), 3 Beav. 227, 233; *Smith v. Smith* (1856), 21 Beav. 385; *Wainford v. Heyl* (1875), L. R. 20 Eq. 321; *Re Smith's Estate, Clifford v. Washington* (1879), 48 L. J. (CH.) 205; *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180; see title HUSBAND AND WIFE, Vol. XVI., pp. 369, 391, 408 *et seq.*, 439, 453 *et seq.*, 457.

(r) *Bahin v. Hughes* (1886), 31 Ch. D. 390, C. A.

(s) *Angier v. Stannard* (1834), 3 My. & K. 566, *per* LEACH, M.R., at p. 571; see *Margetts v. Perks* (1864), 34 L. J. (CH.) 109.

(t) *Angier v. Stannard*, *supra*, at p. 571.

(a) Co. Litt. 272 b; *Sturt v. Mellish* (1743), 2 Atk. 610, *per* Lord HARDWICKE, L.C., at p. 612; *Allen v. Imlett and Nicholls* (1817), Holt (N. P.), 641; *Re Lake, Ex parte Dyer*, [1901] 1 K. B. 710, C. A., *per* RIGBY, L.J., at p. 715. In proceedings for breach of trust the actual breaches must be specified and full particulars thereof must be set out in the pleadings; see title PLEADINGS, Vol. XXII., p. 458, note (f). As to the liability of trustees of charities, see also title CHARITIES, Vol. IV., pp. 276 *et seq.*

(b) *Cox v. Bateman* (1715), 2 Ves. Sen. 19; *Vernon v. Vaudry* (1741), 2 Atk. 119; *Kearnan v. Fitz-Simon* (1793), 3 Ridg. Parl. Rep. 1; *Adey v. Arnold* (1852), 2 De G. M. & G. 432, C. A.; *Brereton v. Hutchinson* (1854), 3 L. Ch. R. 361, *per* BRADY, L.C., at pp. 367, 368; *Brittlebank v. Goodwin* (1868), L. R. 5 Eq. 545, *per* GIFFARD, V.-C., at pp. 551 *et seq.* Strictly speaking, the relation of debtor and creditor does not subsist between a trustee and his *cestui que trust* (*Re Goldsmid, Ex parte Taylor* (1886), 18 Q. B. D. 295, C. A., *per* LINDLEY, L.J., at p. 301; *Re Lake, Ex parte Dyer, supra*, *per* RIGBY, L.J., at p. 715, questioning the dictum of



seal (c) that he will perform the trust, in which case his breach of trust, being also a breach of covenant, gives rise to a specialty debt (d). Such a covenant may be created by an instrument under his seal (e) containing an express agreement that he will perform the trust (f), or a declaration to that effect (g), or may be raised by necessary implication from such an instrument (h). The mere fact of his accepting the trust by a deed under his seal does not, however, constitute a covenant by him to carry the trust into effect (i).

SECT. 1.  
Liability of  
Trustees.

**377.** Where a trustee who is also a beneficiary commits a breach of trust, his beneficial interest in the trust property is liable to make good the loss occasioned thereby (k). Trustee-beneficiary.

**378.** Where several trustees are implicated in a breach of trust there is no primary liability for it between them, but they are all jointly and severally liable to a person who is entitled to sue in respect of it (l). Where a breach of trust has been committed for Several trustees.

Lord HALSBURY, L.C., in *Sharp v. Jackson*, [1899] A. C. 419, at p. 426, nor between a trustee and a co-trustee (*Re Goldsmid, Ex parte Taylor* (1886), 18 Q. B. D. 295, 301, C. A.). But an action for money had and received lies against a trustee on an admission that a balance belonging to the beneficiary is in his hands (*Roper v. Holland* (1835), 3 Ad. & El. 99; *Cummins v. Cummins* (1845), 3 Jo. & Lat. 64; *Sinclair v. Wilson* (1855), 20 Beav. 324; *Re Wilkinson, Ex parte Stubbins* (1881), 17 Ch. D. 58, C. A.; *Re Goldsmid, Ex parte Taylor, supra*); see title CONTRACT, Vol. VII., pp. 474, 475, 490.

(c) *Richardson v. Jenkins* (1853), 1 Drew. 477, per KINDERSLEY, V.-C., at p. 481.

(d) *Primrose v. Bromley* (1739), 1 Atk. 89; *Montford (Lord) v. Cadogan (Lord)* (1816), 19 Ves. 635, per Lord ELDON, L.C., at p. 638; *Jameson v. Farrer* (1841), 3 I. Eq. R. 346; *Wood v. Hardisty* (1846), 2 Coll. 542; *Adey v. Arnold* (1852), 2 De G. M. & G. 432; *Richardson v. Jenkins, supra*; *Newport v. Bryan* (1856), 5 I. Ch. R. 119. As to the covenant for title implied by statute in a conveyance by a person who conveys as trustee, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 301.

(e) *Richardson v. Jenkins, supra*, at p. 481.

(f) The deed must contain words to raise a covenant on which an action would lie at law (*Adey v. Arnold, supra*; *Richardson v. Jenkins, supra*; *Holland v. Holland* (1869), 4 Ch. App. 449, per GIFFARD, L.J., at p. 459).

(g) The words "It is hereby declared" contained in a deed executed by the trustee raise a covenant as effectually as words of agreement (*Richardson v. Jenkins, supra*, at pp. 482, 483; *Alexander v. Foster* (1856), 5 W. R. 33).

(h) *Turner v. Wardle, Barker v. Wardle* (1834), 7 Sim. 80; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 477 *et seq.* A covenant is not implied unnecessarily (*Bartlett v. Hodgson* (1785), 1 Term Rep. 42; *Adey v. Arnold, supra*, per Lord St. LEONARDS, L.C., at p. 437).

(i) *Wynch v. Grant* (1854), 2 Drew. 312; *Isaacson v. Harwood, Brook v. Harwood* (1868), 3 Ch. App. 225. As to the effect of bankruptcy on the liability of a trustee who has committed a breach of trust, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 143, 168, 169, 175, 176, 210, 232, 260, 270, 281.

(k) *Fox v. Buckley* (1876), 3 Ch. D. 508, C. A., per LITTLE, V.-C., at p. 509, note (1); *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; *Re Towndrow, Gratton v. Machen*, [1911] 1 Ch. 662; and see pp. 204, 205, *post*.

(l) *Vandebende v. Levingston* (1674), 3 Swan. 625; *Charitable Corporation v. Sutton* (1742), 9 Mod. Rep. 349; *Wilson v. Moore* (1834), 1 My. & K. 126, 142, 143, 337; *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *Lyse v.*

SECT. 1.  
 Liability of  
 Trustees.

which constructive trustees or trustees *de son tort* (*m*) as well as the duly appointed trustees are liable, the joint and several liability extends to the whole number (*n*). A suit to obtain relief or redress in respect of a breach of trust can therefore be instituted against some only of the persons who are liable for it (*o*) and without making all who are liable for it parties to the suit (*p*).

Solicitor-  
 trustee.

**379.** A solicitor who as a trustee commits a fraudulent breach of trust is liable to be struck off the rolls on the application of a *cestui que trust* (*q*).

No set-off in  
 breaches of  
 trust.

**380.** Where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, but is liable for the whole loss occasioned by the one breach, while the estate is entitled to the whole gain realised by the other (*r*).

*Kingdon* (1844), 1 Coll. 184, *per* KNIGHT BRUCE, V.-C., at p. 188; *Fletcher v. Green* (1864), 33 Beav. 426; *A.-G. v. Daugars* (1864), 33 Beav. 621; *Re Biddulph, Ex parte Norris* (1869), 4 Ch. App. 280; *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189, 203; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141, 158. After accepting a payment from one trustee by way of compromise in discharge of his liability for a breach of trust a *cestui que trust* was held entitled to prove in the bankruptcy of another trustee for the full amount due to the trust estate without giving credit for the compromise (*Edwards v. Hood-Barrs*, [1905] 1 Ch. 20). As to the liability of co-partners for a breach of trust committed by one of them, see note (*n*), *infra*; title PARTNERSHIP, Vol. XXII., pp. 31, 34, 35.

(*m*) See pp. 8, 47 *et seq.*, 58 *et seq.*, 87 *et seq.*, *ante*.

(*n*) *Cowper v. Stoneham* (1893), 68 L. T. 18. Where the solicitors of the trustees have as constructive trustees been parties to a breach of trust committed by the trustees, the solicitors may be joined as defendants in an action against the trustees in respect of the breach, and are jointly and severally liable for it with the trustees (*ibid.*). A whole firm of solicitors may be held liable for the concurrence of one of their number in a breach of trust (*Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; but see *Palmer v. S.* (1907), 51 Sol. Jo. 653); see title SOLICITORS, Vol. XXVI., p. 760. As to the distribution of liability amongst the persons responsible, see pp. 203 *et seq.*, *post*. As to the liability of trustees of charities for breaches of trust, see *Re Chertsey Market, Ex parte Walthew* (1819), 6 Price, 261; and title CHARITIES, Vol. IV., pp. 271, 272.

(*o*) *Wilson v. Moore* (1834), 1 My. & K. 126, 337; *London Gas-Light Co. v. Spottiswoode* (1851), 14 Beav. 264. A trustee who is jointly liable for a breach of trust may take proceedings against his co-trustee who has derived the benefit from the breach to make good to the trust estate the loss occasioned thereby (*Beattie v. Johnstone* (1848), 8 Hare, 169; *Baynard v. Woolley, Wearing v. Baynard* (1855), 20 Beav. 583; *Elwes v. Barnard* (1865), 11 Jur. (N. S.) 1035; but see *Chancellor v. Morecraft* (1848), 11 Beav. 262). As to proceedings to enforce the liability of a trustee, see also pp. 180 *et seq.*, *ante*. Such proceedings are not dismissed on the ground of defect of form (*Burrowes v. Gore* (1858), 6 H. L. Cas. 907).

(*p*) *Walker v. Symonds* (1818), 3 Swan. 1, 75; *Perry v. Knott* (1842), 5 Beav. 293; *Kellaway v. Johnson* (1842), 5 Beav. 319; *A.-G. v. Daugars*, *supra*, at p. 624; *Price v. Price* (1880), 42 L. T. 626. Where two classes of trustees are each liable for a breach of trust the *cestui que trust* may proceed against one class without making the other class parties (*M'Gachen v. Dew, Dew v. M'Gachen* (1851), 15 Beav. 84).

(*q*) *Re Chandler* (1856), 22 Beav. 253; see title SOLICITORS, Vol. XXVI., pp. 848 *et seq.*

(*r*) *Adye v. Feuilletau* (1783), 3 Swan. 84, n.; *Robinson v. Robinson* (1848), 11 Beav. 371, *per* Lord LANGDALE, M.R., at p. 375 (but see S. C.,

(ii.) *Criminal Liability.*

**381.** A trustee of any property, who with intent to defraud converts or appropriates or disposes of or destroys any part of it, is guilty of a misdemeanour and punishable with penal servitude or imprisonment(s). No prosecution for the offence may be commenced without the sanction of the Attorney-General(t); and no person who has taken civil proceedings against the trustee may prosecute him without the sanction of the court or judge before whom such proceedings were taken or are pending(a); nor may the trustee be prosecuted after having compulsorily disclosed the offence on oath in legal proceedings *bonâ fide* instituted by a party aggrieved or on an examination in bankruptcy(b). The criminal liability of the trustee, and any proceedings, conviction, or judgment in respect of it, do not affect the right of any party aggrieved to his remedy at law or in equity nor in any way prejudice an agreement entered into or security given by the trustee with a view to the restoration or repayment of the trust property(c).

(iii.) *Attachment.*

**382.** A trustee who is ordered by the High Court to pay a sum of money in his possession or under his control, and who makes default in doing so, is liable to attachment and imprisonment(d).

SUB-SECT. 3.—*Extent of Liability.*(i.) *Restoration of Trust Property.*

**383.** The extent of the liability incurred by a trustee who is responsible for a breach of trust is measured by the extent of the loss or depreciation which his act or omission has caused to the trust estate; and he is liable to restore to the estate the property which it has thereby lost or its value, and to make good any depreciation and damage which the estate has thereby suffered(e).

varied on appeal (1851), 1 De G. M. & G. 247, C. A.); *Wiles v. Gresham* (1854), 2 Drew. 258. If a trustee loses part of the trust estate, he must answer for it, whatever may be the improvement of the other part (*Wiles v. Gresham, supra, per KINDERSLEY, V.-C.*, at p. 271; *Re Barker, Ravenshaw v. Barker* (1898), 77 L. T. 712). But as to where a gain accrues in the same transaction, see *Fletcher v. Green* (1864), 33 Beav. 426; and p. 159, *ante*, p. 190, *post*.

(s) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 80. As to the definition of "trustee" and "property," see *ibid.*, s. 1; *E. v. Davies*, [1913] 1 K. B. 573, C. C. A.; title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 656, 657.

(t) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 80. When the office of Attorney-General is vacant the sanction of the Solicitor-General is substituted (*ibid.*).

(a) *Ibid.*, s. 80; *Wadham v. Rigg* (1860), 1 Drew. & Sm. 216.

(b) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85.

(c) *Ibid.*, s. 86.

(d) See *Evans v. Bear* (1874), 10 Ch. App. 76; title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 299 *et seq.*

(e) *Younge v. Combe* (1798), 4 Ves. 101; *Caffrey v. Darby* (1801), 6 Ves. 488; *Chambers v. Minchin* (1802), 7 Ves. 186; *French v. Hobson* (1803), 9 Ves. 103; *Bennett v. Colley* (1833), 2 My. & K. 225, C. A.; *Brown v. Sansome* (1825), M'Cle. & Yo. 427; *Fyler v. Fyler* (1841), 3 Beav. 550; *Morris v. Livie* (1842), 1 Y. & C. Ch. Cas. 380; *Challen v. Shippam*

## SECT. 1.

## Liability of Trustees.

Criminal liability for breach of trust.

Default in obeying order for payment.

Measure of liability.



## SECT. 1.

## Liability of Trustees.

## Improper investment.

## Neglect to invest.

**384.** Where a trustee improperly sells out stock and invests in land, he must replace the stock, and if the land realises more than is required for doing so the excess belongs to the trust estate (*f*). A trustee, however, is never charged with imaginary values (*g*), and where there is no loss there is no liability (*h*). If, therefore, he improperly invests trust money on an insufficient security which is realised at a loss and the proceeds are invested in stock, which is subsequently sold at a profit, he is entitled to the benefit of the profit towards discharge of his liability (*i*).

Where a trustee is directed to invest trust money in a particular stock or security and neglects to do so, he may at the option of the *cestui que trust* be charged either with the principal sum which he has retained uninvested and interest thereon (*k*), or with the amount of the stock or security which could have been purchased when he ought to have made the investment, and the dividends which would have accrued thereon (*l*). This option does not exist where the

(1845), 4 Hare, 555; *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, C. A., per Lord CRANWORTH, L.J., at p. 255; *Gibbins v. Taylor* (1856), 22 Beav. 344; *Craven v. Craddock*, [1868] W. N. 229; *Re Bidulph*, *Ex parte Norris* (1869), 4 Ch. App. 280; *Cann v. Cann* (1884), 51 L. T. 770; *Re Deane, Bridger v. Deane* (1889), 42 Ch. D. 9, C. A.; *Re Newen, Smiles v. Carruthers* (1912), 133 L. T. Jo. 589. The liability is not limited to what the trustee who is charged has actually received, and still less to any benefit which he may have personally derived from the breach (*Adair v. Shaw* (1803), 1 Sch. & Lef. 243, per Lord REDESDALE, L.C., at p. 272). Where a trustee mixes trust moneys with his own he is charged with the whole amount except what he can prove to be his own (*Lupton v. White, White v. Lupton* (1808), 15 Ves. 432; *Cook v. Addison* (1869), L. R. 7 Eq. 466, per STUART, V.-C., at p. 470; *Re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356; and see pp. 208, 209, *post*). Where a trustee incautiously invests trust money on a security authorised by the terms of the trust but of insufficient value, he is liable for the deficiency on a realisation of the security (*Re Salmon, Priest v. Uppleby* (1889), 42 Ch. D. 351, C. A.). The court does not assent to any compromise which does not replace the whole of the trust money, where the trustee is able to pay it (*Re Dewar, Dewar v. Brooke* (1885), 54 L. J. (CH.) 830, per KAY, J., at p. 833).

(*f*) *Powlet (Earl) v. Herbert* (1791), 1 Ves. 297; *Pocock v. Reddington* (1801), 5 Ves. 794.

(*g*) *Palmer v. Jones* (1683), 1 Vern. 144, per NORTH, Lord Keeper.

(*h*) *Re Deane, Bridger v. Deane*, *supra*, per Lord ESHER, M.R., at p. 19. The fact that a higher interest than would have been produced by authorised investments has been paid to a beneficiary for life from an unauthorised investment of trust money does not render the trustee liable to recoup the difference to the capital of the trust estate where he restores the principal sum in full (*Stroud v. Gwyer* (1860), 28 Beav. 130; *Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 565, C. A.; *Slade v. Chaine*, [1908] 1 Ch. 522, C. A.; *Re Hoyles, Row v. Jagg* (No. 2), [1912] 1 Ch. 67).

(*i*) *Fletcher v. Green* (1864), 33 Beav. 426; see *Winchelsea (Earl) v. Norcliffe* (1687), 1 Vern. 434. Where a trust estate, consisting in part of new shares in a company liable to calls and allotted in respect of original shares forming part of the estate, was lost through default of the trustee, he was held liable to make good the value of the estate less the amount of the calls on the new shares which had in fact been paid by him (*Briggs v. Massey* (1882), 51 L. J. (CH.) 447, C. A.).

(*k*) See pp. 191, 192, *post*; and compare p. 188, *ante*.

(*l*) *Byrchall v. Bradford* (1821), Madd. & G. 13; *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, C. A., per Lord CRANWORTH, L.J., at pp. 256,

trustee has an alternative power to invest in real security, since if he had done so the capital of the trust fund would remain at the original figure (*m*).

SECT. 1.  
Liability of  
Trustees.

**385.** Where a loss is sustained through a breach of trust on the part of a trustee in neglecting to realise a security, he is charged with the full amount of the loss unless he can show that this amount would not have been produced if he had realised the security when he ought to have done so (*n*).

Neglect to  
realise  
security.

(ii.) *Payment of Interest.*

**386.** A trustee, besides being required to account for principal trust money, is also charged with interest on it in the following cases, namely:—(1) where he can be proved to have received interest; (2) where the presumption of his having received interest is so strong that he is estopped from alleging the contrary; (3) where the court is entitled to decide that he ought to have received interest; and (4) where in breach of his duty he (i.) retains trust money in his own hands uninvested (*o*), or (ii.) mixes it with his own money or property (*p*), or (iii.) employs it in trade or speculation (*q*), or (iv.) applies it in an unauthorised manner (*r*), or (v.) pays it to the wrong person (*s*), or (vi.) fails to produce or account for it when lawfully demanded by the *cestui que trust* or ordered by the court (*t*).

Liability for  
interest.

**387.** A trustee is not generally charged with interest on the income which accrues while the trust property is improperly dealt with (*a*).

Interest on  
income.

260, 261. As to where the trustee lends or uses the uninvested money in trade, see pp. 192, 193, *post*.

(*m*) *Marsh v. Hunter* (1822), Madd. & G. 295; *Shepherd v. Moults* (1845), 4 Hare, 500; *Rees v. Williams* (1847), 1 De G. & Sm. 314; *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, 257, C. A. Where a person is bound to do one of two things and does neither, the measure of damage is in general the loss arising from his having failed to do that which is less and not that which is more beneficial (*Robinson v. Robinson*, *supra*, at pp. 257, 258).

(*n*) *Gainsborough (Earl) v. Watcombe Terra Cotta Clay Co., Ltd., Dunning v. Gainsborough (Earl)* (1885), 54 L. J. (CH.) 991.

(*o*) *Franklin v. Frith* (1792), 3 Bro. C. C. 433; *Ashburnham v. Thompson* (1807), 13 Ves. 402; *Dawson v. Massey* (1809), 1 Ball & B. 219, 250, 231; *Tebbs v. Carpenter* (1816), 1 Madd. 290; *Mousley v. Carr* (1841), 4 Beav. 49; *Robinson v. Robinson*, *supra*, at pp. 255, 256; *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552, 558. The trustee was not ordered to pay interest where the delay in payment of the trust fund was necessitated by questions having arisen as to the respective rights to it (*Wynne v. Tempest*, [1897] W. N. 43 (14)), or where the loss occasioned by the conduct of the trustee was small (*Bone v. Cooke* (1824), 13 Price, 332).

(*p*) *Melland v. Gray* (1845), 2 Coll. 295, 301; *Williams v. Powell* (1852), 15 Beav. 461; *Cook v. Addison* (1869), L. R. 7 Eq. 466.

(*q*) See pp. 192, 193, *post*.

(*r*) *Hutchins v. Hutchins* (1851), 15 Jur. 869; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141, 158; *Wassell v. Leggatt*, [1896] 1 Ch. 554.

(*s*) *Re Hulkes, Powell v. Hulkes*, *supra*.

(*t*) *Sammes v. Rickman* (1792), 2 Ves. 36; *Pearse v. Green* (1819), 1 Jac. & W. 135, 140, 141; *Dobson v. Pattinson* (1857), 5 W. R. 771; *Wroe v. Seed* (1863), 4 Giff. 425; *Price v. Price* (1880), 42 L. T. 626.

(*a*) *Macartney v. Blackwood* (1795), Ridg. L. & S. 602; *Re Maghera-*

## SECT. 1.

## Liability of Trustees.

Rate of interest.

**388.** Where a trustee simply retains uninvested trust money which he ought to have invested, or there are no other special circumstances in the case, he is charged with simple interest at the rate of 4 per cent. (b). He is charged at the rate of 5 per cent., if he has removed the amount from a proper investment in which it was producing 5 per cent. (c) or otherwise commits a direct breach of trust (d); and compound interest is charged where by reason of a trust for accumulation or otherwise it was his duty to have invested the trust fund at compound interest (e), or where he employs it in trade or speculation for his own benefit (f), or is otherwise guilty of a gross breach of trust (g).

## (iii.) Accounting for Profits.

Liability to account.

**389.** Where a trustee makes a profit by an improper employment of trust money or property he is liable to make good to the trust estate the amount of that profit in addition to the money or property improperly employed (h); and where he makes a profit

*morne's (Lord) Estate, Hogg v. Hogg*, [1901] W. N. 152. But where the breach of trust only takes place with reference to the income he may be charged with interest in respect of it (*Melland v. Gray* (1845), 2 Coll. 295).

(b) *Hall v. Hallet* (1784), 1 Cox, Eq. Cas. 134, 138; *Re Hilliard* (1790), 1 Ves. 89; *Roche v. Hart* (1805), 11 Ves. 58; *Tebbs v. Carpenter* (1816), 1 Madd. 290; *Hooker v. Platts* (1837), 1 Jur. 473; *Mousley v. Carr* (1841), 4 Beav. 49; *Jones v. Foxall* (1852), 15 Beav. 388, per ROMILLY, M.R., at p. 392; *Hawkins v. Gardiner* (1854), 2 Sm. & G. 441; *A.-G. v. Alford* (1855), 4 De G. M. & G. 843, C. A.; *Penny v. Avison* (1856), 3 Jur. (N. S.) 62; *Fletcher v. Green* (1864), 33 Beav. 426; *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189, per Lord CAIRNS, L.C., at pp. 209, 210. In some cases the rate charged has been only 3 per cent. (*Gilroy v. Stephens* (1882), 51 L. J. (CH.) 834; *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674).

(c) *Mosley v. Ward* (1805), 11 Ves. 581; *Jones v. Foxall*, *supra*, at p. 392.

(d) *Hall v. Hallet*, *supra*; *Treves v. Townsend* (1784), 1 Bro. C. C. 384; *Forbes v. Ross* (1788), 2 Bro. C. C. 430; *Re Hilliard*, *supra*; *Raphael v. Boehm* (1805), 11 Ves. 92; S. C. (1807), 13 Ves. 407, 590; *Crackelt v. Bethune* (1820), 1 Jac. & W. 586; *Brown v. Sansome* (1825), M'Cle. & Yo. 427; *English v. Willats* (1831), 1 L. J. (CH.) 84; *Court v. Robarts* (1839), 6 Cl. & Fin. 65, H. L.; *Hutchins v. Hutchins* (1851), 15 Jur. 869; *Jones v. Foxall*, *supra*, at p. 392; *Dobson v. Pattinson* (1857), 5 W. R. 771; *Tyrrell v. Bank of London* (1862), 10 H. L. Cas. 26; *Burdick v. Garrick* (1870), 5 Ch. App. 233; *Price v. Price* (1880), 42 L. T. 626; *Re Jones, Jones v. Searle* (1883), 49 L. T. 91.

(e) *Raphael v. Boehm*, *supra*; *Knott v. Cottee* (1852), 16 Beav. 77; *Feltham v. Turner* (1870), 23 L. T. 345; *Re Emmet's Estate, Emmet v. Emmet* (1881), 17 Ch. D. 142; *Re Barclay, Barclay v. Andrew*, *supra*.

(f) *Burdick v. Garrick*, *supra*, per Lord HATHERLEY, L.C., at pp. 241, 242; and see note (i), p. 193, *post*; title MONEY and MONEY-LENDING, Vol. XXI., p. 43.

(g) *Stackpoole v. Stackpoole* (1816), 4 Dow, 209, H. L.; *Heighington v. Grant* (1840), 5 My. & Cr. 258; *Wroe v. Seed* (1863), 4 Giff. 425, 430.

(h) *Re Kempson, Ex parte Shakeshaft* (1791), 2 Bro. C. C. 197, 198; *Brown v. De Tastet* (1821), Jac. 284; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41, 54; *Lord v. Wightwick* (1853), 23 L. J. (CH.) 235, 238, C. A.; *Sugden v. Crossland* (1856), 3 Sm. & G. 192, per STUART, V.-C., at p. 194; *Bowes v. Toronto (City)* (1858), 11 Moo. P. C. C. 463, 517, 518; *Williams v. Stevens* (1866), L. R. 1 P. C. 352; *Fleeming v. Howden*



by improperly employing trust money in trade or speculation he is liable at the option of the *cestui que trust* to account to the trust estate either for the profit actually made or for compound interest at 5 per cent. (i) on the amount of the trust money improperly employed (k).

SECT. 1.  
Liability of  
Trustees.

(iv.) *Costs of Legal Proceedings.*

**390.** The ordinary right of a trustee to his costs of legal proceedings in relation to the trust to which he is party (l) does not extend to proceedings instituted to remedy, or otherwise rendered necessary by, a breach of his duty as trustee (m). He may be ordered to pay the costs of such proceedings where he commits a direct breach of trust (n), or where he refuses or neglects to do his duty as trustee (o). In some cases, however, the court considers

Liability for  
costs.

(1868), L. R. 1 Sc. & Div. 372; *Vyse v. Foster* (1874), L. R. 7 H. L. 318, *per* Lord CAIRNS, L.C., at pp. 333, 334.

(i) Interest is computed at 5 per cent., with yearly rests, where trust property is employed in trade (*Pietty v. Stace* (1799), 4 Ves. 620; *Heathcote v. Hulme* (1819), 1 Jac. & W. 122; *Brown v. Sansome* (1825), M'Cle. & Yo. 427; *Jones v. Foxall* (1852), 15 Beav. 388; *Penny v. Avison* (1856), 3 Jur. (N. S.) 62, *per* WOOD, V.-C., at p. 63; *Re Davis, Davis v. Davis*, [1902] 2 Ch. 314); but see *A.-G. v. Solly* (1829), 2 Sim. 518, where yearly rests were not directed.

(k) *Anon.* (1755), 2 Ves. Sen. 629; *Pocock v. Reddington* (1801), 5 Ves. 794, 800; *Bate v. Scales* (1806), 12 Ves. 402; *Heathcote v. Hulme*, *supra*; *Docker v. Somes* (1834), 2 My. & K. 655; *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, 256, 257, C. A.; *Jones v. Foxall*, *supra*; *Re Davis, Davis v. Davis*, *supra*. The *cestui que trust* cannot claim both interest and profits, nor interest for one part of the time during which the trust money has been improperly employed and profits in respect of the other part (*Pocock v. Reddington*, *supra*, *per* ARDEN, M.R., at p. 800; *Heathcote v. Hulme*, *supra*, at p. 132). It is questionable whether the rule as to election applies to the case of an actual loan by a trustee to himself and others in breach of trust (*Vyse v. Foster* (1872), 8 Ch. App. 309, *per* JAMES and MELLISH, L.JJ., at p. 334).

(l) *Bennett v. Atkins* (1835), 1 Y. & C. (EX.) 247; *Baker v. Carter* (1835), 1 Y. & C. (EX.) 250; *King v. King* (1857), 1 De G. & J. 663, C. A.; *Re Silver Valley Mines* (1882), 21 Ch. D. 381, C. A., *per* JESSEL, M.R., at p. 386; and see pp. 157 *et seq.*, *ante*.

(m) *Parrot v. Treby* (1706), Prec. Ch. 254; *Brown v. How* (1741), Barn. (CH.) 354; *Moore v. Prance* (1851), 9 Hare, 299; *Gresham v. Price* (1865), 35 Beav. 47; *Re Love, Hill v. Spurgeon* (1885), 29 Ch. D. 348, C. A., *per* COTTON, L.J., at p. 350, and see pp. 160, 161, *ante*.

(n) *A.-G. v. Hobert* (1676), Cas. temp. Finch, 259; *Haberdashers Co. v. A.-G.* (1703), 2 Bro. Parl. Cas. 370; *Seers v. Hind* (1791), 1 Ves. 294; *Powlet (Earl) v. Herbert* (1791), 1 Ves. 297; *Whistler v. Newman* (1798), 4 Ves. 129; *Pietty v. Stace*, *supra*, at p. 622; *Caffrey v. Darby* (1801), 6 Ves. 488; *Crackelt v. Bethune* (1820), 1 Jac. & W. 586; *Adams v. Clifton* (1826), 1 Russ. 297; *Baker v. Carter*, *supra*, *per* Lord LYNTHURST, C.B., at p. 254; *Byrne v. Norcott* (1851), 13 Beav. 336; *Eglin v. Sanderson* (1862), 3 Giff. 434; *Cook v. Addison* (1869), L. R. 7 Eq. 466; *Heugh v. Scard* (1875), 33 L. T. 659; *Re Radclyffe, Pearce v. Radclyffe, De Foe v. Radclyffe* (1881), 50 L. J. (CH.) 317; *Plowright v. Lambert* (1885), 52 L. T. 646, 655; *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190, *per* KEKEWICH, J., at p. 197; but see pp. 194, 195, *post*. A trustee is not protected in such circumstances by an express direction in the instrument of trust that he shall be allowed his costs (*Hide v. Haywood* (1741), 2 Atk. 126).

(o) *Hertford Corporation v. Hertford Poor* (1713), 2 Bro. Parl. Cas. 377;

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Trustees.

it sufficient merely to deprive him of his own costs of the proceedings (*p*), and may decline to charge him with the costs of the other parties, even where it orders him to pay interest (*q*) in addition to refunding the principal lost by the breach of trust (*r*).

Excessive or  
unnecessary  
costs.

**391.** Where a trustee incurs or by his conduct occasions excessive or unnecessary costs in respect of the trust estate, he is deprived of his costs (*s*), and may be held personally liable to pay the costs of the proceedings so far as they are excessive or unnecessary (*t*).

Relief in  
certain cases.

A trustee may, however, be relieved from payment of costs, and may even be allowed his own costs where his mistake was merely technical or slight or there are other extenuating circumstances (*a*),

*East v. Ryal* (1725), 2 P. Wms. 284; *Caffrey v. Darby* (1801), 6 Ves. 488, 497; *Taylor v. Glanville* (1818), 3 Madd. 176, *per* LEACH, V.-C., at p. 178; *Watts v. Turner* (1830), 1 Russ. & M. 634; *A.-G. v. East Retford Corporation* (1833), 2 My. & K. 35; *Willis v. Hiscox* (1839), 4 My. & Cr. 197; *Kirby v. Mash* (1838), 3 Y. & C. (EX.) 295; *Wilson v. Wilson* (1838), 2 Keen, 249; *Anon.* (1842), 4 I. Eq. R. 700; *England v. Downs* (1842), 6 Beav. 269, 279; *Man v. Ricketts* (1844), 7 Beav. 93; *Boulton v. Beard* (1853), 3 De G. M. & G. 608, C. A.; *A.-G. v. Murdoch* (1856), 2 K. & J. 571; *Smith v. Bolden* (1863), 33 Beav. 262; *Goldsmid v. Heathcote* (1864), 10 L. T. 811; *Talbot v. Marshfield* (1868), 3 Ch. App. 622; *Southwell v. Martin* (1869), 21 L. T. 135; *Heugh v. Scard* (1875), 33 L. T. 659; *Re Hayter, Re Walleth, Hayter v. Wells* (1883), 32 W. R. 26; *Coppinger v. Shekleton* (1885), 15 L. R. Ir. 461; *Re Skinner, Cooper v. Skinner*, [1904] 1 Ch. 289; *Re Ruddock, Newberry v. Mansfield* (1910), 102 L. T. 89, C. A.

(*p*) *Ball v. Montgomery* (1793), 2 Ves. 191, 199; *O'Callaghan v. Cooper* (1799), 5 Ves. 117, 128; *Knight v. Martin* (1829), 1 Russ. & M. 70; *Devey v. Thornton* (1851), 9 Hare, 222, 232; *Heugh v. Scard*, *supra*; *Gurney v. Gurney* (1883), 48 L. T. 529. The representative of a deceased trustee who has endangered the trust estate is not entitled to be paid out of the trust estate his costs of an action to remedy the breach of trust (*Gurney v. Gurney, supra*), but only out of the estate of the deceased (*Haldenby v. Spofforth* (1846), 9 Beav. 195); but see *Melling v. Melling* (1857), 6 W. R. 121, where the costs of the heir of a defaulting trustee incurred in an unsuccessful attempt to protect the trust property were allowed.

(*q*) See pp. 191, 192, *ante*.

(*r*) *Ashburnham v. Thompson* (1807), 13 Ves. 402, *per* GRANT, M.R., at p. 404; *Tebbs v. Carpenter* (1816), 1 Madd. 290, *per* PLUMER, V.-C., at p. 308; *Mousley v. Carr* (1841), 4 Beav. 49, 53; *Knott v. Cottee* (1852), 16 Beav. 77. A trustee may even be allowed his costs in such cases (*Sammes v. Rickman* (1792), 2 Ves. 36; *Fitzgerald v. O'Flaherty* (1828), 1 Mol. 347; *Woodhead v. Marriott* (1837), Coop. Pr. Cas. 62; *Fozier v. Andrews* (1845), 2 Jo. & Lat. 199; *Chugg v. Chugg*, [1874] W. N. 185).

(*s*) *Re Knight's (Sarah) Will* (1884), 26 Ch. D. 82, C. A.; and see *Re Scowby, Scowby v. Scowby*, [1897] 1 Ch. 741, C. A.

(*t*) *Campbell v. Campbell* (1837), 2 My. & Cr. 25; *Wilson v. Wilson supra*; *Burrows v. Greenwood* (1840), 4 Y. & C. (EX.) 251, 255; *Price v. Loaden* (1856), 21 Beav. 508; *Eddowes v. Eddowes* (1862), 30 Beav. 603; and see pp. 160, 182, *ante*.

(*a*) *Parrot v. Treby* (1706), Prec. Ch. 254; *Sammes v. Rickman, supra*; *Taylor v. Tabrum* (1833), 6 Sim. 281; *Bennett v. Atkins* (1835), 1 Y. & C. (EX.) 247; *Baker v. Carter* (1835), 1 Y. & C. (EX.) 250 (but see *Plowright v. Lambert* (1885), 52 L. T. 646, 655); *A.-G. v. Caius College* (1837), 2 Keen, 150; *Poole v. Pass* (1839), 1 Beav. 600; *Bailey v. Gould* (1840), 4 Y. & C. (EX.) 221; *Harper v. Munday, Horrocks v. Munday* (1856), 2 Jur. (N. s.) 1197; *Ryan v. Nesbitt*, [1879] W. N. 100; *Re Evans, Welch v. Channell* (1884), 26 Ch. D. 58, 65, C. A. Where a trustee denied that he was indebted to the trust estate and on taking the accounts a

or where the breach of trust has caused no loss to the trust estate or the loss has been made good before judgment in the proceedings (*b*).

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**392.** The costs of an innocent co-trustee made a co-defendant in the proceedings may be ordered to be paid by the trustee who actually committed the breach of trust (*c*).

Costs of  
innocent  
co-trustee.

**393.** Where the proceedings are instituted or are carried on partly in reference to the breach of trust and partly for the general benefit of the trust estate, a defaulting trustee, so far as they are unconnected with the breach of trust, is not ordered to pay the costs of them (*d*), and may, if the court thinks fit, be allowed his own costs in respect of them (*e*).

Proceedings  
partly  
occasioned  
by breach  
of trust.

## SECT. 2.—Limitations on Liability of Trustees.

### SUB-SECT. 1.—Exemptions from Liability.

**394.** By statute (*f*) a trustee, without prejudice to the provisions of the instrument, if any, creating the trust (*g*), is chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and is answerable and accountable only for his own acts, receipts, neglects, and defaults, and not for those of any other trustee, nor for any banker,

Statutory  
exceptions.

small sum was found to be still owing to it from him, he was not on that account deprived of his costs (*Turner v. Hancock* (1882), 20 Ch. D. 303, C. A.).

(*b*) *Fitzgerald v. Pringle* (1825), 2 Mol. 534; *Royds v. Royds* (1851), 14 Beav. 54; *Fitzgerald v. Fitzgerald* (1856), 6 I. Ch. R. 145; *Birks v. Micklethwait* (1864), 33 Beav. 409; *Peacock v. Colling* (1885), 54 L. J. (CH.) 743, C. A., *per* COTTON, L.J., at p. 746.

(*c*) *Lockhart v. Reilly*, *Reilly v. Lockhart* (1856), 25 L. J. (CH.) 697; *Boynnton v. Richardson* (1862), 31 Beav. 340; *Price v. Price* (1880), 42 L. T. 626; *Re Linsley*, *Oatley v. West*, [1904] 2 Ch. 785.

(*d*) *Newton v. Bennet* (1784), 1 Bro. C. C. 359; *Hewett v. Foster* (1844), 7 Beav. 348; *Talbot v. Marshfield* (1868), 3 Ch. App. 622; *Easton v. Landor* (1892), 2 R. 176, C. A.; but see *Westover v. Chapman* (1844), 1 Coll. 177, 183; *Payne v. Parker* (1869), 17 W. R. 640; and see p. 161, *ante*.

(*e*) *Sanderson v. Walker*, *Campbell v. Walker* (1807), 13 Ves. 601, 604; *Tebbs v. Carpenter* (1816), 1 Madd. 290, 309; *Fitzgerald v. Pringle*, *supra*; *Pride v. Fooks* (1839), 2 Beav. 430; *Heighington v. Grant* (1845), 1 Ph. 600; *Knott v. Cottee* (1852), 16 Beav. 77; *Rittson v. Stordy* (1855), 1 Jur. (N. S.) 771; *Bate v. Hooper* (1855), 5 De G. M. & G. 338, 345, C. A.; *Springett v. Dashwood* (1860), 2 Giff. 521; *Boynnton v. Richardson*, *supra*; *Bell v. Turner* (1877), 47 L. J. (CH.) 75. Costs occasioned by unfounded charges of fraud or wilful default made against trustees, or even the whole costs of the suit in which they are made, fall upon the parties making such charges, and not upon the trustees, even though they have not acted strictly in accordance with their trust (*Passingham v. Sherborn* (1846), 9 Beav. 424; *Bartlett v. Wood* (1861), 30 L. J. (CH.) 614; *Massey v. Massey* (1867), 17 L. T. 233).

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53).

(*g*) The instrument may expressly exempt a trustee from a liability to which he would otherwise have been subject (*Wilkins v. Hogg* (1861), 10 W. R. 47, C. A.; *Pass v. Dundas* (1880), 43 L. T. 665); see p. 185, *ante*.



SECT. 2.  
Limitations  
on Liability  
of Trustees.

Exemption  
when acting  
under power  
of attorney.

Breach  
excused by  
ignorance of  
facts.

Relief for  
honest and  
reasonable  
conduct.

broker, or other person with whom any trust moneys or securities are deposited, or for the insufficiency or deficiency of any securities, or for any other loss (*h*), unless it happens through his wilful default (*i*).

**395.** By statute (*j*) a trustee acting or paying money in good faith under a power of attorney is not liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was dead or had done some act to avoid the power, if the fact was not known to the trustee at the time of the act or payment (*k*).

**396.** Where a trustee commits what is in itself a breach of trust through ignorance of a fact which he could not with due diligence have ascertained, he may be relieved from liability for the breach (*l*).

**397.** By statute (*m*), where it appears to a court of equity that a

(*h*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24, substantially re-enacting the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 31. The principle of affording proper protection to trustees was recognised before the earlier of these enactments (*Fellows v. Mitchell and Owen* (1705), 1 P. Wms. 81; *Primrose v. Bromley* (1739), 1 Atk. 89; *Leigh v. Barry* (1747), 3 Atk. 583, per Lord HARDWICKE, L.C., at p. 584; *Westley v. Clarke* (1759), 1 Eden, 357; *Dawson v. Clarke* (1811), 18 Ves. 247, per Lord ELDON, L.C., at p. 254), and has since been carried out in accordance with their provisions (*Paddon v. Richardson* (1855), 7 De G. M. & G. 563, C. A.; *Re Fryer, Martindale v. Picquot* (1857), 3 K. & J. 317; *Re Brier, Brier v. Evison* (1884), 26 Ch. D. 238, C. A.; *Jobson v. Palmer*, [1893] 1 Ch. 71; *Shepherd v. Harris*, [1905] 2 Ch. 310; and see pp. 142 *et seq.*, 161, *ante*). The estate of a trustee, who has left the trust funds in a proper state of investment at his death, is not liable for a breach of trust committed after his death (*Re Palk, Re Drake, Chamberlain v. Drake* (1892), 41 W. R. 28).

(*i*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24. A trustee may through his wilful default be liable for the acts of his co-trustee (*Boardman v. Mosman* (1779), 1 Bro. C. C. 68; *Mucklow v. Fuller* (1821), Jac. 198; *Hanbury v. Kirkland* (1829), 3 Sim. 265; *Marriott v. Kinnarsley* (1830), Tam. 470; *Curtis v. Mason* (1843), 12 L. J. (CH.) 442; *Wiglesworth v. Wiglesworth* (1852), 16 Beav. 269; *Dix v. Burford* (1854), 19 Beav. 409; *Trutch v. Lamprell* (1855), 20 Beav. 116; *Egbert v. Butter* (1856), 21 Beav. 560; *Brumridge v. Brumridge* (1858), 27 Beav. 5; *Mendes v. Guedalla* (1861), 2 John. & H. 259; *Hale v. Adams* (1873), 21 W. R. 400; *Wynne v. Tempest* (1897), 13 T. L. R. 360; and see pp. 121 *et seq.*, *ante*); or for the acts of an agent (*Re Litchfield (Earl) and Williams* (1737), 1 Atk. 87; *Abercrombie v. Gordon* (1831), 1 L. J. (CH.) 33; *Bostock v. Floyer* (1865), L. R. 1 Eq. 26; and see pp. 121, 122, 143, 144, *ante*), or for the insufficiency or deficiency of securities (*Knox v. Mackinnon* (1888), 13 App. Cas. 753; *Rae v. Meek* (1889), 14 App. Cas. 558; and see pp. 133 *et seq.*, 190, 191, *ante*).

(*j*) Trustee Act, 1893 (56 & 57 Vict. c. 53).

(*k*) *Ibid.*, s. 23. The protection given to the trustee by this provision does not affect the right of any person entitled to money paid by him against the person to whom the payment is made; and the person so entitled has the same remedy against the person to whom the payment is made as, but for the enactment, he would have had against the trustee (*ibid.*).

(*l*) *Re Biddulph, Ex parte Norris* (1869), 4 Ch. App. 280, per GIFFARD, L.J., at p. 287.

(*m*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35).

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on Liability  
of Trustees.

trustee (*n*) is or may be (*o*) personally liable for a breach of trust (*p*), but has acted honestly (*q*) and reasonably (*r*) and ought fairly to be excused for the breach (*s*), or for having omitted to obtain the directions of the court in the matter in which he committed the breach (*t*), the court may relieve him either wholly or partly from such personal liability (*u*). To have acted reasonably a trustee must at least have acted as an ordinary man of business would act in his own affairs (*w*), but the fact that he has so acted may

(*n*) Including judicial trustees (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3), as to whom see pp. 209 *et seq.*, *post*. The Act does not extend to charities, whether subject to or exempted from the purview of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), and the amending Acts (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 6 (2)).

(*o*) As in cases of doubtful construction (*Re Grindey, Clews v. Grindey*, [1898] 2 Ch. 593, C. A.). The court need not decide whether or not the liability in fact exists (*Re Mackay, Griessemann v. Carr*, [1911] 1 Ch. 300, *per PARKER, J.*, at p. 306).

(*p*) *Re Kay, Mosley v. Kay*, [1897] 2 Ch. 518 (*devastavit* by executor); *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583, 590 (improper investment): *Re De Clifford's (Lord) Estate, De Clifford (Lord) v. Quilter, De Clifford (Lord) v. Lansdowne (Marquis)*, [1900] 2 Ch. 707, 716 (action for common account).

(*q*) *Re Stuart, Smith v. Stuart*, *supra*. One of several trustees acts honestly notwithstanding that he may have failed to prevent his co-trustee from acting dishonestly (*Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1, 18, C. A.), unless such failure is due to careless reliance, without inquiry, on the statements and conduct of the co-trustee (*Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Re Second East Dulwich 745th Starr-Bowkett Building Society* (1899), 68 L. J. (CH.) 196).

(*r*) As to what is reasonable conduct, see, generally, *Wynne v. Tempest* (1897), 13 T. L. R. 360; *Re Grindey, Clews v. Grindey*, *supra*, *per CHITTY, L.J.*, at p. 601; *Perrins v. Bellamy*, [1899] 1 Ch. 797, C. A.; *Re Mackay, Griessemann v. Carr*, *supra*; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1, C. A.; *Re Brookes, Brookes v. Taylor*, [1914] 1 Ch. 558. The burden of proving honesty and reasonableness lies upon the trustee (*Re Stuart, Smith v. Stuart*, *supra*, at p. 590).

(*s*) *National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373, 380, 381, P. C. (where it was said that it was not sufficient merely to show honesty and reasonableness, and that the position of a company performing the duties of a trustee for reward was different from that of an ordinary trustee). Each case depends on its own circumstances (*Re Turner, Barker v. Ivimey*, *supra*, *per BYRNE, J.*, at p. 542; *Re Kay, Mosley v. Kay*, *supra*, *per ROMER, J.*, at p. 524). A trustee is not necessarily excused by the breach having occurred through the fraud of his solicitor (*Davis v. Hutchings*, [1907] 1 Ch. 356; but see *Re Smith, Smith v. Thompson, Smith v. Smith* (1902), 71 L. J. (CH.) 411).

(*t*) *Re Kay, Mosley v. Kay*, *supra*; *Re Grindey, Clews v. Grindey*, *supra*; *Perrins v. Bellamy*, *supra*.

(*u*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3; *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479, C. A. (debt not recovered by executor); *Singlehurst v. Tapscott Steamship Co., Ltd.*, [1899] W. N. 133, C. A.; *Williams (Evans) v. Byron* (1901), 18 T. L. R. 172 (funds paid to solicitor for investment); *Re Houghton, Hawley v. Blake*, [1904] 1 Ch. 622, 626 (compromise of claim of co-executor); *Re Allsop, Whittaker v. Bamford*, *supra* (income paid under advice of solicitor to a person not entitled). The Act does not authorise the court to relieve a trustee in advance from liability for a contemplated breach of trust (*Re Tollemache*, [1903] 1 Ch. 457, 955, C. A., *per KEKEWICH, J.*, at pp. 465, 466). Where directors are being proceeded against for breach of trust, the court has similar powers (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 279); see *titled COMPANIES*, Vol. V., pp. 232, 483.

(*w*) *Re Turner, Barker v. Ivimey*, *supra*, at p. 542; *Re Stuart, Smith v. Stuart*, *supra*, at p. 590; *Re Dive, Dive v. Roebuck*, [1909] 1 Ch.



SECT. 2.  
Limitations  
on Liability  
of Trustees.

Investing on  
authorised  
but in-  
sufficient  
security.

not be sufficient to constitute reasonable conduct (*x*). In the case of an investment on mortgage the requirements of the Trustee Act, 1893 (*y*), constitute a standard of reasonable conduct, though non-compliance with them is not necessarily unreasonable (*a*).

**398.** By statute (*b*), where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon (*c*), the security is deemed an authorised investment for the smaller sum, and the trustee is only liable to make good the sum advanced in excess thereof with interest (*d*).

SUB-SECT. 2.—*Concurrence or Acquiescence of Beneficiaries.*

Effect of  
concurrence  
or acquies-  
cence.

**399.** Beneficiaries who actively concur or passively acquiesce in a breach of trust can obtain no relief against the trustee in respect of it (*e*), if at the time of their concurrence or acquiescence they

328, 343, 344; *Shaw v. Cates*, [1909] 1 Ch. 389, 405; *Re Mackay, Griesse-mann v. Carr*, [1911] 1 Ch. 300, 306.

(*x*) *Re Barker, Ravenshaw v. Barker* (1898), 77 L. T. 712; see *Re De Clifford's (Lord) Estate, De Clifford (Lord) v. Quilter, De Clifford (Lord) v. Lansdowne (Marquis)*, [1900] 2 Ch. 707, 716 (money paid to solicitor for duty).

(*y*) 56 & 57 Vict. c. 53, s. 8; see p. 134, *ante*.

(*a*) *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583, 591, 592; *Waite v. Parkinson* (1901), 85 L. T. 456; see *Chapman v. Browne*, [1902] 1 Ch. 785, C. A.; *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328; *Shaw v. Cates, supra*; *Palmer v. Emerson*, [1911] 1 Ch. 758.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9, re-enacting the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 5.

(*c*) *Re Walker, Walker v. Walker* (1890), 59 L. J. (CH.) 386. The trustee must establish the propriety of the investment independently of its value (*ibid.*, *per* KEKEWICH, J., at p. 391).

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9; *Re Somerset, Somerset v. Poulett (Earl)*, [1894] 1 Ch. 231, C. A., *per* KEKEWICH, J., at pp. 253, 254; *Shaw v. Cates, supra*, at pp. 395, 408.

(*e*) *Brice v. Stokes* (1805), 11 Ves. 319, 325, 326; *Walker v. Symonds* (1818), 3 Swan. 1, 64; *Byrchall v. Bradford* (1821), Madd. & G. 13; *Nail v. Punter* (1832), 5 Sim. 555; *Clifton v. Cockburn* (1834), 3 My. & K. 76; *Broadhurst v. Balguy* (1841), 1 Y. & C. Ch. Cas. 16; *Lincoln v. Wright* (1841), 4 Beav. 427, *per* Lord LANGDALE, M.R., at p. 432; *Stretton v. Ashmall* (1854), 3 Drew. 9; *Brewer v. Swirles* (1854), 2 Sm. & G. 219; *Farrar v. Barraclough* (1854), 2 Sm. & G. 231; *Re Biddulph, Ex parte Barnevall, De Front's (Countess) Executors' Case* (1855), 6 De G. M. & G. 801, 812, C. A.; *Hope v. Liddell* (No. 1), *Liddell v. Norton* (1855), 21 Beav. 183, 210; *Re McKenna's Estate, Ex parte Busted* (1861), 5 L. T. 241, C. A.; *Butler v. Carter* (1868), L. R. 5 Eq. 276, 281; *Sleeman v. Wilson* (1871), L. R. 13 Eq. 36; and see pp. 202, 203, 205, 206, *post*; and title EQUITY, Vol. XIII., pp. 166 *et seq.* A beneficiary who consents to a breach of trust cannot claim against the trustee in respect of it under cover of the non-concurrence of other beneficiaries (*Fletcher v. Collis*, [1905] 2 Ch. 24, C. A., *per* ROMER, L.J., at pp. 32 *et seq.*). Assent to a breach of trust may be given by a beneficiary entitled in reversion (*Life Association of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G. F. & J. 58, *per* TURNER, L.J., at p. 73), but a person who subsequently becomes a beneficiary is not bound by his previous acquiescence in it (*Re Clarke, Ex parte Smith* (1841), 2 Mont. D. & De G. 113). The concurrence of the beneficiary in the breach need not be expressed in writing (*MacLeod v. Annesley* (1853), 16 Beav. 600, 607; *Fletcher v. Collis*, [1905] 2 Ch. 24, 33, C. A.). But the principle that the *cestui que trust* cannot complain of a breach of trust to which he was a party does not preclude a corporation from seeking



were of full age (*f*) and under no incapacity (*g*), and were not acting under undue influence (*h*), and were fully informed of the circumstances (*i*). The fact that the beneficiaries obtain no personal benefit from the breach of trust is immaterial (*k*). A person claiming under a beneficiary stands in the same position as the beneficiary himself (*l*).

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Limitations  
on Liability  
of Trustees.

SUB-SECT. 3.—*Condonation of Breach.*

**400.** A trustee is relieved from liability in respect of a breach of trust if he is released or indemnified therefrom by all the

Effect of  
condonation.

relief against a fraudulent and illegal use of the powers of the corporation by certain of its members to deprive it of property to which it was by law entitled (*A.-G. v. Wilson* (1840), Cr. & Ph. 1, *per* Lord COTTENHAM, L.C., at p. 23).

(*f*) *Adye v. Feuilliteau* (1783), 3 Swan. 84, n., *per* Lord LOUGHBOROUGH, L.C., at pp. 87, n., 88, n.; *Wilkinson v. Parry* (1828), 4 Russ. 272, 276; *March v. Russell* (1837), 3 My. & Cr. 31, 42; see title INFANTS AND CHILDREN, Vol. XVII., p. 62. The protection of the court to infants is continued after they have attained full age until they have acquired all the information which they might have had if they had been all along in adult years (*Walker v. Symonds* (1818), 3 Swan. 1, *per* Lord ELTON, L.C., at p. 69).

(*g*) *Crosby v. Church* (1841), 3 Beav. 485, 489; *Mara v. Manning* (1845), 1 Jo. & Lat. 311, 318; *Cresswell v. Dewell* (1863), 4 Giff. 460, 465; *Fletcher v. Green* (1864), 33 Beav. 426, 429; *Fletcher v. Collis*, [1905] 2 Ch. 24, C.A., *per* VAUGHAN WILLIAMS, L.J., at pp. 31, 32; and see p. 200, *post*. A married woman beneficially entitled for her separate use may lose the right to relief in respect of a breach of trust by acquiescence (*Jones v. Higgins* (1866), L. R. 2 Eq. 538), but where she is restrained from anticipation she cannot consent to a breach of trust which will deprive her of future income (*Dickson v. Hook* (1866), 14 W. R. 552). As to the case where a married woman is guilty of actual fraud, see *Derbishire v. Home* (1853), 3 De G. M. & G. 80, C.A.; *Davies v. Hodgson* (1858), 25 Beav. 177, *per* ROMILLY, M.R., at p. 187.

(*h*) *Lloyd v. Attwood*, *Attwood v. Lloyd* (1859), 3 De G. & J. 614, C.A., *per* TURNER, L.J., at p. 649. As to undue influence, see, generally, title EQUITY, Vol. XIII., pp. 17 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 107 *et seq.*

(*i*) *Ryder v. Bickerton* (1743), 3 Swan. 80, n., 83, n.; *Walker v. Symonds*, *supra*, at pp. 69, 73; *Adams v. Clifton* (1826), 1 Russ. 297; *March v. Russell*, *supra*, at pp. 42, 43; *Munch v. Cockerell* (1840), 5 My. & Cr. 178; *Fyler v. Fyler* (1841), 3 Beav. 550, *per* Lord LANGDALE, M.R., at p. 560; *Burrows v. Walls* (1855), 5 De G. M. & G. 233, 251, 252; *Thompson v. Finde* (1856), 8 De G. M. & G. 560, 566, C.A.; *Bullock v. Downes* (1860), 9 H. L. Cas. 1, 19; *Rehden v. Wesley* (1861), 29 Beav. 213, *per* ROMILLY, M.R., at p. 215; *Cope v. Clark* (1870), 18 W. R. 279; *Westmoreland v. Holland* (1870), 23 L. T. 797, *per* STUART, V.-C., at p. 799; *Dixon v. Dixon* (1878), 9 Ch. D. 587; *Re Jackson*, *Wilson v. Donald* (1881), 44 L. T. 467; *Crichton v. Crichton*, [1896] 1 Ch. 870, C.A., *per* LINDLEY, L.J., at p. 875. In the case of a man of full age there may be a *prima facie* presumption that he is acting with a full knowledge of all the circumstances (*Sawyer v. Sawyer* (1885), 28 Ch. D. 595, C.A., *per* FRY, L.J., at p. 604). A person who actively concurs in the division of a trust fund in ignorance that he has himself an interest in it and that the division is a breach of trust cannot afterwards make the trustee liable for the amount of his interest in it (*Evans v. Benyon* (1887), 37 Ch. D. 329, C.A., *per* COTTON, L.J., at p. 344; compare *Re Horne*, *Wilson v. Cox Sinclair*, [1905] 1 Ch. 76).

(*k*) *Chillingworth v. Chambers*, [1896] 1 Ch. 685, C.A., *per* LINDLEY, L.J., at p. 700; *Fletcher v. Collis*, *supra*, *per* ROMER, L.J., at pp. 32 *et seq.*

(*l*) *Williams v. Lomas* (1852), 16 Beav. 1; *Brewer v. Swirles* (1854), 2 Sm. & G. 219; *Fletcher v. Collis* *supra*.

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beneficiaries or other persons entitled to enforce the liability (*m*), provided that they are of full age (*n*) and under no incapacity (*o*), and are not acting under undue influence (*p*), and have full information as to all material circumstances connected with the breach of trust (*q*). Where all do not join in the release, those who join are precluded from enforcing the liability (*r*). A release of one of several trustees may operate to release the others also (*s*).

Condonation  
by conduct.

**401.** The relief of a trustee from liability by the conduct of the beneficiary is governed by the same principles as relief by actual release (*t*). A beneficiary who, knowing of a breach of trust, obtains from the trustee part only of the trust property to which he is entitled, does not thereby, in the absence of evident intention, lose his right to a further claim against the trustee in respect of the rest of the property (*a*).

SUB-SECT. 4.—*Lapse of Time and Laches.*

Relief under  
statute.

**402.** By statute (*b*), in any proceeding against a trustee (*c*), or

(*m*) *Stackhouse v. Barnston* (1805), 10 Ves. 453, *per* GRANT, M.R., at p. 466; *Williams v. Lomas* (1852), 16 Beav. 1; *Farrant v. Blanchford* (1863), 1 De G. J. & Sm. 107, 119, 120; *Aveline v. Melhuish* (1864), 2 De G. J. & Sm. 288, C. A.; *Evans v. Benyon* (1887), 37 Ch. D. 329, C. A., *per* COTTON, L.J., at p. 342; and see pp. 120, 185, *ante*; titles CONTRACT, Vol. VII., pp. 454 *et seq.*; EQUIT, Vol. XIII., pp. 164 *et seq.* A beneficiary cannot proceed against a trustee for a breach of trust after accepting a benefit on the express condition that he shall refrain from doing so (*Egg v. Devey* (1847), 10 Beav. 444).

(*n*) *Overton v. Banister* (1844), 3 Hare, 503, 506; see title INFANTS AND CHILDREN, Vol. XVII., pp. 49, 61. A release executed by a person immediately after attaining twenty-one is viewed with suspicion (*Wade v. Cox* (1835), 4 L. J. (CH.) 105; *Parker v. Bloxam* (1855), 20 Beav. 295); compare title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 107.

(*o*) The power of a married woman to condone a breach of trust depends on her power to dispose of the property in respect of which it was committed (*Smithwick v. Smithwick* (1861), 12 I. Ch. R. 181, 202; *Rutherford v. Maziere* (1862), 13 I. Ch. R. 204, *per* BRADY, L.C., at p. 209; *Oresswell v. Dewell* (1863), 4 Giff. 460); see title HUSBAND AND WIFE, Vol. XVI., pp. 376 *et seq.*

(*p*) *Bowles v. Stewart* (1803), 1 Sch. & Lef. 209, 226, 227; *Lloyd v. Attwood*, *Attwood v. Lloyd* (1859), 3 De G. & J. 614, 649, C. A.; *Farrant v. Blanchford*, *supra*, *per* Lord WESTBURY, L.C., at pp. 119, 120; *Reade v. Reade* (1881), 9 L. R. Ir. 409, C. A.; see note (*h*), p. 199, *ante*.

(*q*) *Walker v. Symonds* (1818), 3 Swan. 1; *Hore v. Becher* (1842), 12 Sim. 465; *Stanes v. Parker* (1846), 9 Beav. 385; *Aspland v. Watte* (1855), 20 Beav. 474; *Lloyd v. Attwood*, *Attwood v. Lloyd*, *supra*; *Farrant v. Blanchford*, *supra*; *Thomson v. Eastwood* (1877), 2 App. Cas. 215, 233, 234; *Reade v. Reade*, *supra*; *Re Garnett, Gandy v. Macaulay* (1884), 32 W. R. 474.

(*r*) *Aylwin v. Bray* (1822), cited in *Small v. Attwood* (1828), 2 Y. & J. 512, 518, n.; *Morley v. Hawke (Lord)* (undated), cited in *Small v. Attwood*, *supra*, at p. 520; *Bather v. Kearsley* (1844), 7 Beav. 545. Unless they only joined on the understanding that all should join; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 400, 401.

(*s*) *Blackwood v. Borrowes* (1843), 4 Dr. & War. 441.

(*t*) *French v. Hobson* (1803), 9 Ves. 103.

(*a*) *Re Cross*, *Harston v. Tenison* (1882), 20 Ch. D. 109, 122, C. A.

(*b*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1). No beneficiary as against whom there would be a good defence by virtue of this provision

(*c*) For note (*c*) see p. 201, *post*.



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any person claiming through him, all rights and privileges conferred by any Statute of Limitations are enjoyed in the like manner and to the like extent as if he had not been a trustee or person claiming through a trustee (*d*), except where the claim (*1*) is founded upon fraud or fraudulent breach of trust to which the trustee was party or privy (*e*), or (*2*) is to recover trust property or the proceeds of trust property still retained by the trustee (*f*), or previously received by him and converted to his own use (*g*). If the proceeding is instituted to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee, except in the cases above mentioned, is entitled to the benefit of, and may plead, lapse of time in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received (*h*). Under any Statute of Limitations time runs against a married woman entitled in possession for her separate use, whether with or without a restraint on anticipation, but does not begin to run against a beneficiary unless and until his interest is an interest in possession (*i*).

derives any greater or other benefit from a judgment or order obtained in a proceeding by another beneficiary than he could have obtained if he had himself brought such proceeding and this provision had been pleaded (Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (2)). This provision does not deprive an executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations (*ibid.*, s. 8 (3)). Where land or rent is vested in a trustee on an express trust, the right of the *cestui que trust* or any person claiming through him to bring an action against the trustee or any person claiming through him to recover such land or rent is deemed to have first accrued within the meaning of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), at and not before the time at which such land or rent is conveyed to a purchaser for valuable consideration, and is then deemed to have accrued only as against such person and any person claiming through him (*ibid.*, s. 25); see also title LIMITATION OF ACTIONS, Vol. XIX., pp. 68, 69, 139 *et seq.*, 161 *et seq.*

(*c*) Including an executor or administrator and a trustee whose estate arises by construction or implication of law as well as an express trustee, but not the Official Trustee of Charitable Funds (Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 1). It is, however, doubtful whether an executor merely as such comes within the enactment (*Lacons v. Warmoll*, [1907] 2 K. B. 350, C. A., *per* Lord ALVERSTONE, C.J., at p. 362). Directors of a company committing a breach of trust can claim the benefit of the enactment (*Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Whitwam v. Watkin* (1898), 78 L. T. 188; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 663, C. A.). The enactment does not extend to protect a trustee in bankruptcy or other officer of the court (*Re Cornish, Ex parte Board of Trade*, [1896] 1 Q. B. 99, 104, C. A.).

(*d*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 139 *et seq.*, 161 *et seq.*

(*e*) *Re Lands Allotment Co.*, *supra*, at p. 644; *Whitwam v. Watkin*, *supra*, at p. 190.

(*f*) *Re Cornish, Ex parte Board of Trade*, *supra*, at p. 104; *Re Tufnell, Byng v. Tufnell* (1902), 18 T. L. R. 705; *Re Timmis. Nixon v. Smith*, [1902] 1 Ch. 176; *M'Arde v. Gaughran*, [1903] 1 I. R. 106, 114.

(*g*) *Mara v. Browne*, [1895] 2 Ch. 69, 95.

(*h*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1); *Re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444; *Re Blow, St. Bartholomew's Hospital (Governors) v. Cambden*, [1914] 1 Ch. 233, C. A.; see title LIMITATION OF ACTIONS, Vol. XIX., p. 162.

(*i*) Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1); *Spickernell v. Hotham* (1854), Kay, 669, 677; *Mara v. Browne*, *supra*, at p. 96; *Re Dixon*,



## SECT. 2.

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of Trustees.

Relief in-  
dependently  
of statute.

**403.** In cases to which the special statutory protection does not extend, a claim by a *cestui que trust* against his trustee for property held on an express trust, or in respect of a breach of an express trust, is not barred by any Statute of Limitations (j), except in the case of money charged on land (k). On the other hand, in the case of a constructive trust, proceedings to enforce liability for a breach of trust may be barred by mere lapse of time (l).

Proceedings against a trustee for breach of trust may, however, be barred, even in the case of an express trust, by the laches of the beneficiary, where such laches amounts to acquiescence or has caused the trustee to alter his position to his detriment (m).

SUB-SECT. 5.—*Indemnity from Beneficiaries.*

Impounding  
of interest.

**404.** By statute (n), where a trustee (o) commits a breach of trust (p) at the instigation or request (q) or with the consent in

*Heynes v. Dixon*, [1900] 2 Ch. 561, C. A.; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1, C. A. Where proceedings are instituted against a trustee by a beneficiary for life and remaindermen, the statute may bar the claim of the beneficiary for life though not that of the remaindermen (*Re Somerset, Somerset v. Poulett (Earl)*, [1894] 1 Ch. 231, C. A.).

(j) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 25 (2), 91; *Orrett v. Corser, Corser v. Orrett* (1855), 21 Beav. 52, 55; and see *Reid-Newfoundland Co. v. Anglo-American Telegraph Co., Ltd.*, [1912] A. C. 555, P. C.; title LIMITATION OF ACTIONS, Vol. XIX., pp. 83, 85, 86, 103, 125, 126, 139 *et seq.*, 161 *et seq.*, 170.

(k) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 83, 141, 164.

(l) *Re Manchester Gas Act, Ex parte Hasell* (1839), 3 Y. & C. (EX.) 617, 622; *Soar v. Ashwell*, [1893] 2 Q. B. 390, 393, 395, C. A.; *Re Gallard, Ex parte Gallard*, [1897] 2 Q. B. 8, 14; *Schulze v. Tod*, [1913] A. C. 213; *Henry v. Hammond*, [1913] 2 K. B. 515; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 142, 164.

(m) *Baker v. Read* (1854), 3 W. R. 118, C. A.; *Bright v. Legerton* (No. 1) (1860), 29 Beav. 60; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, C. A.; *Re Rix, Rix v. Rix* (1912), 56 Sol. Jo. 573; see title EQUITTY, Vol. XIII., pp. 168 *et seq.* In the absence of proof of knowledge of the facts, laches cannot be attributed to a beneficiary entitled in reversion because he does not take proceedings before his interest vests in possession (*Taylor v. Cartwright* (1872), L. R. 14 Eq. 167, *per* WICKENS, V.-C., at p. 176).

(n) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 45, 46, re-enacting the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 6. These enactments have sanctioned and extended the jurisdiction in such cases which had been previously exercised by courts of equity (*Trafford v. Boehm* (1747), 3 Atk. 440, *per* Lord HARDWICKE, L.C., at p. 444; *Raby v. Ridehalgh* (1855), 7 De G. M. & G. 104, C. A.; *Sawyer v. Sawyer* (1885), 28 Ch. D. 595, C. A., *per* CHITTY, J., at p. 598), but have not curtailed the previously existing rights and remedies of trustees, or altered the law or the principles on which it is to be administered, except by giving greater power to the court (*Re Somerset, Somerset v. Poulett (Earl)*, *supra*, *per* DAVEY, L.J., at p. 275; *Bolton v. Curre*, [1895] 1 Ch. 544, *per* ROMER, J., at p. 549; *Fletcher v. Collis*, [1905] 2 Ch. 24, C. A., *per* ROMER, L.J., at pp. 34, 35).

(o) Including a constructive or implied trustee and a personal representative of a deceased person (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50; *Mara v. Browne*, [1895] 2 Ch. 69, 94).

(p) *Re Somerset, Somerset v. Poulett (Earl)*, *supra*; *Mara v. Browne*, *supra*, at p. 93.

(q) The instigation or request need not be in writing (*Griffith v. Hughes*, [1892] 3 Ch. 105; *Mara v. Browne*, *supra*, at p. 92).

writing of a beneficiary (*r*), the High Court and, in cases within their respective jurisdictions, a palatine court or county court (*s*) may, if it thinks fit (*t*), impound all or any part of the interest of the beneficiary in the trust estate (*a*) by way of indemnity to the trustee, or a person claiming through him (*b*), and may do so notwithstanding that the beneficiary is a married woman entitled for her separate use and restrained from anticipation (*c*).

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Limitations  
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of Trustees.

SUB-SECT. 6.—*Contribution or Indemnity from Co-trustees.*

**405.** Where several trustees are jointly and severally liable for a breach of trust (*d*), a trustee who pays more than his quota of the loss is generally entitled to contribution in respect of their quota of it from his co-trustees or their representatives (*e*); and he

Contribution  
between  
trustees.

(*r*) The beneficiary must know what he is instigating or requesting or consenting to (*Re Somerset, Somerset v. Poulett (Earl)*, [1894] 1 Ch. 231, 270, 274, C. A.).

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 45, 46.

(*t*) *Ricketts v. Ricketts* (1891), 64 L. T. 263, 265; *Griffith v. Hughes*, [1892] 3 Ch. 105, 107; *Re Somerset, Somerset v. Poulett (Earl)*, *supra*, at p. 274; *Bolton v. Currie*, [1895] 1 Ch. 544.

(*a*) *Booth v. Booth* (1838), 1 Beav. 125; *Lincoln v. Wright* (1841), 4 Beav. 427, 432; *Bentley v. Robinson* (1859), 9 I. Ch. R. 479. The interest must be in the actual trust estate of which the trustee seeking to impound it is trustee (*Ricketts v. Ricketts, supra*). The rule applies where the beneficiary is one of the trustees (*Chillingworth v. Chambers*, [1896] 1 Ch. 685, C. A.). The beneficiary's interest may be impounded as against a person to whom it has been assigned subsequently to the breach of trust (*Bolton v. Currie, supra*, at pp. 548, 549), and as against the beneficiary's trustee in bankruptcy (*Fletcher v. Collis*, [1905] 2 Ch. 24, 39, C. A.).

(*b*) *Monk v. Druce* (1834), 4 L. J. (EX. EQ.) 61; *Chillingworth v. Chambers, supra*. A trustee does not waive his equity to the indemnity by declining to take a mortgage of the beneficiary's interest as security for the breach of trust at the time of its commission (*Bolton v. Currie, supra*, at pp. 549, 550).

(*c*) *Ricketts v. Ricketts, supra*; *Griffith v. Hughes, supra*; *Mara v. Browne*, [1895] 2 Ch. 69, 93, 94; *Re Holt, Re Rollason, Holt v. Holt*, [1897] 2 Ch. 525; *Molyneux v. Fletcher*, [1898] 1 Q. B. 648, 656. The court exercises its discretion as to removing a restraint on anticipation in order that the interest of a married woman may be impounded (*Bolton v. Currie, supra*), and is slow to do so when the trustee ought to have protected her against herself when requested by her to commit the breach of trust (*ibid.*, at p. 551). For the previous law as to impounding the interests of married women, see *Davies v. Hodgson* (1858), 25 Beav. 177; *Olive v. Carew* (1859), 1 John. & H. 199; *Butler v. Cumpston* (1868), L. R. 7 Eq. 16; *Sawyer v. Sawyer* (1885), 28 Ch. D. 595, C. A.

(*d*) *A.-G. v. Daugars* (1864), 33 Beav. 621, *per* ROMILLY, M.R., at p. 624; and see pp. 187, 188, *ante*.

(*e*) *Lingard v. Bromley* (1812), 1 Ves. & B. 114; *Jesse v. Bennett* (1856), 6 De G. M. & G. 609; *Birks v. Micklethwait* (1864), 33 Beav. 409, 411 (but see *Micklethwait v. Winstanley* (1864), 5 New Rep. 204, C. A.); *Prince v. Hine* (No. 2) (1859), 27 Beav. 345; *Fletcher v. Green* (1864), 33 Beav. 426, 430; *A.-G. v. Daugars, supra*, at p. 624; *Ramskill v. Edwards* (1885), 31 Ch. D. 100; *Bacon v. Camphausen* (1888), 58 L. T. 851; *Re Eyton, Bartlett v. Charles* (1890), 45 Ch. D. 458; *Chillingworth v. Chambers, supra*; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Moxham v. Grant*, [1900] 1 Q. B. 88, 92, C. A.; *Jackson v. Dickinson*, [1903] 1 Ch. 947; *Collings v. Wade*, [1903] 1 I. R. 89. The right constitutes a specialty debt from the co-trustees liable to contribute (Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, altering the previous law as laid down in *Priestman v. Tindall* (1857), 24 Beav. 244; *Lockhart v. Reilly* (1857), 1 De G. & J. 464, 477).

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Limitations  
on Liability  
of Trustees.

Trustee-bene-  
ficiary.

Trustee  
deriving  
personal  
benefit.

No contribu-  
tion in certain  
cases.

When  
liability  
arises.

has the same rights against them as the beneficiary had to whom he has made good the loss (*f*).

Where one of the trustees is also a beneficiary, he must bear the loss and indemnify his co-trustees to the full extent of his share in the trust estate, and can only claim contribution from them in respect of the amount, if any, by which the loss exceeds the value of his share (*g*).

Where one of the trustees obtains a personal benefit from a breach of trust in which the others took no active part, he must bear the loss to the extent of the benefit which he has obtained, and must indemnify his co-trustees to that extent (*h*).

**406.** In special circumstances (*i*) one of several trustees who has been alone actively concerned in committing a breach of trust may be deprived of the right to contribution from his co-trustees, and may be ordered to pay the whole amount of the loss and indemnify them in respect of it, and of all costs in relation thereto (*k*), and, where no actual loss has been sustained by the trust estate, to indemnify them against the costs of proceedings occasioned by the breach of trust (*l*). Independently of any action by the beneficiaries, one of several trustees who commits a breach of trust may be required by the others to make it good (*m*).

SECT. 3.—*Liability of Other Persons.*

SUB-SECT. 1.—*In General.*

**407.** A beneficiary or agent or other person renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it (*n*), or knowingly

(*f*) *Birks v. Micklethwait* (1864), 33 Beav. 409, 411, 412.

(*g*) *Chillingworth v. Chambers*, [1896] 1 Ch. 685, C. A., *per* LINDLEY, L.J., at p. 698.

(*h*) *Warwick v. Richardson* (1842), 10 M. & W. 284; *Gray v. Addison* (1856), 2 Jur. (N. S.) 662; *Butler v. Butler* (1877), 7 Ch. D. 116, 121, C. A.; *Bahin v. Hughes* (1886), 31 Ch. D. 390, C. A., *per* COTTON, L.J., at pp. 395, 396; *Wynne v. Tempest*, [1897] 1 Ch. 110. But the right of a co-trustee in such a case as this is not a right to indemnity entitling him to serve a third party notice under R. S. C., Ord. 16, r. 48 (*Wynne v. Tempest, supra*). As to third party notices, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 162 *et seq.*

(*i*) *Bahin v. Hughes, supra*, at pp. 395, 396. The case may arise where the defaulting trustee is solicitor to the trust estate and is entrusted with the management of it (*Lockhart v. Reilly, Reilly v. Lockhart* (1856), 25 L. J. (CH.) 697; *Lockhart v. Reilly* (1857), 1 De G. & J. 464; *Re Partington, Partington v. Allen* (1887), 57 L. T. 654); but a solicitor-trustee will not, merely because he is a solicitor, be made to indemnify a co-trustee in respect of a breach of trust in which the co-trustee actually participated (*Head v. Gould*, [1898] 2 Ch. 250).

(*k*) *Price v. Price* (1880), 42 L. T. 626, 627; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536, 544; *The Millwall*, [1905] P. 155, C. A., *per* COZENS-HARDY, L.J., at p. 176; and see pp. 193, 195, *ante*.

(*l*) *Re Linsley, Cattley v. West*, [1904] 2 Ch. 785.

(*m*) *Powlet (Earl) v. Herbert* (1791), 1 Ves. 297; *Franco v. Franco* (1796), 3 Ves. 75; *Baynard v. Woolley, Wearing v. Baynard* (1855), 20 Beav. 583.

(*n*) *M'Leod v. Drummond* (1810), 17 Ves. 152, *per* Lord ELDON, L.C., at p. 154; *Fyler v. Fyler* (1841), 3 Beav. 550; *Pannell v. Hurley* (1845),



receives trust property and deals with it in a manner inconsistent with the trust (*o*), or where in acting for the trustee he commits a wrong for which he is liable to the trustee (*p*). On the other hand, he is not liable for a breach of trust when he has no notice of the trust (*a*) or of the intended trust (*b*), or when he merely acts as agent for a trustee (*c*).

SECT. 3  
Liability  
of Other  
Persons.

SUB-SECT. 2.—*Liability of Beneficiaries.*

**408.** Where one of several beneficiaries procures trust money to be improperly laid out or to be paid away under a fraudulent appointment by him, or otherwise himself commits a breach of the terms of the trust, and part of the trust estate is consequently lost, the other beneficiaries are entitled as against him to have their shares made good out of his share of what is ultimately recovered (*d*), or out of any benefit which he has himself derived from the breach of trust (*e*). A beneficiary who induces a trustee to commit a breach of trust is primarily liable for it, and will be

Procuring  
breach of  
trust.

2 Coll. 241; *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903, C. A.; *Bridgman v. Gill* (1857), 24 Beav. 302; *Rolfe v. Gregory* (1864), 4 De G. J. & Sm. 576; *Gray v. Johnston* (1868), L. R. 3 H. L. 1, *per* Lord CAIRNS, L.C., at p. 11; *Clark v. Hoskins* (1868), 37 L. J. (CH.) 561, C. A. His liability does not depend on his knowing the actual terms of the trust (*Foxton v. Manchester and Liverpool District Banking Co.* (1881), 44 L. T. 406; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337).

(*o*) *M'Leod v. Drummond* (1810), 17 Ves. 152, 154; *Keane v. Robarts* (1819), 4 Madd. 332, *per* LEACH, V.-C., at pp. 357, 358; *Wilson v. Moore* (1833), 1 My. & K. 126; *Morgan v. Stephens* (1861), 3 Giff. 226, 236; *Dettmar v. Metropolitan and Provincial Bank* (1863), 1 Hem. & M. 641; *Hardy v. Caley* (1864), 33 Beav. 365; *Gray v. Johnston*, *supra*, at p. 11; *Burdick v. Garrick* (1870), 5 Ch. App. 233; *Pearson v. Scott* (1878), 9 Ch. D. 198; *Re Bell*, *Lake v. Bell* (1886), 34 Ch. D. 462; *Stanier v. Evans*, *Evans v. Stanier* (1886), 34 Ch. D. 470, 476 *et seq.*; *Magnus v. Queensland National Bank* (1888), 37 Ch. D. 466, C. A.; *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

(*p*) *Sadler v. Lee* (1843), 6 Beav. 324.

(*a*) *Williams v. Williams* (1881), 17 Ch. D. 437; *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693, P. C.

(*b*) *Shields v. Bank of Ireland*, [1901] 1 I. R. 222.

(*c*) *M'Leod v. Drummond*, *supra*, at p. 154; *Keane v. Robarts*, *supra*; *Myler v. Fitzpatrick* (1822), Madd. & G. 360, *per* LEACH, V.-C.; *Robertson v. Armstrong* (1860), 28 Beav. 123; *Morgan v. Stephens*, *supra*, at p. 236; *Gray v. Johnston*, *supra*; *Rae v. Meek* (1889), 14 App. Cas. 558; *Brinsden v. Williams*, [1894] 3 Ch. 185; *Coleman v. Bucks and Oxon Union Bank*, *supra*; *Stokes v. Prance*, [1898] 1 Ch. 212, 224; *Bath v. Standard Land Co., Ltd.*, [1911] 1 Ch. 618, C. A., *per* FLETCHER MOULTON, L.J., at pp. 633 *et seq.* A solicitor does not become liable as a constructive trustee by having been paid an undue amount for costs out of the trust estate (*Maw v. Pearson* (1860), 28 Beav. 196; *Re Spencer*, *Spencer v. Hart* (1881), 51 L. J. (CH.) 271, C. A.). As to bankers and solicitors generally, see titles BANKERS AND BANKING, Vol. I., pp. 583 *et seq.*, 605 *et seq.*, 621; SOLICITORS, Vol. XXVI., p. 760.

(*d*) *Phillipson v. Gatty*, *Gatty v. Phillipson* (1850), 2 H. & Tw. 459, C. A. As to where the beneficiary is also trustee, see pp. 187, 204, *ante*. The other beneficiaries have no claim on the beneficiary's share in a fund held under another trust (*Edgar v. Plomley*, [1900] A. C. 431, P. C.).

(*e*) *Greenwood v. Wakeford* (1839), 1 Beav. 576; *Williams v. Allen* (No. 2) (1863), 32 Beav. 650; *Re Deane*, *Bridger v. Deane* (1889), 42 Ch. D. 9.

## SECT. 3.

Liability  
of Other  
Persons.

## Overpayment.

ordered to recoup to the trustee the amount which the trustee has been required to make good to the trust estate (*f*).

**409.** Where a beneficiary receives from the trustee more than he is entitled to, whether in respect of capital or income, he is liable to refund to the trust estate the excess which ought not to have been paid to him (*g*). The court in administering the estate will cause the amount wrongly paid to him in respect of one interest to be deducted from any other shares in the estate to which he is entitled (*h*).

SUB-SECT. 3.—*Liability of Agents and Third Parties.*Liability as  
constructive  
trustee.

**410.** Where an agent or a third party by his conduct or the circumstances of the case has become a constructive or implied trustee or a trustee *de son tort* (*i*), he incurs for a breach of trust a liability similar to that of an express trustee (*k*).

SECT. 4.—*Other Remedies.*SUB-SECT. 1.—*Prevention.*Refusal of  
specific  
performance.

**411.** The court never lends its assistance to the commission of a breach of trust (*l*), and, therefore, does not decree specific performance of a contract which involves a breach of trust (*m*).

## Injunction.

**412.** Where the court is satisfied that trustees are contemplating a breach of trust, it restrains the commission thereof by injunction (*n*).

(*f*) *Trafford v. Boehm* (1747), 3 Atk. 440, 444; *Keays v. Lane* (1869), 3 I. R. Eq. 1; and see pp. 202, 203, *ante*.

(*g*) *Brooksbank v. Smith* (1836), 2 Y. & C. (EX.) 58; *Fuller v. Knight* (1843), 6 Beav. 205, 210; *M'Gachen v. Dew*, *Dew v. M'Gachen* (1851), 15 Beav. 84, 90; *Baynard v. Woolley*, *Wearing v. Baynard* (1855), 20 Beav. 583; *Re Smith's Estate*, *Olifford v. Washington* (1879), 48 L. J. (CH.) 205; *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502, *per* WARRINGTON, J., at p. 513; and see pp. 202, 203, *ante*. But the executors of a deceased trustee who was also a beneficiary were held not entitled to recover from the other beneficiaries amounts which the deceased trustee had overpaid to them in excess of their shares (*Re Horne, Wilson v. Cox Sinclair*, [1905] 1 Ch. 76).

(*h*) *Dibbs v. Goren* (1849), 11 Beav. 483; *Re Robinson, McLaren v. Public Trustee*, *supra*. It makes no difference that the other shares have been assigned for valuable consideration (*Dibbs v. Goren*, *supra*; *Re Brown, Dixon v. Brown*, *supra*).

(*i*) See pp. 87 *et seq.*, *ante*.

(*k*) *Pollard v. Downes* (1682), 2 Cas. in Ch. 121; *Myler v. Fitzpatrick* (1822), Madd. & G. 360; *Montgomery v. Johnson* (1848), 11 I. Eq. R. 476; *Rackham v. Siddall* (1848), 16 Sim. 297; *Life Association of Scotland v. Siddal*, *Cooper v. Greene* (1861), 3 De G. F. & J. 58, C. A.; *Hennessey v. Bray* (1863), 33 Beav. 96; *Cowper v. Stoneham* (1893), 68 L. T. 18; see pp. 186 *et seq.*, *ante*.

(*l*) *Wood v. Richardson* (1840), 4 Beav. 174, *per* Lord LANGDALE, M.R., at pp. 176, 177; *Maw v. Topham* (1854), 19 Beav. 576, *per* ROMILLY, M.R., at p. 578; *Roberts v. Death* (1881), 8 Q. B. D. 319, C. A.; *Bowman v. Hill*, [1907] 1 I. R. 451, C. A.

(*m*) *Ord v. Noel* (1820), 5 Madd. 438; *Thompson v. Blackstone* (1843), 6 Beav. 470; *Maw v. Topham*, *supra*, at p. 578; see title SPECIFIC PERFORMANCE, Vol. XXVII., p. 39.

(*n*) *Hipkins v. Newton* (1831), 9 L. J. (O. S.) (CH.) 227; *Balls v. Strutt* (1841), 1 Hare, 146; *Snare v. Baker*, *Beasley v. Snare* (1849), 13 Jur. 203; *Dance v. Goldingham* (1873), 8 Ch. App. 902; but see *Lambert v. Lambert*

**413.** Where trust property is in jeopardy by reason of the conduct of the trustee or his sudden death or incapacity or bankruptcy, a receiver may be appointed (*o*), and an injunction granted to restrain the trustee from further acting in the trusts (*p*), or a writ of possession or delivery or assistance may be obtained (*q*), or the property may be ordered to be brought into court (*r*).

**414.** Where a solicitor is a trustee or in a fiduciary position, the court exercises its summary jurisdiction to prevent or remedy a breach of trust by him (*s*).

SECT. 4.  
Other Remedies.

Securing trust property.

Summary jurisdiction over solicitor.

SUB-SECT. 2.—*Following Trust Property.*

**415.** Trust money or property which has been wrongfully alienated or converted in breach of trust, or the money or property into which it has been converted, can, so long and so far as traceable (*t*), be followed and recovered (*u*), unless such money or

Following and recovering trust property.

(1843), 5 I. Eq. R. 339; *Parker v. Dunn River Navigation Co.* (1847), 1 De G. & Sm. 192; see also title INJUNCTION, Vol. XVII., pp. 253, 254, 265, 266, 268, 269; as to restraining breaches of trust by corporations, see *ibid.*, pp. 225, 226.

(*o*) *Gladdon v. Stoneman* (1808), cited in *Howard v. Papera* (1815), 1 Madd. 142, 143, note (*a*); *Brodie v. Barry* (1811), 3 Mer. 695; *Malcolm v. Montgomery* (1824), 2 Mol. 500; *Wilson v. Wilson* (1838), 2 Keen, 249; *Noad v. Backhouse* (1843), 2 Y. & C. Ch. Cas. 529; *Cole v. Muddle* (1852), 10 Hare, 186, *per* TURNER, V.-C., at p. 190; *Evans v. Coventry* (1854), 5 De G. M. & G. 911, C. A.; and see *George v. Evans* (1840), 4 Y. & C. (EX.) 211; pp. 173 *et seq.*, *ante*; and title RECEIVERS, Vol. XXIV., p. 352. As to constructive trusts, see *Cassidy v. Hopkins* (1847), 10 I. Eq. R. 208.

(*p*) *Gladdon v. Stoneman*, *supra*; *Bowen v. Phillips*, [1897] 1 Ch. 174.  
(*q*) R. S. C., Ord. 47, Ord. 48; *Wyman v. Knight* (1888), 39 Ch. D. 165; *Re Taylor*, *Taylor v. Rawson*, [1913] W. N. 212; see title EXECUTION, Vol. XIV., pp. 74 *et seq.*

(*r*) *Wyatt v. Sharratt* (1840), 3 Beav. 498; *Cole v. Muddle*, *supra*; *Wiglesworth v. Wiglesworth* (1852), 16 Beav. 269; *Re Clerihew's Estate*, *Clerihew v. Clerihew*, *Re Howard (a Solicitor)* (1871), 24 L. T. 860; *Staniar v. Evans*, *Evans v. Staniar* (1886), 34 Ch. D. 470; *Re Carroll*, *Brice v. Carroll*, [1902] 2 Ch. 175; and see p. 181, *ante*.

(*s*) *Re Carroll*, *Brice v. Carroll*, *supra*; *Re a Solicitor, Ex parte Hales*, [1907] 2 K. B. 539, *per* DARLING, J., at p. 545; see titles CONTEMPT OF COURT, ATTACHMENT, and COMMITTAL, Vol. VII., pp. 299 *et seq.*; SOLICITORS, Vol. XXVI., pp. 828 *et seq.*

(*t*) *Re Mawson, Ex parte Hardeastle* (1881), 44 L. T. 523; *Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237, C. A.

(*u*) *Whitecomb v. Jacob* (1710), 1 Salk. 160; *Mansell v. Mansell* (1732), 2 P. Wms. 678; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Robertson v. Morrice* (1845), 9 Jur. 122; *Pannell v. Hurley* (1845), 2 Coll. 241; *Murray v. Pinkett* (1846), 12 Cl. & Fin. 764, H. L.; *Pennell v. Deffell* (1853), 4 De G. M. & G. 372, C. A.; *Ernest v. Croysdill* (1860), 2 De G. F. & J. 175, C. A.; *Frith v. Carlland* (1865), 2 Hem. & M. 417, 420 *et seq.*; *Boursot v. Savage* (1866), L. R. 2 Eq. 134; *Re West of England and South Wales District Bank, Ex parte Dale & Co.* (1879), 11 Ch. D. 772, *per* FRY, J., at p. 778; *Re Anslow, Ex parte Barber* (1880), 28 W. R. 522; *Carson v. Sloane* (1884), 13 L. R. Ir. 139; *Gibert v. Gonard* (1884), 54 L. J. (CH.) 439; *Re Murray*, *Dickson v. Murray* (1887), 57 L. T. 223; *Patten v. Bond* (1889), 60 L. T. 583; *Crichton v. Crichton*, [1895] 2 Ch. 853, 858; *Re Oatway*, *Hertslet v. Oatway*, [1903] 2 Ch. 356; *Pullan v. Koe*, [1913] 1 Ch. 9; see title EQUITV, Vol. XIII., pp. 159 *et seq.* Trust money can be followed into land (*Lane v. Dighton* (1762), Amb. 409; *Lench v. Lench* (1805), 10 Ves. 511, *per* GRANT, M.R., at p. 517). The principle applies wherever a fiduciary relationship between parties subsists (*Ex parte Dumas* (1754), 2 Ves. Sen.



SECT. 4.  
Other  
Remedies.

property has come into the hands of a purchaser for valuable consideration without notice of the trust, who has acquired a right to it paramount to that of the persons claiming under the trust by reason of his having the legal estate therein or the best right to call for it (a), or unless the property has passed as money or as a negotiable instrument without notice of the trust (b). Where trust money is wrongfully laid out in the purchase of real or personal property, the *cestui que trust* can elect either to take the purchased property or to have a charge upon it for the amount of the trust money (c).

Trustee  
mixing trust  
money with  
his own.

**416.** Where a trustee mixes trust money with his own money, whether at his account at a bank or elsewhere, the *cestui que trust* has a claim to have it restored out of the mixed fund in priority to any right of the trustee to the fund (d), and can claim the whole fund, if the amount which is trust money cannot be ascertained (e).

582; *Buckeridge v. Glasse* (1841), Cr. & Ph. 126; *Frith v. Cartland* (1865), 2 Hem. & M. 417; *Hooper v. Conyers* (1866), L. R. 2 Eq. 549; *Re Strachan, Ex parte Cooke* (1876), 4 Ch. D. 123, C. A.; *New Zealand and Australian Land Co. v. Watson* (1881), 7 Q. B. D. 374, C. A., per BAGGALLAY, L.J., at pp. 383, 384; *Harris v. Truman* (1882), 9 Q. B. D. 264, C. A.; *Comité des Assureurs Maritimes v. Standard Bank of South Africa* (1883), Cab. & El. 87; *Marten v. Locke, Eyton & Co.* (1885), 53 L. T. 946, per NORTH, J., at p. 948; *Hancock v. Smith* (1889), 41 Ch. D. 456, C. A.). The money or property may be followed by a trustee who has been concerned in the breach of trust (*Brooksbank v. Smith* (1836), 2 Y. & C. (ex.) 58; *Price v. Blakemore* (1843), 6 Beav. 507; *Carson v. Sloane* (1884), 13 L. R. Ir. 139). As to property which has become subject to a covenant to settle after-acquired property of a married woman, see *Pullan v. Koe*, [1913] 1 Ch. 9. As to setting aside a conveyance to a purchaser made in breach of trust, see also title CHARITIES, Vol. IV., pp. 200, 201; as to following trust property where a trustee in default has become bankrupt, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 169.

(a) *A.-G. v. Gower* (1736), 2 Eq. Cas. Abr. 685; *Carter v. Carter* (1857), 3 K. & J. 617; *Thorndike v. Hunt, Browne v. Butler* (1859), 3 De G. & J. 563, C. A.; *Case v. James* (1861), 3 De G. F. & J. 256, 266, C. A.; *Dodds v. Hills* (1865), 2 Hem. & M. 424; *Cave v. Cave* (1880), 15 Ch. D. 639; *Taylor v. Blakelock* (1886), 32 Ch. D. 560, C. A.; *Edgar v. Plomley*, [1900] A. C. 431, P. C.; and see pp. 89, 90, *ante*; title CHARITIES, Vol. IV., p. 201.

(b) *Ex parte Dumas* (1754), 2 Ves. Sen. 582, per Lord HARDWICKE, L.C., at pp. 585, 586; *Dawson v. Prince* (1857), 2 De G. & J. 41, C. A.; *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693, P. C.

(c) *Murray v. Pinkett* (1846), 12 Cl. & Fin. 764, H. L.; *Mant v. Leith* (1852), 15 Beav. 524; *Harford v. Lloyd* (1855), 20 Beav. 310; *Patten v. Edmonton Union* (1883), 52 L. J. (CH.) 787.

(d) *Lupton v. White, White v. Lupton* (1808), 15 Ves. 432; *Frith v. Cartland* (1865), 2 Hem. & M. 417, 421; *Birt v. Burt* (1877), 11 Ch. D. 773, note (6), C. A.; *Re Hallett's Estate, Knatchbull v. Hallett* (1879), 13 Ch. D. 696, C. A., dissenting on this point from *Pennell v. Deffell* (1853), 4 De G. M. & G. 372, C. A., and *Brown v. Adams* (1869), 4 Ch. App. 764; *Re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356. The rule laid down in *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572, 608 (see titles BANKERS AND BANKING, Vol. I., p. 586; CONTRACT, Vol. VII., p. 450), does not apply as between a trustee and his *cestui que trust* (*Re Hallett's Estate, Knatchbull v. Hallett*, *supra*; see *The Admiralty v. Mills* (1908), *Times*, 29th October), but applies as between two or more *cestuis que trust* (*Re Hallett's Estate, Knatchbull v. Hallett*, *supra*; *Hancock v. Smith* (1889), 41 Ch. D. 456, C. A.; *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433).

(e) *Lupton v. White, White v. Lupton*, *supra*, at pp. 439 *et seq.*; *Cook v. Addison* (1869), L. R. 7 Eq. 466, per STUART, V.-C., at p. 470; and see note (e), p. 189, *ante*.

If property is purchased partly with trust money and partly with the money of the trustee, or of a person who is cognisant of the trust, the *cestui que trust* has a first charge upon it for the amount of the trust money (*f*).

SECT. 4.  
Other Remedies.

417. Where trust money is paid into a trust account at a bank, it remains subject to the trust (*g*).

Trust money paid into trust account.

## Part V.—Judicial Trustees.

### SECT. 1.—Appointment and Discontinuance.

418. Under the Judicial Trustees Act, 1896 (*h*), the court having jurisdiction in the matter (*i*) may in its discretion, on an application by or on behalf of a creator or intending creator of a trust (*k*), or a trustee (*l*) or beneficiary (*m*), appoint a person (*n*) as judicial trustee

Appointment.

(*f*) *Lupton v. White*, *White v. Lupton* (1808), 15 Ves. 432; *Price v. Blakemore* (1843), 6 Beav. 507; *Robertson v. Morrice* (1845), 9 Jur. 122; *Lambe v. Orton* (1863), 11 W. R. 1043, *per* KINDERSLEY, V.-C., at p. 1044; *Hopper v. Conyers* (1866), L. R. 2 Eq. 549.

(*g*) *Bridgman v. Gill* (1857), 24 Beav. 302; *Re Gross, Ex parte Kingston* (1871), 6 Ch. App. 632; *Foxton v. Manchester and Liverpool District Banking Co.* (1881), 44 L. T. 406. As to drawings on a trust account, see title BANKERS AND BANKING, Vol. I., p. 605.

(*h*) 59 & 60 Vict. c. 35.

(*i*) The jurisdiction is exercisable by the Chancery Division of the High Court, either in London or in a district registry, and, as respects trusts within its jurisdiction, by a palatine court (see title COURTS, Vol. IX., pp. 120 *et seq.*); and as respects trusts in which the trust property does not exceed in value £500, by the metropolitan county courts mentioned in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. III., or a county court having at the time bankruptcy jurisdiction (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 2; Judicial Trustee Rules (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, p. 911), 1897, rr. 2, 29, 30, 31). As to the jurisdiction of county courts, see title COUNTY COURTS, Vol. VIII., pp. 660, 661.

(*k*) The Act does not extend to a charity (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 6 (2)); but the administration of the property of a deceased testator or intestate is a trust within the Act (*ibid.*, s. 1 (2); Judicial Trustee Rules, 1897, r. 25).

(*l*) Including an executor or administrator (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (2); *Re Ratcliff*, [1898] 2 Ch. 352, *per* KEKEWICH, J., at pp. 355, 356 (where it was said that the Act authorised the removal of an executor)).

(*m*) The application may be made in a pending cause or matter or by originating summons (Judicial Trustee Rules, 1897, rr. 2—4).

(*n*) Any fit person nominated in the application may be appointed, including a beneficiary or relative, or solicitor, or a married woman, or an existing trustee (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (3); Judicial Trustee Rules, 1897, r. 5). If no one is nominated or the court is not satisfied as to the fitness of the person nominated, the court may appoint any fit person otherwise suggested (*Douglas v. Bolam*, [1900] 2 Ch. 749, C. A.), or the official solicitor of the court; and, where the proceedings are taken in a district registry, or a palatine court, or a county court, some other official of the court may be appointed (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), ss. 1 (3), 5; Judicial Trustee Rules, 1897, rr. 7, 29 (3), 30 (2), 31 (3)). Where an official of the court is appointed judicial

SECT. 1.  
Appoint-  
ment and  
Discon-  
tinuance.

to be a trustee of the trust either jointly with any other person or as sole trustee, and, for sufficient cause, in place of all or any existing trustees (*o*). On his appointment the trust property is to be vested in him either solely or jointly with other trustees as the case requires (*p*).

Discharge.

**419.** Where a judicial trustee desires to be discharged, he must give notice to the court, and state what arrangement it is proposed to make with regard to the appointment of a successor; and an official of the court will be appointed in his place if no other fit person is available for the office (*q*).

Suspension or  
removal.

**420.** A judicial trustee may be suspended or removed on the application of a person interested in the trust, or, if the court thinks fit, without any application (*r*).

Cesser of  
judicial  
trustee.

**421.** The court may, on the application of any of the persons interested in the trust, and must, if they all so desire, order that there shall cease to be a judicial trustee of the trust, whether the person who is judicial trustee continues as a trustee of the trust or not (*s*).

SECT. 2.—*Security.*

Security.

**422.** A judicial trustee, if not an official of the court, must, before his appointment can take effect, give security for the due application of the trust property by recognisance, bond, or otherwise as the

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trustee, funds can be held by him under his official title (Judicial Trustee Additional Rule, 1899 (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, p. 922)); and all remuneration, allowances and payments for his services as such are paid and applied and the trust property is dealt with as the Treasury direct (Judicial Trustee Rules, 1897, r. 18; Judicial Trustee Rule, April, 1900 (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, p. 923)). Where an official of the court who is judicial trustee of a trust dies or ceases to hold office, his successor, in the absence of direction to the contrary, becomes judicial trustee, and the trust property becomes vested in him (Judicial Trustee Rules, 1897, r. 7 (4)). An official of the court is not to be appointed judicial trustee for members or debenture-holders of, or persons being in any other relation to, a company, whether incorporated or unincorporated, or a club, and if the trust involves carrying on a trade or business, that circumstance is to be taken into account in reference to whether or under what special conditions he should be appointed (*ibid.*, r. 26). As to appointing the Public Trustee a judicial trustee, see p. 213, *post*.

(*o*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), ss. 1. 4. The appointment is in the discretion of the court, and will not be made where there is good reason to the contrary (*Re Chisholm, Legal Reversionary Society v. Knight* (1898), 43 Sol. Jo. 43; *Re Ratcliff*, [1898] 2 Ch. 352 (where the application was refused and an ordinary trustee was appointed); *Re Martin*, [1900] W. N. 129 (where KEKEWICH, J., considered the union of a judicial trustee and a private or gratuitous trustee undesirable and appointed an ordinary trustee)).

(*p*) Judicial Trustee Rules, 1897, r. 6.

(*q*) *Ibid.*, r. 23. The retiring judicial trustee has no statutory power of appointing his successor (*Re Johnston, Mills v. Johnston* (1911), 105 L. T. 701, *per* NEVILLE, J., at p. 702).

(*r*) Judicial Trustee Rules, 1897, rr. 20, 21.

(*s*) *Ibid.*, r. 24. A summons should be taken out asking for an order that there shall cease to be a judicial trustee (*Re Johnston, Mills v. Johnston, supra*, at p. 702).



court directs, and with such sureties as the court approves, unless the court dispenses with security (*t*). The court may at any time require the amount or nature of the security to be varied, or security to be given where previously dispensed with (*a*).

SECT. 2.  
Security.  
—

SECT. 3.—*Administration and Accounts of the Trust.*

**423.** Except where the court considers it unnecessary, a judicial trustee must, as soon as practicable after his appointment, furnish the court with a complete statement of the trust property containing an approximate estimate of the income and capital value of each item, and must from time to time give to the court all information necessary for keeping the statement correct (*b*).

Statement  
of trust  
property.

**424.** Where there is a judicial trustee, a separate account of the trust must be kept in the names of the trustees at a bank approved by the court, and the judicial trustee must forthwith pay to that account all trust money coming to his hands; and all the trust documents of title must be deposited with that bank, or in such other custody as the court directs, in the names of the trustees; and the judicial trustee must deposit a list of such documents with the court (*c*).

Separate  
account at  
a bank.

Deposit of  
trust docu-  
ments.

**425.** Fees are prescribed to cover the expenses of the administration of the Act, and, when paid by a judicial trustee, may be deducted out of the income of the trust property, unless the court otherwise directs (*d*).

Fees.

**426.** A judicial trustee may at any time request the court to give him directions as to the trust or its administration, and the court may at any time give him such directions without any request on his part (*e*).

Directions by  
the court.

**427.** The court may at any time order an inquiry into the administration of a trust by a judicial trustee, or into any dealing or transaction of a judicial trustee (*f*).

Inquiry by  
the court.

(*t*) Judicial Trustee Rules, 1897, r. 9. Where an administrator who has given an administration bond is appointed a judicial trustee, he need not give security as such unless so directed by the court (*ibid.*, r. 25 (2)). The amount is ordinarily six-fifths of the estimated income of the trust property (*ibid.*, r. 9 (4)). A premium payable by a judicial trustee to a guarantee company on account of his security may be directed by the court to be paid out of the trust property (*ibid.*, r. 9 (9)).

(*a*) *Ibid.*, r. 9 (6).

(*b*) *Ibid.*, r. 8.

(*c*) *Ibid.*, rr. 10, 11. Where an official of the court is judicial trustee, the court may direct that, instead of such separate account, all receipts may be dealt with and all payments made and accounts thereof kept, in such manner as the Treasury directs (*ibid.*, r. 10 (8)).

(*d*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 4 (3); Judicial Trustee Rules, 1897, r. 32, Sched.

(*e*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (4); Judicial Trustee Rules, 1897, rr. 12, 13.

(*f*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (6); Judicial Trustee Rules, 1897, r. 22.

## SECT. 3.

Adminis-  
tration and  
Accounts of  
the Trust.Audit of  
accounts.

**428.** Where there is a judicial trustee the accounts of the trust are audited once a year (*g*) and, together with a note of any corrections made upon the audit, are filed as the court directs (*h*). Unless the court otherwise directs, the judicial trustee is allowed on the audit deductions on account of his remuneration and allowances and fees paid by him, but not on account of the expenses of professional assistance or his own work or personal outlay, unless authorised by the court or justified by the strict necessity of the case (*i*).

SECT. 4.—*Remuneration.*Amount of  
remuneration.

**429.** A judicial trustee may receive out of the trust property such remuneration as is in each case fixed by the court, which, unless the court for special reasons otherwise orders, covers all his work and personal outlay (*k*). The court may, if it thinks fit, make to him out of the trust property special allowances of a limited amount for the statement of the trust property prepared by him on his appointment, and for realising and investing or reinvesting trust property, and for extraordinary trouble caused by special circumstances (*l*).

Forfeiture of  
remuneration.

Where a judicial trustee fails to comply with the Act or the rules or with any direction of the court or of an officer of the court thereunder, or otherwise misconducts himself in relation to the trust, the court may, after he has had the opportunity of being heard, order that the whole or any part of his remuneration be forfeited (*m*).

## Part VI.—The Public Trustee.

SECT. 1.—*Appointment, Status, and Officers.*Appointment  
and officers.

**430.** The Public Trustee is an officer who is appointed by the Lord Chancellor under the Public Trustee Act, 1906 (*n*). He

(*g*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (6). The court fixes the date to which the accounts are to be made up in each year, and the time after that date within which the accounts are to be delivered to it for audit (Judicial Trustee Rules, 1897, r. 14 (1)). The accounts are ordinarily audited by the officer of the court; but if they are likely to involve questions of difficulty, they may be referred to a professional accountant for report at such remuneration as the court fixes (*ibid.*, r. 14 (2)).

(*h*) *Ibid.*, r. 15 (1). The judicial trustee is to send a copy or summary of the accounts to such beneficiaries or other persons as the court thinks proper; and the court may allow the filed accounts to be inspected on reasonable notice by persons connected with the trust (*ibid.*, r. 15 (2), (3)).

(*i*) *Ibid.*, r. 16.

(*k*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), ss. 1 (5), 4 (3); Judicial Trustee Rules, 1897, r. 17.

(*l*) Judicial Trustee Rules, 1897, r. 17 (3)—(5).

(*m*) *Ibid.*, r. 19.

(*n*) 6 Edw. 7, c. 55. The objects of the Act are carried into effect by rules made by the Lord Chancellor with the concurrence of the Treasury (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 14). Legal proceedings under the Act are taken in the High Court; but in cases within the jurisdiction of a palatine court, that court has concurrent powers (*ibid.*, ss. 10, 12, 13 (7)).

holds office during pleasure, receiving such salary or fees (*o*) and being appointed on such terms as the Treasury determines (*p*). The Lord Chancellor appoints such officers of the Public Trustee as, subject to the sanction of the Treasury, he considers necessary for the purposes of the Act, and they hold office upon such terms and are remunerated at such rates and in such manner as the Treasury sanctions (*q*). A person appointed Public Trustee or an officer of the Public Trustee may, and, if the Treasury so requires, must, be a person already in the public service (*r*). The Central Office of the Public Trustee is in London (*s*).

SECT. 1.  
Appoint-  
ment,  
Status, and  
Officers.

**431.** The Public Trustee is a corporation sole with perpetual succession and a common seal, and can sue and be sued by that name (*t*), and can hold land (*u*). Scope of office.

The Public Trustee may be appointed to be a judicial trustee (*w*), or to be administrator of the property of a convict under the Forfeiture Act, 1870 (*a*). He cannot, however, accept a trust exclusively for religious or charitable purposes (*b*); or a trust which involves the management or carrying on of a business, except to the extent to which he is authorised to do so by rules made under the Act (*c*); or a trust under a deed of arrangement for the benefit of creditors; or the administration of an estate known or believed by him to be insolvent (*d*).

#### SECT. 2.—*Ordinary Trusteeship.*

**432.** The Public Trustee may be appointed, either originally or as a new or additional trustee, to be trustee of a will or settlement or other instrument creating a trust, or to perform a trust or duty belonging to a class which he is authorised by rules made under the Act to accept, in like manner in all respects as if he were a private trustee, except that he may be appointed sole trustee, Acting as trustee of instrument of trust.

(*o*) See p. 219, *post*.

(*p*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), ss. 1 (1), 8 (1).

(*q*) *Ibid.*, s. 8 (2); see note (*s*), *infra*.

(*r*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 8 (3). The Treasury may direct any person so appointed to give security for performing his duties and accounting for money received by him (Public Trustee Rules, 1912 (Stat. R. & O., 1912, Trustee, p. 1232), r. 5).

(*s*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 8 (4); Public Trustee Rules, 1912, r. 3. The Lord Chancellor may, by notice in the *London Gazette*, from time to time prescribe the establishment of branch offices and notify the appointment at such offices of officers of the Public Trustee (see the text, *supra*) by the name of deputy public trustees, who have the powers and perform the duties assigned to them under the rules (Public Trustee Rules, 1912, rr. 3 (2), 4). As from the 1st April, 1914, a branch office has been established at Manchester.

(*t*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 1 (2). An instrument sealed by him is not liable to a higher stamp duty, owing to his using a seal, than if he were an individual (*ibid.*).

(*u*) *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611.

(*w*) See pp. 209, 210, *ante*,

(*a*) 33 & 34 Vict. c. 23; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429.

(*b*) See *Re Cherry's Trusts*, *Robinson v. Wesleyan Methodist Chapel Purposes (Trustees for)*, [1914] 1 Ch. 83.

(*c*) A limited power of accepting such a trust is conferred by the Public Trustee Rules, 1912, r. 7.

(*d*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2 (1), (4), (5).



SECT. 2.  
Ordinary  
Trustee-  
ship.

notwithstanding that two or more trustees were originally appointed (*e*), and notwithstanding that the instrument creating the trust directs that the number of trustees shall not be less than three (*f*). He may also be appointed under the Settled Land Act, 1882 (*g*), to be sole trustee of a settlement (*h*).

Retirement of  
co-trustee.

**433.** Where the Public Trustee has been appointed a trustee, a co-trustee may retire from the trust under the Trustee Act, 1893 (*i*), s. 11, without the consents thereby required, and notwithstanding that there are not more than two trustees (*k*).

Power to  
become legal  
personal  
representa-  
tive.

**434.** The court having jurisdiction in the matter may grant to the Public Trustee by that name, and the Public Trustee may accept by that name, probates of wills and letters of administration (*l*). With the sanction of the court an executor who has obtained probate or an administrator who has obtained letters of administration

(*e*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), ss. 2, 5 (1); *Re Kensit*, [1908] W. N. 235; *Re Johnston*, *Mills v. Johnston* (1911), 105 L. T. 701; *Re Firth*, *Firth v. Loveridge*, [1912] 1 Ch. 806. Subject to the Act and the rules he may accept as ordinary trustee any trust created by a trust instrument or arising upon an intestacy, except the trusts of an instrument made solely by way of security for money (Public Trustee Rules, 1912, rr. 6—8). Where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, he cannot be appointed unless the court having jurisdiction in the matter (see note (*n*), p. 212, *ante*) so orders (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 5 (3)). He may decline a trust absolutely or accept on conditions, but not on the ground only of small value (*ibid.*, s. 2 (3)). In the case of his appointment by a testator his subsequent consent, and in every other case his previous consent, to act is requisite (Public Trustee Rules, 1912, rr. 8—10; *Re Shaw*, *Public Trustee v. Little*, [1914] W. N. 141, C. A.). Notice of his proposed appointment as a new or additional trustee must, so far as practicable, be given to the beneficiaries under the trust, or to their guardians where they are infants (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 5 (4); Public Trustee Rules, 1912, rr. 40 (2), (3), 41); and the court may, upon application by any of them, within twenty-one days after receipt of the notice, prohibit the appointment if the interests of all the beneficiaries appear so to require (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 5 (4); *Re Hope Johnstone's Settlement Trusts* (1909), 25 T. L. R. 369; *Re Claremont* (1910), 25th February (unreported); *Re Firth*, *Firth v. Loveridge*, *supra*).

(*f*) *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611.

(*g*) 45 & 46 Vict. c. 38.

(*h*) *Re Leslie's Hassop Estates*, *supra*. As to payments to him of damages recovered by or on behalf of a person of unsound mind, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 466. When the interests of the Public Trustee as trustee of one estate conflict with his interests as trustee of another, he has no greater power than a private trustee to make a bargain with himself, and he should apply to the court to obtain its sanction to any proposed compromise (*Re New Haw Estate Trusts* (1912), 107 L. T. 191).

(*i*) 56 & 57 Vict. c. 53; see pp. 112, 113, *ante*.

(*k*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 5 (2).

(*l*) *Ibid.*, s. 6 (1); Public Trustee Rules, 1912, r. 6. The Public Trustee is considered as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration; but the consent or citation of the Public Trustee is not required for the grant of the letters to any other person; and as between the Public Trustee and the widower, widow, or next of kin of the deceased, they are to be preferred to him, unless good cause is shown to the contrary (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 6 (1)).

may, notwithstanding that he has acted in the administration of the deceased's estate, but only after such notice to the person beneficially interested as the court directs, transfer the estate to the Public Trustee for administration either solely or jointly with any continuing executor or administrators (*m*).

SECT. 2.  
Ordinary  
Trustee-  
ship.

SECT. 3.—*Custodian Trusteeship.*

**435.** Where the Public Trustee is appointed custodian trustee of a trust (*n*), the trust property is to be transferred to him as if he were sole trustee (*o*); but the management of the trust property and the exercise of all powers and discretions under the trust remain vested in the other trustees as managing trustees (*p*). As between himself and the other trustees, he has the custody of all the trust securities and documents of title, but they have free access thereto and are entitled to take copies and extracts (*q*).

Public  
Trustee as  
custodian  
trustee.

In determining the number of trustees for the purposes of the Trustee Act, 1893 (*r*), the custodian trustee is not reckoned as a trustee (*s*).

The power of appointing new trustees, when exercisable by the trustees, is exercisable by the managing trustees alone; but the custodian trustee has the same power as any other trustee of applying to the court for the appointment of a new trustee (*t*).

(*m*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 6 (2). Subject to the provisions of the Act, the order of the court sanctioning the transfer confers on the Public Trustee all the powers of the transferring executor or administrator; and the transferring executor or administrator is not liable in respect of any act or default in reference to the estate subsequent to the date of the order, other than an act or default of himself or of some person for whose conduct he is in law responsible (Public Trustee Act, 1906 (6 Edw. 7 c. 55), s. 6 (2)).

(*n*) As to his appointment in that capacity, see p. 86, *ante*.

(*o*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (2) (a). Vesting orders for the purpose may, where necessary, be made under the Trustee Act, 1893 (56 & 57 Vict. c. 53); see pp. 103 *et seq.*, *ante*. All sums payable to or out of the income or capital of the trust property are payable to or by the custodian trustee; but he may allow the income arising from the trust property to be paid to the other trustees, or to such person or the banking account of such person, as they direct; and in that case he is exonerated from seeing to its application or being answerable for its loss or misapplication (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (2) (e)).

(*p*) *Ibid.*, s. 4 (2) (b). The custodian trustee is to concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including power to pay money or securities into court), unless the matter is a breach of trust or involves personal liability on him in respect of calls or otherwise. Where he does not so concur, he is not liable for any act or default on the part of any of the managing trustees (*ibid.*, s. 4 (2) (d)). If he acts in good faith, he is not liable for accepting as correct, and acting upon the faith of, a written statement by the managing trustees as to a birth, death, marriage, or other matter of pedigree or relationship, or of fact, upon which the title to any of the trust property depends, or for acting upon legal advice obtained by the managing trustees independently of him (*ibid.*, s. 4 (2) (h)).

(*q*) *Ibid.*, s. 4 (2) (c). Other custodian trustees have the same powers (*ibid.*, s. 4 (3)).

(*r*) 56 & 57 Vict. c. 53.

(*s*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (2) (g).

(*t*) *Ibid.*, s. 4 (2) (f).

SECT. 3.  
Custodian  
Trustee-  
ship.

Determina-  
tion of  
custodian  
trusteeship.

**436.** On the application of either the custodian trustee or any managing trustee or beneficiary, and on proof that the termination of the custodian trusteeship is generally desired by the beneficiaries or is on other grounds expedient, the court may make an order for the purpose, and make such vesting orders and give such directions as appear necessary or expedient (a).

SECT. 4.—Administration of Small Estates.

Administra-  
tion of small  
estates.

**437.** Where an application to the Public Trustee to administer an estate (b) is made by a person who in the opinion of the Public Trustee would be entitled to apply to the court for an order for its administration by the court, and the Public Trustee is satisfied that the gross capital value thereof is less than £1,000 (c), and that the persons beneficially entitled thereto are persons of small means, he must administer the estate unless he sees good reason to the contrary (d).

Effect of  
undertaking  
administra-  
tion.

**438.** On the Public Trustee undertaking, by a declaration under his hand and seal, to administer an estate the trust property other than stock and the right to transfer or call for the transfer of stock forming part of the estate vest in him in like manner as if vesting orders for the purpose had been made by the High Court under the Trustee Act, 1893 (e); and that Act applies accordingly (f). As from such vesting, any trustee entitled under the trust to administer the estate is discharged from all liability attaching to the administration, except in respect of past acts (g).

Opinion of the  
court.

**439.** The Public Trustee can, without judicial proceedings, take the opinion of the High Court upon any question arising in the course of an administration (h).

(a) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4 (2) (i).

(b) That is to say, the estate of a deceased person (*Re Devereux, Toovey v. Public Trustee*, [1911] 2 Ch. 545, *per* EVE, J., at p. 548).

(c) That is to say, at the time when the application is made, although the original value was greater (*ibid.*).

(d) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (1); Public Trustee Rules, 1912, rr. 12—16. For the purposes of the administration he has (subject to the rules) all the administrative powers and authorities exercisable by a master of the Supreme Court acting in the administration of an estate (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (3); Public Trustee Rules, 1912, r. 14). A refusal by the Public Trustee to administer the estate does not prevent him from exercising with respect to the estate any other powers exercisable by him under the Act or the rules which he may be duly appointed to exercise (Public Trustee Rules, 1912, r. 13 (3)).

(e) 56 & 57 Vict. c. 53; see pp. 103 *et seq.*, *ante*.

(f) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (2). The Public Trustee cannot himself transfer stock without the leave of the court (*ibid.*). Copyhold land forming part of the estate does not vest in him, but he has in respect of it the like powers, and the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 34 (2), applies in like manner, as if he had been appointed by the court under *ibid.*, s. 33, to convey the land (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (2)). Deposits in the Post Office Savings Bank standing in the names of deceased depositors whose estates are being administered by the Public Trustee are transferred into his name (Post Office Savings Bank (Public Trustee) Act, 1908 (8 Edw. 7, c. 52), s. 1 (1)).

(g) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (2).

(h) *Ibid.*, s. 3 (4); Public Trustee Rules, 1912, r. 15.



**440.** Where proceedings have been instituted in any court for the administration of an estate, and by reason of its small value the court considers that it can be more economically administered by the Public Trustee, or that for any other reason it should be administered by him, the court may order that it be administered by him, in like manner, subject to any special directions by the court, as if he had undertaken it upon an application to him for the purpose (*i*).

SECT. 4.  
Adminis-  
tration of  
Small  
Estates.

Order for  
administra-  
tion by  
Public  
Trustee.

#### SECT. 5.—*Investigation of Trust Accounts.*

**441.** A trustee or beneficiary of a trust may apply to the Public Trustee for an investigation and audit of the condition and accounts of the trust (*k*). Notice is given, where the applicant is a beneficiary, to every trustee, and where the applicant is a trustee, to each co-trustee and to the person entitled to the income of the trust property; and the applicant and the trustees may within three months after receipt of the notice agree on a solicitor or public accountant to act as auditor in the investigation and audit. If they fail to agree, the Public Trustee or some person appointed by him is to act as auditor (*l*).

Application  
for investiga-  
tion and audit  
of accounts.

**442.** An auditor may be removed by an order of the court; and if an auditor is removed, or resigns, or dies, or becomes bankrupt or incapable of acting before the investigation and audit is completed, a new auditor may be appointed in his place in like manner as the original auditor (*m*).

Removal of  
auditor and  
appointment  
of new  
auditor.

**443.** On the completion of the investigation and audit, the auditor forwards to the applicant and to every trustee a copy of the accounts, together with a report thereon and a certificate signed by him to the effect that the accounts exhibit a true view of the trust, and that he has seen and verified the trust securities, or, if such is the case, that the accounts are deficient in the respects specified in the certificate (*n*).

Report and  
certificate of  
auditor.

**444.** The amount of the auditor's remuneration and other expenses of the investigation and audit is fixed by agreement between the trustees, the person entitled to the income of the trust property, and the auditor, or, in default of agreement, by the Public Trustee, who, in fixing it, has regard to the estimated value of the

Expenses of  
audit.

(*i*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 3 (5).

(*k*) *Ibid.*, s. 13.

(*l*) *Ibid.*; Public Trustee Rules, 1912, rr. 31—37. The investigation and audit take place unless the High Court, or, in cases within its jurisdiction, a county court, otherwise orders (Public Trustee Act, 1906 (6 Edw. 7, c. 55), ss. 13 (1), (7), 15; and see title COUNTY COURTS, Vol. VIII., pp. 679, 680). A trustee or beneficiary cannot be appointed auditor (Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 13 (1)). The auditor has full powers of inspecting documents and requiring information (*ibid.*, s. 13 (2), (6), (7); *Re Williams (James), deceased* (1910), 26 T. L. R. 604).

(*m*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 13 (4).

(*n*) *Ibid.*, s. 13 (2). A beneficiary is entitled to inspect and take copies of the accounts, report and certificate, and, at his own expense, to be furnished with copies thereof or extracts therefrom (*ibid.*, s. 13 (3)). Wilfully making a statement false in any material particular in any statement of accounts, report or certificate, is punishable by fine or imprisonment or both (*ibid.*, s. 13 (8)).

SECT. 5.  
Investigation of Trust  
Accounts.

trust property, the time occupied or likely to be occupied by the investigation and audit, and other circumstances. Unless he otherwise directs, the amount is borne by the estate; but he may order it to be borne by the applicant or by the trustees personally, or partly by them and partly by the applicant (*o*).

SECT. 6.—*Conduct of Business.*

Register  
and accounts.

**445.** A register is kept at the Central Office in London of a trust in which the Public Trustee is acting as trustee or custodian trustee, and of all estates in course of administration by him, whether from the Central Office or from any branch office (*p*). Separate accounts of capital and income are kept for every trust or estate (*q*), and the capital and income is dealt with, and the accounts are audited, in the manner prescribed by rules made under the Act (*r*).

No notice of  
trust.

**446.** A company cannot object to enter the Public Trustee on its books on account only of his being a corporation, and the entry does not constitute notice of a trust (*s*). In dealings with property the fact that the person or one of the persons dealt with is the Public Trustee does not of itself constitute notice of a trust (*t*).

Employment  
of solicitors  
and other  
agents.

**447.** The Public Trustee is empowered to employ solicitors, bankers, accountants, brokers and other persons, having regard in each case to the interests of the trust, and, where practicable, to the express or implied wishes of the creator of the trust and the other trustees, if any, and the beneficiaries (*a*).

Appeal.

**448.** Persons aggrieved by any act or omission or decision of the Public Trustee may appeal to a judge of the Chancery Division of the High Court in chambers or, in cases within its jurisdiction, to a county court (*b*).

SECT. 7.—*Discharge of Liabilities.*

No bond or  
security.

**449.** The Public Trustee upon the grant to him of administration, or upon his appointment to act in any capacity, is not required to give any bond or security which would be required from a private person, but is subject to the same liabilities and duties as if he had given the bond or security (*c*).

(*o*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 13 (5); Public Trustee Rules, 1912, rr. 35—37. The costs of wholly unnecessary applications may be directed to be paid by the applicant (*Re Utley, Russell v. Cubitt*, [1912] W. N. 147). A person ordered to pay the costs can appeal from the order (*Re Oddy*, [1911] 1 Ch. 532).

(*p*) Public Trustee Rules, 1912, r. 16. Regulations are made for the inspection and taking of copies of entries in the register (*ibid.*, r. 29).

(*q*) *Ibid.*, r. 19. The Public Trustee can, in respect of separate trusts, keep separate accounts in the Post Office Savings Bank (Post Office Savings Bank (Public Trustee) Act, 1908 (8 Edw. 7, c. 52), s. 1 (1)).

(*r*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 14; Public Trustee Rules, 1912, rr. 17, 18, 20—29, 31—37.

(*s*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 11 (5).

(*t*) *Ibid.*, s. 11 (5).

(*a*) *Ibid.*, s. 11 (2), (3); Public Trustee Rules, 1912, rr. 26, 42, 43.

(*b*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 10; *Re Oddy, supra*; and see title COUNTRY COURTS, Vol. VIII., pp. 679, 680.

(*c*) Public Trustee Act, 1907 (6 Edw. 7, c. 55), s. 11 (4).

**450.** Where a liability is incurred which the Public Trustee, if he were a private trustee, would be personally liable to discharge, the Consolidated Fund is liable to make good all sums required to discharge it; if, however, the loss is one to which neither the Public Trustee nor any of his officers has in any way contributed, and which neither he nor they could by the exercise of reasonable diligence have averted, neither the Public Trustee nor the Consolidated Fund is subject to any liability in respect of it (*d*). SECT. 7.  
Discharge  
of  
Liabilities.  
Discharge of  
liabilities.

SECT. 8.—*Remuneration.*

**451.** The Public Trustee receives such salary or fees as the Treasury determines (*e*); and such fees are chargeable to the public in respect of his duties as the Treasury fixes with the sanction of the Lord Chancellor (*f*). He retains and pays out of any trust property the fees chargeable in respect thereof, and any expenses which might have been retained or paid out of the property, if he had been a private trustee (*g*). No other reward may be taken by him or any of his officers for discharging the duties of the office (*h*). Salary and  
fees.

(*d*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 7.

(*e*) *Ibid.*, s. 8 (1).

(*f*) *Ibid.*, s. 9 (1). The fees are arranged from time to time so as to produce annually sufficient to discharge the salaries and incidental expenses under the Act, including a sum to insure the Consolidated Fund against loss (*ibid.*, s. 9 (4)), and are applied in aid of moneys provided by Parliament for expenses under the Act, and so far as not so applied are paid into the Exchequer (*ibid.*, s. 9 (3)). The scale of fees is fixed by the Public Trustee (Fees) Order, 1912 (Stat. R. & O., 1912, Trustee, pp. 1241 *et seq.*). Where the trust property consists wholly or in part of reversionary interests or property not readily realisable, the Public Trustee may charge an additional fee (*ibid.*, r. 5); and where the circumstances of a trust or estate appear to him to render, or to be likely to render, his duties in relation thereto exceptionally onerous, he may, with the approval of the Treasury, charge a special additional fee, and may make its payment, or the agreement to pay it, a condition of his accepting the trust or administering the estate (*ibid.*, r. 6); and where his duties with regard to a trust or estate appear to be, or to be likely to be, exceptionally simple, or otherwise of an exceptional character, he may, with the approval of the Treasury, remit a part not exceeding one-half of any fee payable in respect thereof (*ibid.*, r. 7).

(*g*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 9 (2). The incidence of the fees and expenses as between capital and income is determined by the Public Trustee (*ibid.*, s. 9 (5)). He may in certain cases commute fees, and may, with the approval of the Treasury, agree to any mode of payment of fees which seems to him just and reasonable (Public Trustee (Fees) Order, 1912, rr. 9—11).

(*h*) Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 11 (1).

## TUBERCULOSIS.

See FOOD AND DRUGS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.



## TUG AND TOW.

*See* ADMIRALTY; SHIPPING AND NAVIGATION.

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## TUNNELS.

*See* HIGHWAYS, STREETS, AND BRIDGES; RAILWAYS AND CANALS;  
SEWERS AND DRAINS; WATER SUPPLY.

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## TURBARY.

*See* COMMONS AND RIGHTS OF COMMON; EASEMENTS AND PROFITS  
À PRENDRE.

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## TURK'S AND CAICOS ISLANDS.

*See* DEPENDENCIES AND COLONIES.

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## TURNPIKES.

*See* HIGHWAYS, STREETS, AND BRIDGES.

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## UBERRIMA FIDES.

*See* AGENCY; CONTRACT; EQUITY; FAMILY ARRANGEMENTS;  
GUARANTEE; INSURANCE; PARTNERSHIP; SOLICITORS;  
TRUSTS AND TRUSTEES.

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## UGANDA.

*See* DEPENDENCIES AND COLONIES.

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## ULTRA VIRES.

*See* COMPANIES ; CORPORATIONS.

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## UMPIRE.

*See* ARBITRATION ; BUILDING CONTRACTS, ENGINEERS, AND  
ARCHITECTS ; RAILWAYS AND CANALS.

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## UNCONSCIONABLE BARGAINS.

*See* EQUITY ; FRAUDULENT AND VOIDABLE CONVEYANCES ; MONEY  
AND MONEY-LENDING.

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## UNDERLEASE.

*See* LANDLORD AND TENANT.

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## UNDER-SHERIFF.

*See* SHERIFFS AND BAILIFFS.

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## UNDERTAKERS.

*See* BURIAL AND CREMATION ; COMPULSORY PURCHASE OF LAND AND  
COMPENSATION ; ELECTRIC LIGHTING AND POWER ; GAS ; RAIL-  
WAYS AND CANALS ; TELEGRAPHS AND TELEPHONES ; WATER  
SUPPLY.

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## UNDERWOOD.

*See* AGRICULTURE; COMMONS AND RIGHTS OF COMMON; LAND-LORD AND TENANT; RATES AND RATING; SETTLEMENTS.

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## UNDERWRITERS.

*See* INSURANCE.

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## UNDEVELOPED LAND DUTY.

*See* REVENUE.

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## UNDUE INFLUENCE.

*See* CONTRACT; EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; GIFTS; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; MISREPRESENTATION AND FRAUD; WILLS.

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## UNDUE PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY; CARRIERS; RAILWAYS AND CANALS.

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## UNEMPLOYMENT INSURANCE.

*See* WORK AND LABOUR.

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## UNINCORPORATED ASSOCIATIONS.

*See* BUILDING SOCIETIES; CLUBS; FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES; LOAN SOCIETIES.

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## UNION OF BENEFICES.

*See* ECCLESIASTICAL LAW.

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## UNION OF PARISHES.

*See* ECCLESIASTICAL LAW ; LOCAL GOVERNMENT ; POOR LAW.

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## UNION OF SOUTH AFRICA.

*See* DEPENDENCIES AND COLONIES.

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## UNIONS.

*See* POOR LAW.

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## UNITARIANS.

*See* ECCLESIASTICAL LAW.

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## UNIVERSITIES.

*See* COURTS ; EDUCATION ; ELECTIONS ; PARLIAMENT.

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## UNLAWFUL ASSEMBLY.

*See* CRIMINAL LAW AND PROCEDURE.

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## UNSOUND FOOD.

*See* FOOD AND DRUGS.

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## URBAN DISTRICT COUNCIL.

*See* LOCAL GOVERNMENT.

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## URBAN · SANITARY DISTRICT.

*See* LOCAL GOVERNMENT; PUBLIC HEALTH AND LOCAL  
ADMINISTRATION.

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## URINALS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## USAGE.

*See* CUSTOM AND USAGES; SHIPPING AND NAVIGATION; THEATRES  
AND OTHER PLACES OF ENTERTAINMENT; TRADE AND TRADE  
UNIONS.

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## USE AND OCCUPATION.

*See* LANDLORD AND TENANT.

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## USES.

*See* REAL PROPERTY AND CHATTELS REAL; TRUSTS AND TRUSTEES.

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## USURY.

*See* MONEY AND MONEY-LENDING.

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## VACANT POSSESSION.

*See* LANDLORD AND TENANT; PRACTICE AND PROCEDURE.

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## VACATION.

*See* JUDGMENTS AND ORDERS; TIME.

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## VACCINATION.

*See* MEDICINE AND PHARMACY; PUBLIC HEALTH AND  
LOCAL ADMINISTRATION.

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## VAGRANCY.

*See* POOR LAW.

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## VALUABLE CONSIDERATION.

*See* CONTRACT; FRAUDULENT AND VOIDABLE CONVEYANCES;  
SETTLEMENTS.

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## VALUATION LIST.

*See* RATES AND RATING.

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## VALUATIONS.

*See* ESTATE AND OTHER DEATH DUTIES; REVENUE;  
VALUERS AND APPRAISERS.

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## VALUED POLICY.

*See* INSURANCE.

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# VALUERS AND APPRAISERS.

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## SECT. 1.—*Licences to Act.*

## SECT. 1.

**452.** Every person who values or appraises any estate or property, real or personal, or any interest in possession or reversion, remainder, or contingency in any estate or property, real or personal, or any goods, merchandise, or effects of whatsoever kind or description for or in expectation of hire, gain, fee, or reward, to be therefor paid to him, is deemed and taken to be an appraiser to all intents and purposes (*a*), and must take out an annual licence (*b*). Any person who acts as an appraiser or valuer for or in expectation of reward without taking out the requisite licence is liable for each offence to forfeit the sum of £50 (*c*); and without such licence he cannot recover at law remuneration for work done as an appraiser (*d*).

## Licences to Act.

Necessity for licence.

Penalty.

(*a*) Appraisers Licences Act, 1806 (46 Geo. 3, c. 43), s. 4; compare title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 162. As to the effect of making a single valuation, see p. 228, *post*; as to the appointment of a valuer under the Inclosure Acts, 1845—1899, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 548 *et seq.*, and as to his powers and duties, see *ibid.*, pp. 550 *et seq.*; as to the appointment of a valuer for the purposes of a partition by order of the Board of Agriculture and Fisheries, see title PARTITION, Vol. XXI., p. 829; as to the appointment and duties of a valuer for the purposes of enfranchisement under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), see title COPYHOLDS, Vol. VIII., pp. 123, 124; as to the appointment of valuers under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 10 (6), see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 227, 228, and of valuation officers for the purposes of duties on land values, see title REVENUE, Vol. XXIV., p. 555.

(*b*) Appraisers Licences Act, 1806 (46 Geo. 3, c. 43), s. 5.

(*c*) *Ibid.*, s. 6. As to the method of enforcing such forfeiture, see Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 6.

(*d*) *Palk v. Force* (1848), 12 Q. B. 666. He may, however, it seems, recover moneys expended by him in connexion with such valuation on behalf of his employer (*Smith v. Lindo* (1858), 4 C. B. (N. S.) 395).

SECT. 1.  
Licences to  
Act.

Grant of  
licence.

When licence  
unnecessary.

Single  
valuation.

**453.** The licence is granted by such officer or officers of excise, and is in such form as the Commissioners of Inland Revenue direct (*e*). It must state the true name and place of abode of the person who takes it out (*f*).

**454.** The following persons may act as appraisers without taking out licences so to act, namely, a duly licensed auctioneer (*g*), a county court bailiff authorised in writing by the county court judge to act as appraiser for valuing goods, chattels, or effects taken in execution (*h*), and a duly licensed house agent (*i*).

**455.** A person who has not the known character of an appraiser does not become such merely by making a valuation in a single instance (*k*).

SECT. 2.—*Duties and Liabilities.*

Competency  
and duties in  
general.

**456.** Any person who purports to act as a valuer and appraiser holds himself out as competent to act as such (*l*). He is not bound to know the intricacies of the law, but he is bound to know its general principles (*m*). It is his duty, notwithstanding what may apparently be incomplete instructions, to determine what are the facts and circumstances connected with the property which it is necessary for him to take into account in arriving at his valuation (*n*). In advising trustees as to property on which it is proposed to invest trust funds, a valuer should advise as to the amount which it is safe to advance on that particular property, in addition to advising as to its actual value (*o*). A valuer should not be an interested party in the subject-matter of the valuation (*p*), and he should act independently of the owner of the property to be valued (*q*).

(*e*) Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 6. As to officers of excise in general, see title REVENUE, Vol. XXIV., pp. 545, 546.

(*f*) Appraisers Licences Act, 1806 (46 Geo. 3, c. 43), s. 5. As to the duty on the licence and the period of its currency, see title REVENUE, Vol. XXIV., p. 648.

(*g*) Appraisers Licences Act, 1806 (46 Geo. 3, c. 43), s. 7; see also title AUCTION AND AUCTIONEERS, Vol. I., p. 501.

(*h*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 159; see also titles COUNTY COURTS, Vol. VIII., p. 565; REVENUE, Vol. XXIV., p. 648, note (*b*).

(*i*) Revenue (No. 1) Act, 1861 (24 & 25 Vict. c. 21), s. 11. A duly licensed appraiser may also act as a house agent without further licence (*ibid.*, s. 13).

(*k*) *Atkinson v. Fell* (1816), 5 M. & S. 240.

(*l*) *Harmer v. Cornelius* (1858) 5 C. B. (N. S.) 236; see title AGENCY, Vol. I., pp. 185 *et seq.*

(*m*) *Jenkins v. Betham* (1854), 15 C. B. 168; *Turner v. Goulden* (1873), L. R. 9 C. P. 57.

(*n*) *Shaw v. Cates*, [1909] 1 Ch. 389, 398; *Re Solomon, Nore v. Meyer*, [1912] 1 Ch. 261, 274.

(*o*) *Shaw v. Cates*, *supra*, at p. 398; *Re Solomon, Nore v. Meyer*, *supra*. As to the duties of valuers in relation to the valuation of property for mortgage as a trust investment, see titles MORTGAGE, Vol. XXI., pp. 108, 109; TRUSTS AND TRUSTEES, p. 134, *ante*.

(*p*) *Re Dive, Dive v. Roebuck*, [1909] 1 Ch. 328, 343.

(*q*) *Shaw v. Cates*, *supra*, at pp. 396, 403, 404.



SECT. 2.  
Duties and  
Liabilities.

Liability for  
careless or  
unskilful  
valuation.

**457.** A valuer and appraiser has a duty to his employer to use in carrying out his work that skill which his undertaking the work warrants (*r*), and to do the work with reasonable care and diligence. If he has not such skill, or fails to exercise such reasonable care and diligence, he is liable to his employer for the damages naturally resulting from his lack of skill, care, or diligence(s), and cannot, at all events where the valuation is so inaccurate as to be useless, recover any remuneration for the work which he has done (*t*). He is not liable, however, to persons other than his employer for such lack of skill, care, or diligence (*u*).

**458.** A valuer and appraiser who makes a valuation which is fraudulent, namely, one which is either false to his knowledge, or one as to the truth of which he knows or cares nothing, with the intention that such valuation shall be acted upon, is liable to an action of deceit by any person who was intended to act upon such valuation, and who acts upon it to his detriment (*w*). Fraudulent valuation.

SECT. 3.—*Valuation to Fix Purchase Price.*

**459.** In making valuations to fix the purchase price, the duty of the valuer is to have a reasonable degree of skill and to act with reasonable care and diligence. He is not in the position of an arbitrator (*x*), and is liable to an action for negligence (*y*); but the valuation, when made, however faulty it may be, is binding upon the valuer's employer in the absence of fraud, mistake, or collusion, provided that it is clear that the employer agreed to be bound thereby (*a*). Duty of valuer.

(*r*) See p. 228, *ante*.

(*s*) *Jenkins v. Betham* (1854), 15 C. B. 168; *Turner v. Goulden* (1873), L. R. 9 C. P. 57; *Scholes v. Brook* (1891), 64 L. T. 674, C. A.; compare *Pritty v. Child* (1902), 71 L. J. (K. B.) 512. As to the measure of damages generally, see title DAMAGES, Vol. X., pp. 331 *et seq.*

(*t*) *Whitty v. Dillon* (Lord) (1860), 2 F. & F. 67; compare *Moneypenny v. Hartland* (1826), 2 C. & P. 378.

(*u*) *Scholes v. Brook*, *supra*; *Love v. Mack* (1905), 93 L. T. 352, C. A.; compare *Le Lievre v. Gould*, [1893] 1 Q. B. 491, C. A., overruling *Cann v. Wilson* (1888), 39 Ch. D. 39.

(*w*) See *Derry v. Peek* (1889), 14 App. Cas. 337; and compare *Le Lievre v. Gould*, *supra*. As to representations made without a belief in their truth, compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 688 *et seq.*; as to fraud generally, see *ibid.*, pp. 759 *et seq.*

(*x*) A valuer differs from an arbitrator in that he does not hear the parties and determine judicially between them, but decides solely by using his eyes, his knowledge, and his skill (*Re Dawdy* (1885), 15 Q. B. D. 426, C. A., following *Collins v. Collins* (1858), 26 Beav. 306, and *Bos v. Helsham* (1866), L. R. 2 Exch. 72, and distinguishing *Re Hopper* (1867), L. R. 2 Q. B. 367); see, further, title ARBITRATION, Vol. I., pp. 440, 441. Hence, a valuation in order to prevent a difference between the parties arising does not preclude either party from afterwards raising a difference (*Sutherland v. Sun Fire Office* (1852), 14 Dunl. (Ct. of Sess.) 775); and an agreement for a valuation may be combined with an agreement for arbitration if the valuation is unsatisfactory (*Johnson v. Hopper* (1858), 4 Jur. (N. S.) 882).

(*y*) *Turner v. Goulden*, *supra*; compare title ARBITRATION, Vol. I., p. 459.

(*a*) *Collier v. Mason* (1858), 25 Beav. 200; *Weekes v. Gallard* (1869),

## SECT. 3.

**Valuation to Fix Purchase Price.**

Valuation not made.

**460.** Where an agreement has been made for the sale or purchase of property to be fixed by valuation, and the valuation is not or cannot be made in the mode agreed upon, specific performance of the agreement is not granted, as the court does not make a contract for the parties, and the price is an essential part of the contract (*b*). Where, however, a valuer has been properly appointed, and a party refuses to permit him to value, the court orders that such party shall allow the valuation to proceed (*c*). Where there is a clear and completed contract, and the term as to valuation is subsidiary only, specific performance is granted (*d*).

SECT. 4.—*Stamps.*

Stamp duty on appraisal or valuation.

**461.** Every appraiser by whom an appraisement or valuation chargeable with stamp duty is made must, within fourteen days of its being made, write it out, in words and figures showing its full amount, on duly stamped material. If he neglects or omits to do so, or in any other manner discloses the amount of the appraisement or valuation, he is liable to a fine of £50 (*e*), and any person who receives from any appraiser or pays for the making of any such appraisement or valuation is liable, unless the same is duly written out and stamped, to a fine of £20 (*f*). These provisions as to stamping apply to the appraisement or valuation of any property, or of any

21 L. T. 655; but see *Parken v. Whitby* (1823), Turn. & R. 366; and note (*x*), p. 229, *ante*. As to the effect of fraud generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.*; and of mistake, title MISTAKE, Vol. XXI., pp. 1 *et seq.*

(*b*) *Milnes v. Gery* (1807), 14 Ves. 400 (valuation to be by umpire if two valuers disagree; valuers disagree but fail to agree on umpire); *Blundell v. Brettargh* (1810), 17 Ves. 232, 241 (price to be fixed before certain date; before that date one of the parties to the agreement dies); *Wilks v. Davis* (1817), 3 Mer. 507 (agreement to sell at price fixed by arbitrators; defendant refuses to sign arbitration bond); *Morgan v. Milman* (1853), 3 De G. M. & G. 24 (agreement for sale of land at price to be fixed by a jury or by arbitration at A.'s option; A. dies without exercising option); *Vickers v. Vickers* (1867), L. R. 4 Eq. 529 (agreement to sell business at valuation; defendant after appointing valuer will not let him proceed); *Darbey v. Whittaker* (1857), 4 Drew. 134 (agreement for sale of leasehold premises and goodwill, together with trade fixtures, at the valuation of two named persons or their umpire; no price so fixed); see titles SALE OF GOODS, Vol. XXV., p. 148; SPECIFIC PERFORMANCE, Vol. XXVII., p. 26; compare title CONTRACT, Vol. VII., p. 433, note (*w*).

(*c*) *Morse v. Merest* (1821), Madd. & G. 26; *Smith v. Peters* (1875), L. R. 20 Eq. 511.

(*d*) *Gourlay v. Somerset (Duke)* (1815), 19 Ves. 429, 431 (contract for lease, certain terms to be settled by person agreed on by parties; no such person agreed on); *Jackson v. Jackson* (1853), 1 Sm. & G. 184 (agreement to buy lands and premises for named sum and plant and machinery at valuation; valuation not made; specific performance granted); *Richardson v. Smith* (1870), 5 Ch. App. 649, n. 650, n. (agreement for purchase of land and premises at named sum, and furniture at price to be fixed by valuers mutually agreed; no valuers appointed; specific performance granted as to land and premises); see title SPECIFIC PERFORMANCE, Vol. XXVII., pp. 25, 26.

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 24 (1). As to stamp duties generally, and the recovery of penalties in connexion therewith, see title REVENUE, Vol. XXIV., pp. 700 *et seq.*, 703 *et seq.*

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 24 (2).

interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever (*g*).

SECT. 4.  
Stamps.

Exemptions.

**462.** The following appraisements are exempted (*h*):—

(1) Appraisements or valuations made for and for the information of one party only, and not being in any manner obligatory as between parties either by agreement or operation of law ;

(2) Appraisements or valuations made in pursuance of the order of any Court of Admiralty or of any Court of Appeal from a judgment of any Court of Admiralty (*i*) ;

(3) Appraisements or valuations of property of a deceased person made for the information of an executor or other person required to deliver in England or Ireland an affidavit, or to record in any commissary court in Scotland an inventory of the estate of such deceased person (*k*) ;

(4) Appraisements or valuations of any property made for the purpose of ascertaining the legacy or succession or account duty payable in respect thereof (*l*).

**463.** A stamp (*m*) is also necessary (*n*) on valuations furnished to the Board of Agriculture and Fisheries (*o*) for the purpose of exchanges (*p*), partitions (*q*), and divisions of intermixed lands (*r*),

Statutory  
valuations.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Appraisement," which fixes the duty, where the amount of the appraisement or valuation does not exceed £5, at 3*d.* ; exceeds £5 and does not exceed £10, 6*d.* ; exceeds £10 and does not exceed £20, 1*s.* ; exceeds £20 and does not exceed £30, 1*s.* 6*d.* ; exceeds £30 and does not exceed £40, 2*s.* ; exceeds £40 and does not exceed £50, 2*s.* 6*d.* ; exceeds £50 and does not exceed £100, 5*s.* ; exceeds £100 and does not exceed £200, 10*s.* ; exceeds £200 and does not exceed £500, 15*s.* ; exceeds £500, £1.

(*h*) *Ibid.*

(*i*) See titles ADMIRALTY, Vol. I., pp. 89, 90 ; SHIPPING AND NAVIGATION, Vol. XXVI., p. 587.

(*k*) See titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 209, 210, 215 ; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 166, 167. As to inventory duty in Scotland, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 305, note (*p*).

(*l*) See title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 209, 210, 215, 255, 296.

(*m*) The amount of the stamp is the same as on an appraisement (Inclosure, etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), s. 2) ; see note (*g*), *supra*.

(*n*) Inclosure, etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), s. 2. For form of notice of application by valuer for recovery of redemption money of rentcharge, see Encyclopædia of Forms and Precedents, Vol. XIV., p. 383.

(*o*) The powers and duties of the Land Commissioners relating to tithe commutation, copyholds and the inclosure, exchange, and improvement of land were, in 1889, transferred to the Board of Agriculture, now the Board of Agriculture and Fisheries ; see title AGRICULTURE, Vol. I., p. 297.

(*p*) See titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 580 ; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 296.

(*q*) See title PARTITION, Vol. XXI., p. 830 ; and see, generally, *ibid.*, pp. 824 *et seq.*

(*r*) See title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 113.



SECT. 4.  
Stamps.

under the Tithe Commutation Acts (*s*), Inclosure Acts (*t*), and Lands Improvement Acts (*a*); valuations attached to the reports of any university or college surveyor made for the purposes of transactions to which the consent of the Board (*b*) is required under the Universities and College Estates Acts (*c*) also require a stamp (*d*).

(*s*) See, generally, title ECCLESIASTICAL LAW, Vol. XI., pp. 742 *et seq.*

(*t*) As to the Inclosure Acts generally, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535 *et seq.*; as to the partition and exchange of allotments, see *ibid.*, p. 580. The provision requiring a valuation under the Copyhold Acts (now repealed) to be stamped (Inclosure, etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), preamble, s. 2) is virtually repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 58 (1); see title COPYHOLDS, Vol. VIII., p. 124.

(*a*) As to the Land Improvement Acts generally, see title LAND IMPROVEMENT, Vol. XVIII., pp. 275 *et seq.*

(*b*) The powers and duties of the Land Commissioners, formerly the Copyhold Commissioners, under the Universities and College Estates Acts, 1858—1880, were transferred to the Board of Agriculture, now the Board of Agriculture and Fisheries, by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2, Sched. I., Part II.; see title AGRICULTURE, Vol. I., pp. 297, 298.

(*c*) Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44); Universities and College Estates Act Extension, 1860 (23 & 24 Vict. c. 59); Universities and College Estates Amendment Act, 1880 (43 & 44 Vict. c. 46); Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55). The Board of Agriculture and Fisheries (see note (*o*), p. 231, *ante*) may, if it thinks fit, require a valuation to be made by a selected or approved surveyor as a condition precedent to approving proposals for any sale, enfranchisement, exchange, purchase, or mortgage under these provisions (Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44), s. 2). As to the provisions of the Universities and College Estates Acts generally, see titles CHARITIES, Vol. IV., pp. 217, 218, 228, 236, 241; COPYHOLDS, Vol. VIII., pp. 114, 131, 132; ECCLESIASTICAL LAW, Vol. XI., p. 578; EDUCATION, Vol. XII., pp. 93, 98; LANDLORD AND TENANT, Vol. XVIII., p. 366; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 534; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 265, note (*m*).

(*d*) Inclosure etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), s. 2.

## VENDITIONI EXPONAS.

See EXECUTION; SHERIFFS AND BAILIFFS.

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*See* LIEN; SALE OF GOODS; SALE OF LAND.

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## VENTILATION.

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PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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AND PROCEDURE.

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## VERMIN.

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## VERMINOUS PERSONS.

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## VESTED INTERESTS.

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## VESTMENTS.

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*See* ECCLESIASTICAL LAW ; LOCAL GOVERNMENT.

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## VEXATIOUS ACTIONS.

*See* ACTION.

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## VEXATIOUS INDICTMENTS.

*See* CRIMINAL LAW AND PROCEDURE.

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## VICAR.

*See* ECCLESIASTICAL LAW.

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## VICAR-GENERAL.

*See* ECCLESIASTICAL LAW.

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## VICINAGE.

*See* COMMONS AND RIGHTS OF COMMON.

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*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS.

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## VIEW.

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BRIDGES ; JURIES.

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*See* COMMONS AND RIGHTS OF COMMON ; OPEN SPACES AND  
RECREATION GROUNDS.

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## VINEGAR-MAKERS.

*See* REVENUE.

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## VINTNER.

*See* COMPANIES ; INTOXICATING LIQUORS.

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*See* TORT.

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*See* PEERAGES AND DIGNITIES.

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*See* CHARITIES ; CORPORATIONS ; ECCLESIASTICAL  
LAW ; EDUCATION.

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## VISITOR IN LUNACY.

*See* LUNATICS AND PERSONS OF UNSOUND MIND.

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## VIVISECTION.

*See* ANIMALS.

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## VOIDABLE CONVEYANCES.

*See* FRAUDULENT AND VOIDABLE CONVEYANCES; GIFTS.

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## VOLUNTARY ASSIGNMENTS, BONDS, CONVEYANCES, AND SETTLEMENTS.

*See* BANKRUPTCY AND INSOLVENCY; BONDS; FRAUDULENT AND  
VOIDABLE CONVEYANCES; GIFTS; SETTLEMENTS.

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## VOLUNTARY LIQUIDATION.

*See* COMPANIES.

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## VOLUNTEER FORCES.

*See* ROYAL FORCES.

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## VOLUNTEERS.

*See* FRAUDULENT AND VOIDABLE CONVEYANCES ; MORTGAGE ;  
NEGLIGENCE ; POWERS ; SETTLEMENTS.

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## VOTERS.

*See* ELECTIONS ; LOCAL GOVERNMENT.

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## VOYAGE.

*See* INSURANCE ; SHIPPING AND NAVIGATION.

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## VOYAGE POLICY.

*See* INSURANCE.

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## WAGERS.

*See* GAMING AND WAGERING ; INSURANCE.

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## WAGES.

*See* MASTER AND SERVANT ; SHIPPING AND NAVIGATION ; WORK  
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## WALES.

*See* EDUCATION.

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## WALES, PRINCE OF.

*See* CONSTITUTIONAL LAW.

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## WAR OFFICE.

*See* CONSTITUTIONAL LAW.

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## WAR OFFICE LANDS.

*See* CONSTITUTIONAL LAW; ROYAL FORCES; TRAMWAYS AND LIGHT RAILWAYS.

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## WARD OF COURT.

*See* INFANTS AND CHILDREN.

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## WARDS.

*See* ELECTIONS ; LOCAL GOVERNMENT.

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## WAREHOUSEMEN.

*See* BAILMENT ; CARRIERS.

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## WARNING LIGHTS.

*See* RAILWAYS AND CANALS ; SHIPPING AND NAVIGATION.

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## WARRANT.

*See* CRIMINAL LAW AND PROCEDURE ; MAGISTRATES ; POLICE ;  
SHERIFFS AND BAILIFFS.

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## WARRANT OF ATTORNEY.

*See* JUDGMENTS AND ORDERS ; MORTGAGE.

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## WARRANTY.

*See* ANIMALS ; AUCTION AND AUCTIONEERS ; BAILMENT ;  
SALE OF GOODS.

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## WARRANTY OF AUTHORITY.

*See* AGENCY.

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## WARREN.

*See* COMMONS AND RIGHTS OF COMMON ; GAME.

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## WASHHOUSES.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION ;  
WATER SUPPLY.

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## WASTE.

*See* EQUITY ; LANDLORD AND TENANT ; SETTLEMENTS ;  
TRUSTS AND TRUSTEES ; WATER SUPPLY.

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## WASTE OF THE MANOR.

*See* COMMONS AND RIGHTS OF COMMON ; COMPULSORY PURCHASE OF  
LAND AND COMPENSATION ; COPYHOLDS ; HIGHWAYS, STREETS,  
AND BRIDGES.

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## WASTING SECURITIES.

*See* EXECUTORS AND ADMINISTRATORS ; TRUSTS AND TRUSTEES.

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## WATCHES.

*See* TRADE MARKS, TRADE NAMES, AND DESIGNS.

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## WATCHING AND LIGHTING.

*See* ELECTRIC LIGHTING AND POWER ; GAS ; HIGHWAYS, STREETS,  
AND BRIDGES ; LOCAL GOVERNMENT.

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## WATER BAILIFFS.

*See* FISHERIES.

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## WATER BOARD.

*See* METROPOLIS ; WATER SUPPLY.

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## WATER-CLOSETS.

*See* METROPOLIS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION ;  
WATER SUPPLY.

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## WATER RIGHTS.

*See* EASEMENTS AND PROFITS À PRENDRE ; WATER SUPPLY ;  
WATERS AND WATERCOURSES.

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## Part I.—Powers and Duties as to Water Supply under the General Law.

### SECT. 1.—Introductory.

### SECT. 1.

#### Introductory.

Rights of landowners.

**464.** The owner of land has, as incidental to such ownership, the right to collect, store, use and supply to others, the water that is percolating therein (a). As regards water flowing in defined channels, either through or on the boundaries of his land, his rights incidental to ownership are limited by corresponding rights of other riparian owners. They include the right to use and consume the water for domestic purposes and for his cattle, and, further, to use a reasonable amount for the irrigation of, or for manufacturing purposes on, his land, provided that he returns the water so used substantially undiminished in volume and unaltered in character (b); but he may not use such water for the purposes of supplying persons outside his land (c). He may, however, acquire by purchase or otherwise the rights of other owners, and so become entitled to divert the whole or part of the water in a stream for the purpose of a general water supply (d).

(a) *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; and see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 310; WATERS AND WATERCOURSES, p. 358, *post*.

(b) *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301, *per* Lord MACNAGHTEN, at pp. 306, 307; see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 311 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 588 *et seq.*; WATERS AND WATERCOURSES, pp. 424 *et seq.*, *post*.

(c) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697; *Owen v. Davies*, [1874] W. N. 175 (where a local authority was riparian owner).

(d) As to purchase of water rights, see p. 255, *post*. Where water rights are purchased or granted by deed, the nature of such rights are to be

## SECT. 1.

Intro-  
ductory.Supply for  
general  
consumption.

**465.** In many places water for general consumption is supplied by individuals and companies without any special statutory powers, and their rights and liabilities are governed by the general law (*e*). Under public general statutes local authorities have important duties imposed upon them in regard to water supply, and have wide powers of supplying water (*f*); parish councils also have certain restricted powers (*g*), while limited owners are empowered for the purpose of supplying water (*h*) to charge their lands. In a large number of cases, however, the water supply of a district is carried on by companies under powers contained in local Acts or Provisional Orders, or by local authorities whose general powers have been supplemented by such Acts or Orders (*i*).

Powers of  
limited  
owners.

**466.** Landowners having limited interests in their land may construct waterworks of a permanent character for the supply of water, either to persons residing on their land or engaged in labour thereon, or for the more convenient and profitable user of their land, or for the supply of water to any local authority, water company, manufacturer or other person, or for any one or more of such purposes, and, subject to certain conditions, to charge their estates with the expenses thereof (*k*). Such landowners may not, however, injuriously affect any water rights of other persons without their consent (*l*), but in connexion with the works may by agreement purchase any water right or easement which might otherwise interfere with or prevent the construction of the works or with the supply of water (*m*).

SECT. 2.—*Duties of Local Authorities.*SUB-SECT. 1.—*In General.*Provision of  
water supply.

**467.** Where complaint is made to the Local Government Board that a local authority has made default in providing its district

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determined by the construction of such deed, independently of any rights the parties would have had as riparian owners or otherwise (*Whitehead v. Parks* (1858), 2 H. & N. 870).

(*e*) As to the liability of such persons in respect of breaking up the streets to lay pipes, see title GAS, Vol. XV., p. 307, and the cases there cited.

(*f*) See the text, *infra*, pp. 254 *et seq.*, *post*. By "local authority" is meant a local authority as defined in the Public Health Act, 1875 (38 & 39 Vict. c. 55), as amended; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXI., p. 372. The term includes the councils of county boroughs, of boroughs, and of urban and rural districts.

(*g*) See p. 266, *post*.

(*h*) See the text, *infra*.

(*i*) See p. 268, *post*.

(*k*) Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31). As to the power of a landowner to contribute towards the expenses of a district council in supplying his land with water, see title LAND IMPROVEMENT, Vol. XVIII., pp. 281, 282; see also p. 262, *post*; as to the powers of limited owners to execute permanent improvements generally, see titles LAND IMPROVEMENT, Vol. XVIII., pp. 283, 284; SETTLEMENTS, Vol. XXV., pp. 644, 645.

(*l*) Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), s. 9.

(*m*) *Ibid.*, s. 5.



with a supply of water, in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply can be got at a reasonable cost (*n*), the Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, must make an order limiting a time for the performance by the authority of its duty in the matter of such complaint (*o*). If such duty is not performed by the time so limited, the order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty, and may from time to time change any person so appointed (*p*). A like complaint may be made by a parish council to the county council in respect of the water supply of the parish, and the county council, if satisfied after due inquiry that the district council has so failed, may resolve that the duties and powers of the district council in respect of such water supply be transferred to the county council (*q*).

SECT. 2.  
Duties of  
Local  
Authorities.

468. In certain conditions it is the duty of a local authority, whether urban or rural, to give notice in writing to the owner of any house (*r*) within its district requiring him, within a time therein specified, to obtain a proper water supply for such house, and to do all such works as may be necessary for that purpose (*s*).

Notice  
requiring  
supply to be  
obtained.

(*n*) Persons making the complaint are required by the Local Government Board to furnish evidence that a proper and sufficient supply can be obtained and at a reasonable cost. An objection to a notice requiring an owner to supply his house with water may amount to such a complaint; see p. 252, *post*.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 377 *et seq*. The courts cannot entertain any complaint under this provision (*Pasmore v. Oswaldtwistle Urban Council*, [1898] A. C. 387); see title SEWERS AND DRAINS, Vol. XXV., pp. 732, 736. For form of order limiting time for performance by a rural district council of the duty to provide a water supply, see Encyclopædia of Forms and Precedents, Vol. XV., p. 183.

(*p*) The order of the Local Government Board may confer upon the person appointed to perform the duty of the defaulting authority the power of levying rates (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 300); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 378, note (*h*).

(*q*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (1); see title LOCAL GOVERNMENT, Vol. XIX., p. 375. The county council may, instead of so resolving, make a like order to that mentioned in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299 (see note (*p*), *supra*), and may appoint a person to perform the duty, and thereupon the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 299—302, apply, with the substitution of the county council for the Local Government Board (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (2)); see title LOCAL GOVERNMENT, Vol. XIX., p. 375. For form of resolution, see Encyclopædia of Forms and Precedents, Vol. XV., p. 181; for form of complaint by parish council, see *ibid.*, p. 182.

(*r*) For definition of "owner," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (*o*). For form of notice, see Encyclopædia of Forms and Precedents, Vol. XV., p. 165.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62. For form of such report, see Encyclopædia of Forms and Precedents, Vol. XV., p. 165.

SECT. 2.  
Duties of  
Local  
Authorities.

The conditions are that it must appear to the authority on the report of its surveyor that the house is without a proper supply of water, and that such a supply of water can be furnished to the house at a cost for such supply (*t*) not exceeding either the water rate authorised by any local Act in force within the district, or where there is no such Act in force, at a cost not exceeding 2*d.* a week, or at such other cost as the Local Government Board may on the application determine in all the circumstances of the case to be reasonable (*u*). On such an application the Board may by order fix a general scale of charges for the whole or any part of the district of the local authority. The cost of the supply of water to any house within the area specified in the order is deemed to be determined to be reasonable if it does not exceed the cost authorised by such general scale of charges (*x*). If the notice is unreasonable, as by reason of the expense of bringing the water being excessive, an appeal against the order of the local authority lies to the Local Government Board (*a*).

Non-com-  
pliance with  
notice.

469. If such notice to the owner is not complied with within the time specified in the notice, the local authority may, if it thinks fit, do such work and obtain such supply, and for that purpose may enter into any contract with any water company supplying water within the district (*b*). Water rates may be made and levied on the premises by the authority or company which furnishes the supply, and may be recovered as if the owner or occupier of the premises had demanded a supply of water and was willing to pay water rates for the same (*c*); and such rates may be recovered whether the connexion between the mains and the house has been made or not (*d*). Any expenses incurred by the local authority in doing any such works may be recovered summarily (*e*), or may, by order

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As to the nature of expenses under this provision, see title LOCAL GOVERNMENT, Vol. XIX., pp. 281, 282, 336, 337.

(*t*) The cost referred to evidently relates only to the supply, and is distinct from the expense of laying mains and making connexions in order to enable the house to have a supply; see, for example, *Southend Waterworks Co. v. Howard* (1884), 13 Q. B. D. 215; and compare Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 8, which provision seems to be applicable primarily to cases where the mains are within a reasonable distance of the house (*West Lancashire Rural Council v. Ogilvy*, [1899] 1 Q. B. 377, per CHANNELL, J., at p. 381).

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62.

(*x*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 8.

(*a*) *West Lancashire Rural Council v. Ogilvy*, *supra*, per LAWRENCE and CHANNELL, JJ., at pp. 380, 381, where it was held that the limitations of the amount mentioned in the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3, do not apply to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62.

(*c*) *Ibid.* As to the right of an owner to demand a water supply, see p. 260, *post*.

(*d*) *Southend Waterworks Co. v. Howard*, *supra*. The authority is not bound to make the connexion as a condition precedent to the company recovering the rate (*ibid.*, per STEPHEN, J., at p. 218).

(*e*) As to such recovery, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 251; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 337, 368; as to summary procedure generally, see title MAGISTRATES,

of the local authority, be declared to be private improvement expenses (*f*).

**470.** Local authorities may also require common lodging-houses to be supplied with water, if it can be obtained at a reasonable rate (*g*).

**471.** City, borough, and urban district councils may be empowered (*h*) to make bye-laws with respect to keeping water-closets supplied with sufficient water for flushing, and it will be the duty of such councils to enforce them.

City, borough, and urban district councils must (*i*) cause fire-plugs and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire to be provided and maintained, and for this purpose they may enter into any agreement with any water company or person (*k*).

SECT. 2.  
Duties of  
Local  
Authorities.

Common  
lodging-  
houses.  
Flushing of  
water-closets.

Fire extinc-  
tion.

SUB-SECT. 2.—*Special Duties of Rural District Councils.*

**472.** Subject to certain provisions hereinafter mentioned, it is the duty (*l*) of every rural district council, in addition to the

Supply to be  
available  
for every  
house.

Vol. XIX., pp. 589 *et seq.* No preliminary resolution by the authority as to the necessity of such works need apparently be proved; compare *Caballero v. Lewis* (1874), 38 J. P. 614.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62. As to such expenses, see *ibid.*, s. 213; titles LOCAL GOVERNMENT, Vol. XIX., p. 336; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 381, 382, 384.

(*g*) Common Lodging Houses Act, 1853 (16 & 17 Vict. c. 41); see also Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 74; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 511, 512.

(*h*) City, borough and urban councils obtain this power by adopting the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., which, by *ibid.*, s. 23, amends and extends the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157, and gives this power; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 416 *et seq.* Rural district councils may adopt the necessary part of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 23; see *ibid.*, ss. 3, 23 (3), 50; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION,\* Vol. XXIII., pp. 548, 549. An almost identical provision is to be found in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 124, but only applies when incorporated in a local Act.

(*k*) Statutory undertakers must fix and maintain such plugs, if requested by the council (see pp. 304, 305, *post*); but they frequently fix such plugs without request. In the absence of such request or agreement, the provision above cited does not make the urban district council liable to pay for the maintenance (*Grand Junction Waterworks Co. v. Brentford Local Board*, [1894] 2 Q. B. 735, C. A.). The provision, however, imposes a statutory obligation on the council, which can be enforced by indictment or by information by the Attorney-General (*ibid.*, *per* LINDLEY, L.J., at p. 738). As to fixing marks to indicate position of fire-plugs, and, generally, as to fire appliances, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 548, 549. Rural districts probably have power to insert plugs or hydrants in their mains under the general powers given by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51: see p. 254, *post*.

(*l*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3.



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Duties of  
Local  
Authorities.

general duties above mentioned (*a*), to see that every occupied dwelling-house within its district has within a reasonable distance an available supply of wholesome water sufficient for the consumption and use for domestic purposes of the inmates of the house (*b*).

Procedure.

**473.** The provisions applicable to the enforcing of this duty are the following: Where it appears to a rural district council, on the report of its inspector of nuisances or medical officer of health (*c*), that any occupied dwelling-house within its district has not such a supply of water within a reasonable distance (*d*), and the council is of opinion that such supply can be obtained at a reasonable cost not exceeding a capital sum of £8 13s. 4d., or at such other cost, not exceeding £13 (*e*), as the Local Government Board on the application of the local authority determines in all the circumstances of the case to be reasonable (*f*), and that the expense of providing the supply ought to be paid by the owner or defrayed as private improvement expenses, certain proceedings may be taken to effect this purpose (*g*).

(*a*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), ss. 3 (proviso), 13. This Act is construed as one with the Public Health Act, 1875 (38 & 39 Vict. c. 55) (Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 1). Its provisions do not repeal the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62, under which a rural authority may act (*Colne Valley Water Co. v. Treharne* (1884), 48 J. P. 279). If there are mains in the neighbourhood within a reasonable distance of the house, the procedure should apparently be under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62 (*West Lancashire Rural Council v. Ogilvy*, [1899] 1 Q. B. 377).

(*b*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3. An urban authority may be invested with all or any of the powers and duties under this Act, and such investment may be made either unconditionally or subject to any conditions to be specified by the Local Government Board as to the time, portion of the district, or manner during, at, or in which the powers and duties are to be exercised (*ibid.*, s. 11). For form of report by an inspector of nuisances and medical officer of health of a rural district council that an occupied house within the district is without a sufficient water supply, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 167.

(*c*) As to these officials, see title LOCAL GOVERNMENT, Vol. XIX., pp. 273, 275 *et seq.*, 332, 333.

(*d*) The Local Government Board has not fixed any distance as reasonable. The local authority in determining what is a reasonable distance must have regard to the labour involved in carrying the water by hand, and the possibility of impure water being more easily obtained; see Lumley, *Public Health Acts*, 8th ed., p. 702.

(*e*) The words of the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3, are "a capital sum the interest on which at the rate of five per centum per annum would amount to twopence per week, or at such other cost not exceeding a capital sum the interest on which at the rate of five per centum per annum would amount to threepence per week."

(*f*) The Local Government Board has stated that the specified limit of cost must be taken as referring to each individual house, and that when the cost of providing any house considered individually would exceed the limit, the council cannot require a supply to be obtained under the statutory provision, even if it appears that the cost of supply for two or more houses would, if distributed over these houses, be within the specified limit; see Lumley, *Public Health Acts*, 8th ed., p. 702.

(*g*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3.

**474.** These proceedings are as follows:—The council may serve on the owner of the house a notice (*h*) requiring him within a time specified in the notice, and not exceeding six months from the date of the service thereof, to provide such supply, and to do all such works as may be necessary for that purpose. If the notice is not complied with at the expiration of the time specified, the authority may serve a second notice on the owner informing him that if the requirements of the first notice are not complied with within one month from the date of the service of the second notice, the authority will itself provide such supply, and that the expense of providing the supply will in that case be payable by the owner or as a private improvement expense (*i*). The council, on cause being shown to its satisfaction why the requirements of such a notice served by them should not be complied with, may withdraw the notice or modify the requirements thereof (*k*). The owner has a right to object to these requirements on certain specified grounds (*l*) by a memorial stating his objections and addressed to the authority within twenty-one days after service on him of the second notice. In that case the council cannot proceed with the execution of the works which it might otherwise execute until it has been authorised to execute the same, in certain cases by a court of summary jurisdiction, and in others by the Local Government Board (*m*).

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Service of  
notices.

If at the expiration of one month from the date of the service of the second notice its requirements are not complied with, the council may, subject to the provisions as to its withdrawing or modifying the requirements or to the owner objecting, itself provide the supply, and for that purpose may enter upon the premises and execute all such works as appear to it necessary for obtaining a supply of water for the house (*n*). Any expenses incurred by the council in providing such supply and doing such works may, when the supply has been provided, be recovered before a court of summary jurisdiction from the owner

Effect of non-  
compliance.

Recovery of  
expenses.

(*h*) Forms for these notices are contained in the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), Schedule; these forms or forms to the like effect, varied as circumstances may require, may be used and are deemed sufficient for all purposes (*ibid.*, s. 12); see Encyclopædia of Forms and Precedents, Vol. XV., pp. 168, 169.

(*i*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3. As to private improvement expenses, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 336, 337; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 381, 382.

(*k*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3. For form of notice withdrawing or modifying previous notice, see Encyclopædia of Forms and Precedents, Vol. XV., p. 170.

(*l*) As to the grounds of objection, see p. 252, *post*.

(*m*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 4. For form of such memorial, see Encyclopædia of Forms and Precedents, Vol. XV., p. 172.

(*n*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3 (3). For the purposes of such entry the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 102, 103 (see title NUISANCE, Vol. XXI., p. 572), apply, until the works are completed, in the same manner as if an order of a court of summary jurisdiction had been made for the abatement of a nuisance on the premises, and that order had not been complied with (Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3 (3)).

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Provision of  
joint supply.

of the house, or may, at the option of the council, be declared private improvement expenses (*a*).

Where the owners of two or more houses have failed to comply with the requirements of the notices served on them, and the council has power as aforesaid to execute the works for each house, the council may, if it appears to it desirable, and no greater expense would be occasioned thereby, execute the works for the joint supply of water to those houses and apportion the expenses as it deems just (*b*). Notice of such apportionment must be given forthwith to each of such owners. If any owner objects to the apportionment as unjust, he may, within twenty-one days of service on him of notice thereof, apply to a justice, who may summon the council and the other owners to show cause before a court of summary jurisdiction why the apportionment should not be varied, and the court may either dismiss the application or make such order varying the apportionment as it thinks reasonable (*c*).

Grounds of  
objection.

**475.** The grounds upon which an owner may object to the requirements of a notice as to providing a water supply to his house are: (1) that the supply is not required; (2) that the time limited by the notice for providing the supply is insufficient; (3) that it is impracticable to provide the supply at a reasonable cost; (4) that the authority ought itself to provide a supply of water for the district or contributory place in which the house is situated, or to render the existing supply of water wholesome; or (5) that the whole or part of the expense of providing the supply, or of rendering the existing supply wholesome, ought to be charged on the district or contributory place (*d*).

Hearing of  
objections.

If the objections stated in the memorial do not include either the fourth or fifth of the above-mentioned grounds, the council may apply to a court of summary jurisdiction for an order authorising it to proceed with the works. The court must thereupon summon the owner, and, if satisfied on hearing the case that the objections are not well founded, must make an order authorising the council to proceed with the works in the event of their not being executed by the owner within a time limited by the order (*e*).

(*a*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3 (4).

(*b*) *Ibid.*, s. 3 (5). For form of resolution of a rural district council apportioning expenses, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 174.

(*c*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 5. An appeal lies from such an order to the next court of quarter sessions (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269); see titles *MAGISTRATES*, Vol. XIX., p. 642; *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., p. 369. For form of notice of apportionment, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 175.

(*d*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 4. As to contributory places, see title *LOCAL GOVERNMENT*, Vol. XIX., pp. 335, 336; see also title *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., p. 381, note (*e*).

(*e*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 4. An appeal to quarter sessions lies from the order of the court (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269); see title *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., p. 369.



If the objections are or include either or both of the fourth or fifth grounds, the council must forward a copy of the memorial to the Local Government Board, which may either cancel the requirement or confirm the same by an order, with or without modifications (*f*).

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**476.** It is also the duty of every rural district council from time to time to take such steps as may be necessary to ascertain the condition of the water supply within its district. The council may pay all reasonable costs and expenses incurred by it in so doing. The council, or any of its officers or any person authorised for that purpose by the council, having reasonable ground for believing that any occupied dwelling-house within the district is without a proper supply of wholesome water sufficient for the consumption and domestic use of the inmates of such house, must be admitted into the premises for which such supply is required, or from which the water supply may be derived, for the purpose of ascertaining whether or not such house has such a supply within a reasonable distance (*g*).

Condition of  
water supply.

**477.** A rural district council has also a duty in respect of the water supply to dwelling-houses in its district erected after the 4th July, 1878 (*h*), or which after that date are pulled down to or below the ground floor and rebuilt. The owner of such a house may not occupy it or permit it to be occupied, unless and until he has obtained from the council a certificate that there is provided, within a reasonable distance of the house, such an available supply of wholesome water as appears to such authority, on the report of its inspector of nuisances or of its medical officer of health, to be sufficient for the consumption and use for domestic purposes of the inmates of the house (*i*). If the

Supply to  
new houses.

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(*f*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 4. If the Board confirms the requirement, it must issue an order authorising the council, subject to any modification the Board may prescribe, to execute the works in the event of such works not being executed by the owner within a time limited by the order. Such order may, if the Board considers it equitable, apportion the expense of providing the supply between the owner of the house and the council, or between the owner and any other person or persons (*ibid.*). If the Board cancels the requirements upon the grounds mentioned in the fourth objection, the memorial is deemed to have been a complaint of default made to the Board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299 (Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 4); as to such a complaint, see pp. 246, 247, *ante*.

(*g*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 7. For the purpose of such admission, the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 102, 103, which authorise the officer to enter only upon the order of a justice (see title NUISANCE, Vol. XXI., p. 573), apply in the same manner as if such admission were necessary for the purpose of examining as to the existence of any nuisance on the premises, and the person so authorised were an officer of the council (Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 7).

(*h*) The date of the passing of the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 45).

(*i*) *Ibid.*, s. 6. Breach of this provision renders the owner liable on conviction by a court of summary jurisdiction to a penalty not exceeding £10 (*ibid.*). Permitting tenants to put their furniture into

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council refuses to grant such certificate, the owner may apply to a court of summary jurisdiction for an order authorising the occupation of the house notwithstanding the refusal of the certificate. The court must then summon the council, and if, on hearing the case, the court is of opinion that the certificate ought to have been granted, such order may be made (*k*).

SECT. 3.—*Powers of Local Authorities to Supply Water.*

SUB-SECT. 1.—*In General.*

General  
powers.

**478.** Subject to certain restrictions which are intended to prevent undue competition with statutory undertakings (*l*), any borough or urban district council may provide its district or any part thereof, and any rural authority may provide its district or any contributory place (*m*) therein, or any part of such contributory place, with a supply of water proper and sufficient for public and private purposes (*n*). For those purposes, or any of them, such councils have powers of constructing and maintaining (*o*) and of taking on lease or hiring waterworks (*a*), and in certain cases of purchasing waterworks (*b*), and the rights, powers, and privileges of water companies (*c*), and they may contract with any person for a supply of water (*d*). They have also powers to maintain or close public wells and pumps (*e*).

Joint boards.

Two or more urban or rural districts or any of them may be formed into a united district for the purpose of procuring a common

the house, though they do not otherwise reside there, would apparently amount to a technical breach; see *Downie v. Fraser* (1901), 3 F. (Ct. of Sess.) 1044.

(*k*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 15), s. 6. An appeal lies from the order of the court to quarter sessions (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 369. For form of certificate, see Encyclopædia of Forms and Precedents, Vol. XV., p. 176.

(*l*) See p. 256, *post*.

(*m*) For the definition of a "contributory place," see title LOCAL GOVERNMENT, Vol. XIX., pp. 335, 336.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51.

(*o*) See p. 255, *post*.

(*a*) "Waterworks" are defined as including "streams, springs, wells, pumps, reservoirs, cisterns, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, engines, and all machinery, lands, buildings, and things for supplying or used for supplying water, also the stock-in-trade of any water company" (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4).

(*b*) See p. 258, *post*.

(*c*) As to the power of sale by a company, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 63; and p. 258, *post*.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51. Local authorities can supply water to adjoining local authorities; see p. 261, *post*. The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 122, 123, contain provisions as to contracts by local authorities for water supply, but these only apply when incorporated in a local Act. As to the powers and duties of local authorities in connexion with watering streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 256. As to the notice to be given by a rural district council before entering into a contract for water supply, see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16 (3); title LOCAL GOVERNMENT, Vol. XIX., p. 249.

(*e*) See pp. 264 *et seq.*, *post*.

water supply. This may be done by the Local Government Board by a Provisional Order (*f*). Local authorities may also combine for the purpose of erecting and maintaining works for the benefit of their respective districts (*g*).

SUB-SECT. 2.—*Construction and Acquisition of Works.*

**479.** To provide its district or part thereof with a supply of water a local authority may construct and maintain waterworks, dig wells, and do any other necessary acts (*h*). Before the authority can exercise these powers, it must possess or acquire land for the purpose, and in some cases it may be necessary, in addition, to acquire water rights (*i*). Land may be acquired by agreement (*k*), or compulsorily by means of a provisional order granted by the Local Government Board and confirmed by Parliament (*l*). Water rights not incidental to such land may be acquired by agreement (*m*); but provisional orders authorising their compulsory purchase are not issued by the Local Government Board (*n*), and the promotion of a Bill for a local Act is, therefore, necessary if powers of compulsory purchase are required (*o*). Nothing in the Public Health Acts (*p*) is to be construed as authorising a local authority to injuriously affect (*q*) any reservoir, canal, river, or

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water rights.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279; see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 338, 339. Such boards are sometimes formed by special Act; see pp. 268, 269, *post*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 285; and see title LOCAL GOVERNMENT, Vol. XIX., p. 291.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51. There is a power to construct certain works in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 121, but this provision only applies where it is incorporated by a local Act. As to the liability of statutory undertakers for negligence in the construction of their works, see titles NEGLIGENCE, Vol. XXI., pp. 402, 464 *et seq.*; TORT, Vol. XXVII., pp. 496, 497. As to the liability of persons allowing water to escape, see titles NEGLIGENCE, Vol. XXI., pp. 382, 401, 408; NUISANCE, Vol. XXI., pp. 528, 529; WATERS AND WATERCOURSES, pp. 453 *et seq.*, *post*; p. 295, *post*.

(*i*) As to the water rights incidental to land, see p. 245, *ante*; title WATERS AND WATERCOURSES, pp. 424 *et seq.*, *post*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175.

(*l*) *Ibid.*, s. 176; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 8. As to the confirmation of provisional orders, see title PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

(*m*) A local authority is expressly empowered to buy up any water mill, dam, or weir which interferes with the supply of water to its district (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175); and, with the necessary consents, it may do acts injuriously affecting streams (*ibid.*, ss. 327, 332). As to rights of interference with the flow of water generally, see title WATERS AND WATERCOURSES, pp. 424 *et seq.*, *post*. As to acquiring land subject to a tenant's right of water supply, see *Key v. Neath Rural District Council* (1906), 71 J. P. 57, C. A.

(*n*) Such orders were at one time issued; but the Board was advised by the law officers of the Crown that it was not authorised to do so, by reason of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 327, 332 (Report of Select Committee of House of Commons on the Public Health Act (1875) Amendment Bill (1878), R. No. 134, p. xiv.).

(*o*) As to such Bills, see p. 269, *post*.

(*p*) As to these Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*).

(*q*) As to the meaning of this expression generally, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 5, 43 *et seq.* The regulation of a stream, whereby a constant instead of an intermittent flow is



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stream, or the feeders thereof, or the supply, quality, or fall of water contained therein, in cases where any body of persons or person would, independently of such Acts, be entitled by law to prevent or be relieved against such injury, unless the local authority first obtains the consent (*r*) in writing of such persons or person (*s*).

**480.** A local authority may not construct any waterworks (*t*) within the limits of supply (*u*) of any water company (*a*) empowered to supply water by Act of or order confirmed by Parliament, if and so long as any such company is able and willing to supply water proper and sufficient for the purposes for which it is required by the local authority (*b*). This condition does not, however, prevent a local authority constructing works to obtain water for its own

provided, although no damage is caused, is injuriously affecting (*Roberts v. Gwyrfaei District Council*, [1899] 2 Ch. 608, C. A.); and so, probably, would be pollution by sewage, but that might, apart from the statutory provision, give a cause of action (*Manchester, Sheffield and Lincolnshire Rail. Co. v. Worksop Board of Health* (1857), 23 Beav. 198). As to intercepting percolating water, see *Kibble v. Chipping Norton Urban District Council* (1901), *Times*, 27th February; title WATERS AND WATERCOURSES, pp. 430, 431, *post*. The remedy for such interference is by an action for injunction and damages, and not for compensation; see the last-mentioned cases; *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483, better reported 24 L. T. 402; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 251; and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 43 *et seq.* As to interference with water, see, further, titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 561; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 310 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 588 *et seq.*

(*r*) As to whether there can be an implied consent, compare *A.-G. v. Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *A.-G. v. Bradford Canal (Proprietors)* (1866), L. R. 2 Eq. 71, *per* WOOD, V.-C., at p. 81.

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 332; see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 365, 366, note (*s*); compare Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 327 (3), (4), in regard to injuriously affecting the navigation on any river, canal, dock, harbour, lock, reservoir or basin, in cases where persons are authorised by Act of Parliament to navigate or use the same, or to receive tolls or dues in respect thereof, and also in regard to interfering with any watercourse in such manner as to injuriously affect the supply of water to any river, canal, dock, harbour, reservoir or basin, in cases where any such person or body of persons would have been entitled by law, if the Act had not been passed, to prevent or be relieved against such interference, without the consent of such person or persons in writing; see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 365 *et seq.*

(*t*) For the definition of "waterworks," see p. 254, *ante*. As to works to supply sea water, see *Shaw's Water Co. v. Greenock Magistrates etc.* (1855), 2 Macq. 151, H. L.

(*u*) As to the limits of supply of a water company, see pp. 276, 277, *post*.

(*a*) The expression "water company" is defined, as meaning, if not inconsistent with the context, "any person or body of persons corporate or unincorporate supplying or who may hereafter supply water for his or their own profit" (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4). A municipal corporation supplying water for its own profit would be such a company (*Wolverhampton Corporation v. Bilston Commissioners*, [1891] 1 Ch. 315, affirmed on another point, [1891] W. N. 56, C. A.).

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52. As to the cesser of the powers of a company authorised by provisional order, see pp. 273, 274, *post*, and by special Act, p. 277, *post*.

use (c), nor does it prevent the authority from enlarging and improving works of a substantial nature already belonging to it (d); but it does prevent the authority laying pipes for water supply in a new area added to its district (e). Before commencing to construct waterworks within such limits, the local authority must give written notice to every such company within whose limits of supply the authority is desirous of supplying water, stating the purposes for which, and, so far as may be practicable, the extent to which water is required by the authority. Any difference as to whether the water which any such company is able and willing to lay on is proper and sufficient for the purposes for which it is required (f), or whether such purposes are reasonable, or as to the terms of supply if and so far as the charges of the company are not regulated by Parliament, must be settled by arbitration (g).

481. A local authority may not, under its general powers (h), construct any reservoir, other than a service reservoir or tank which will hold not more than 100,000 gallons, except under certain

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(c) As, for instance, for their sewage disposal works (*West Surrey Water Co. v. Chertsey Union Guardians*, [1894] 3 Ch. 513). The condition does not apparently apply to works for providing a pure supply of water to a public well, cistern or reservoir; see pp. 264, 265, *post*.

(d) *Cleveland Water Co. v. Redcar Local Board*, [1895] 1 Ch. 168, approved in *Huddersfield Corporation v. Ravensthorpe Urban Council*, [1897] 2 Ch. 121, C. A.

(e) See *Huddersfield Corporation v. Ravensthorpe Urban Council*, *supra*, where the order adding the area made no provision for water supply. As to such alterations of area, and as to whether such a provision could be made, see title LOCAL GOVERNMENT, Vol. XIX., p. 377. As to a clause restricting the laying of mains as distinguished from service pipes, see *Whittington Gas Light and Coke Co., Ltd. v. Chesterfield Gas and Water Board*, [1914] 1 Ch. 270; affirmed, [1914] 2 Ch. 146, C. A.

(f) The company must have both the power to supply and the water (*Richmond Waterworks Co. and Southwark and Vauxhall Waterworks Co. v. Richmond (Surrey) Vestry* (1876), 3 Ch. D. 82). If a company with the necessary powers is taking steps to supply the water within a reasonable time, it appears to be ready and willing (*Newhaven and Seaford Water Co. v. Newhaven District Local Board* (1882), 72 L. T. Jo. 226; *Bognor Water Co. v. Bognor Local Board* (1894), 70 L. T. 402). In the case of new companies, or companies and corporations whose limits of supply are extended, a clause is commonly inserted removing the above condition, if after so many years from the passing of the special Act the company is not furnishing, or prepared on demand to furnish, a sufficient supply of water; see Model Water Bill, 1913, clause 24.

(g) Public Health Act 1875 (38 & 39 Vict. c. 55), s. 52. The arbitration is held in manner provided by that Act, as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 367. As to the matters over which an arbitrator has jurisdiction, see *Re Yeadon Local Board and Yeadon Waterworks Co.* (1888), 59 L. T. 844, *per* KAY, J., at p. 845, reversed upon a technical point (1889), 41 Ch. D. 52, C. A. For a form of notice by a local authority to a water company, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 148.

(h) That is, the powers under the Public Health Acts (see p. 254, *ante*; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (a)); but an authority may be empowered to do so by a local Act. For further provisions with respect to the security of reservoirs, see Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), ss. 3—11; pp. 295 *et seq.*, *post*. These provisions apply to local authorities supplying water under the Public Health Act, 1875 (38 & 39 Vict. c. 55), being incorporated therein by *ibid.*, s. 57.



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conditions. The authority must, at least two months before commencing to construct such a reservoir, give notice of the intended work by advertisement in one or more of the local newspapers circulating within the district in which the reservoir is to be constructed (*i*). Any person affected by the intended work and objecting thereto may serve notice in writing of such objection on the local authority at any time within the said two months, and in such case the local authority must not commence the intended work without the sanction of the Local Government Board, granted with or without modification of the work after local inquiry, unless the objection is withdrawn. The Board may, on the application of the local authority, appoint an inspector to make the inquiry (*k*).

Leasing of  
waterworks.

**482.** For the purpose of supplying water to its district or part thereof, a local authority may take on lease or hire any waterworks (*l*), and any water company may lease its waterworks to any local authority (*m*).

Purchase of  
waterworks.

A local authority may also for the like purpose, with the sanction of the Local Government Board, purchase any waterworks or any water or right to take or convey water, either within or without its district, and any rights, powers, and privileges of any water company (*l*). The directors of any water company, in pursuance of certain resolutions (*n*) passed for the purpose, may sell and transfer to any local authority, on such terms as may be agreed on between the company and the local authority, all the rights, powers and privileges, and all or any of the waterworks, premises, and other property of the company, but subject to all liabilities to which the same are subject at the time of such purchase (*o*).

(*i*) For form of advertisement, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 149.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 53. The inquiry is as to the propriety of the intended work and into the objections thereto. The inspector must report to the Board thereon, and on receiving such report the Board may make an order disallowing, or allowing with such modifications, if any, as it deems necessary, the intended work (*ibid.*). For a form of application to the Local Government Board for an inquiry as to the construction of a reservoir by a local authority, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 151.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51. For a form of agreement for sale of a water undertaking by a water company to a local authority, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 218.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 63. For the definitions of "waterworks," see note (*a*), p. 254, *ante*, and of "water company," see note (*a*), p. 256, *ante*.

(*n*) In the case of a company registered under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (see title COMPANIES, Vol. V., pp. 33 *et seq.*), the resolution must be a special resolution of the members passed in manner provided by that Act, and in the case of any other company (see *ibid.*, pp. 674 *et seq.*), a resolution passed by three-fourths in number and value of the members present, either personally or by proxy, at a meeting specially convened with notice of the business to be transacted (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 63).

(*o*) *Ibid.* s. 63. Debenture-holders of a company authorised by provisional order to carry on a water undertaking are not entitled to an order for sale of the undertaking (*Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399; see title COMPANIES, Vol. V., pp. 380, 738).



Agreements for purchase sometimes require the sanction of Parliament by local Act (*p*). The compulsory acquisition of water undertakings by local authorities or joint boards at prices to be fixed by arbitration is frequently sanctioned by Parliament in local Acts (*q*).

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SUB-SECT. 3.—*Laying of Water Mains and Pipes.*

**483.** Where a local authority supplies water within its district it has the same powers, and is subject to the same restrictions, for carrying water mains within or without the district as in the case of sewers (*r*); and in regard to the support for such mains and other works for water supply the authority has the same rights and is subject to the same duties as in respect of sewers and works of sewerage (*a*).

Parlia-  
mentary  
sanction.  
Water mains.

For the purpose of enabling a local authority to supply water it has the same powers as are usually conferred upon statutory undertakers with respect to the breaking up of streets for the purpose of laying pipes (*b*), in cases where the local authority has not the control of the streets (*c*), and with respect to the communication

Breaking  
streets.

(*p*) As to the construction of such an agreement, see *Ward v. Wolverhampton Waterworks Co.* (1871), L. R. 13 Eq. 243.

(*q*) The practice of Parliament in regard to the compulsory purchase of water undertakings is similar to that in regard to gas undertakings; see title GAS, Vol. XV., pp. 321, 322. When the water undertaking extends beyond the district of a local authority, a like clause is commonly inserted as in the corresponding case of a gas undertaking; see *ibid.* As to the basis of calculation of the price, see *Stockton and Middlesbrough Water Board v. Kirkleatham Local Board*, [1893] A. C. 444, where the special Act was not for the purchase of "the undertaking," but of the "mains, pipes, and fittings"; the basis would have been different if the word "undertaking" had been used. See, generally, the cases cited in title GAS, Vol. XV., p. 322, note (*t*); *Re London County Council and London Street Tramways Co.*, [1894] 2 Q. B. 189, 199, 221, C. A., affirmed, [1894] A. C. 489; *Perth Gas Co., Ltd. v. Perth (City) Corporation*, [1911] A. C. 506, P. C. As to purchase by a board, see, for example, *Metropolis Water Act*, 1902 (2 Edw. 7, c. 41); and pp. 330 *et seq.*, *post*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 54. As to these powers, see *ibid.*, ss. 16, 32—34; title SEWERS AND DRAINS, Vol. XXV., pp. 731 *et seq.* For form of surveyor's report to local authority as to necessity for carrying a main through private lands, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 152. As to works outside the district, see *Jones v. Conway and Colwyn Bay Water Supply Board*, [1893] 2 Ch. 603, C. A. These powers enable the local authority to lay mains in streets dedicated to the public, although such streets are not repairable by the inhabitants at large (*Hill v. Wallasey Local Board*, [1894] 1 Ch. 133, C. A.; but compare *Redhill Gas Co. v. Reigate Rural Council*, [1911] 2 K. B. 565; *Postmaster-General v. Hendon Urban Council*, [1914] 1 K. B. 564, C. A.). For form of advertisement by a local authority of its intention to lay a main outside its district, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 155.

(*a*) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), which applies to any works of water supply. See, generally, titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 155, 156, 163; SEWERS AND DRAINS, Vol. XXV., pp. 748, 749.

(*b*) These are contained in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28—34, which are incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57; see pp. 291 *et seq.*, *post*.

(*c*) Both urban and rural authorities have now the general control of the streets; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 211;

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Pure water to  
be supplied.

Purposes for  
which water  
may be  
supplied.

pipes to be laid by the undertakers (*d*) or by the inhabitants (*e*), provided that the provisions as to communication pipes apply only in districts or parts of districts where the local authority lays any pipes for the supply of the inhabitants (*f*).

SUB-SECT. 4.—*Supply of Water.*

**484.** A local authority constructing or purchasing any water-works must provide and keep therein a supply of pure and wholesome water (*g*); but this duty is performed if the water in the mains is pure and wholesome, even although it is of such a nature that it becomes contaminated in passing through the service pipes (*h*).

Every owner or occupier of a dwelling-house within the area of supply, who has laid the necessary communication pipes and paid or tendered the water rate payable in respect thereof, is entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes (*i*). A local authority may, if it thinks fit, supply water from its works to any public baths or washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied (*k*).

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and if this provision means the general control these powers are not now necessary; see *Hill v. Wallasey Local Board*, [1894] 1 Ch. 133, C. A.; but compare *Redhill Gas Co. v. Reigate Rural Council*, [1911] 2 K. B. 565.

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 44—47; in *ibid.*, s. 44, the words “with the consent in writing of the owner or reputed owner of any such house, or of the agent of such owner” are deemed omitted; see pp. 307, 308, *post*. For a form of demand of costs of communication pipes laid by a local authority, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 159.

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 48—53; see p. 309, *post*.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57. Any dispute authorised or directed to be settled by an inspector or two justices must be settled by a court of summary jurisdiction (*ibid.*); see pp. 293, 304, *post*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 55. If the water is unwholesome, a complaint lies to the Local Government Board (*ibid.*, s. 299), or by a parish council to the county council (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16); see pp. 246, 247, *ante*. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 61—67, dealing with the provisions for guarding against fouling the water of the undertakers, are incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57, for the purpose of enabling any local authority to supply water; as to these provisions, see pp. 297 *et seq.*, *post*.

(*h*) *Milnes v. Huddersfield Corporation* (1886), 11 App. Cas. 511 (where the water was soft and dissolved the lead in the service pipes). A person who suffers damage by reason of a breach of this duty would, apparently, be entitled to recover damages by action (*ibid.*); see pp. 299, 300, *post*.

(*i*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 53, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57; see note (*g*), *supra*. As to the meaning of “domestic purposes,” see p. 301, *post*. If premises are not rated, the occupier is entitled to a supply on paying the value of the water supplied (*Postmaster-General v. Nenagh Urban District Council*, [1913] 1 I. R. 238).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 65. A local authority may, if it thinks fit, construct any works for the gratuitous supply of any public baths or washhouses established otherwise than for private profit or supported out of any poor or borough rates (*ibid.*). In respect of water supplied for other than domestic purposes under agreement, the



**485.** Where a local authority lays any pipes for the supply of any of the inhabitants of its district, the water may be constantly laid on at such pressure as will carry the same to the top story of the highest dwelling-house within the district or part of the district supplied (*l*).

**486.** Any local authority for the time being supplying water within its own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities (*m*). Such sanction may properly limit the supply to a specified part of the adjoining district (*n*). In case of a dispute as to the terms on which the water is to be supplied, such terms may be settled by arbitration (*o*).

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Authorities  
to Supply  
Water.

Pressure  
authorised.  
Supply out-  
side district.

SUB-SECT. 5.—*Expenses of Water Supply.*

**487.** The expenditure incurred by local authorities in providing a water supply is borne by the rates, or by borrowing in manner provided in the Public Health Acts (*p*) for expenditure incurred in the execution of those Acts (*q*). In rural districts the expenses of providing a supply of water to any contributory place (*r*) and maintaining any necessary works therefor, if and so far as they are

Local  
authorities.

local authority, in the absence of express stipulation, is not liable to any penalty or damages for not supplying such water, if the want of such supply is due to frost, unusual drought or other unavoidable cause or accident (Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 13, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57; see p. 303, *post*).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 55. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35, requiring a constant supply (see p. 302, *post*), is not incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 61. A local authority receiving a supply from another may, if the agreement permits, and the sanction of the Board is obtained, sell part of it to another adjoining authority (*Halifax Corporation v. Soothill Upper Local Board* (1874), 31 L. T. 6, C. A.). For a form of agreement by a local authority to supply water to an adjoining local authority, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 199.

(*n*) *Soothill Urban Council v. Wakefield Rural Council*, [1905] 2 Ch. 516, C. A. In the case of such a limited sanction the authority cannot supply to another part of the area without obtaining a fresh sanction from the Board. As to supply outside statutory limits, see pp. 277, 313, *post*.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 61. The arbitration is held in the manner provided in that Act (*ibid.*; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 367). In a contract between an urban and rural district council as to such supply, it is not necessary to specify a pecuniary penalty (*Soothill Urban Council v. Wakefield Rural Council*, *supra*).

(*p*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*).

(*q*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 280 *et seq.*, 336. A rural district council cannot, however, at the expense of the rates, promote a Bill to obtain a water supply (*Cleverton v. St. Germain's Union Rural Sanitary Authority* (1886), 56 L. J. (Q. B.) 83); but such a Bill if passed would commonly contain a clause authorising such expenditure.

(*r*) For the definition of "contributory place," see title LOCAL GOVERNMENT, Vol. XIX., pp. 335, 336.



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to Supply  
Water.

Limited  
owners.

Joint boards.

not defrayed out of water rates or rents (*s*), are deemed to be special expenses (*t*). If the supply is to part only of a contributory place, such excess of expenditure is to be raised as special expenses on the whole contributory place (*u*).

Limited owners may contribute to the expenses of a district council for the purpose of supplying water to any lands of such owner, and in certain cases charge the same on such lands (*w*).

**488.** The expenses of joint boards are defrayed out of a common fund, contributed by the component districts or contributory places, in proportion to the rateable value of the property in each district or contributory place, to be determined according to the valuation list, or provision may be made in the order constituting the board (*a*).

SUB-SECT. 6.—*Water Rates and Rents.*

Power to  
charge rate.

**489.** Where a local authority supplies water to any premises, it may (*b*) charge in respect of such supply a water rate (*c*), to be assessed on the net annual value (*d*) of the premises ascertained in the manner prescribed with respect to general district rates (*e*); in respect to the payment and recovery of such rates the authority has the powers given by the Waterworks Clauses Acts, 1847 (*f*) and 1863 (*g*). The authority may also enter into agreements for supplying water on such terms as may be agreed on between it and the persons receiving the supply, and has the same powers for

(*s*) As to rates and rents, see the text, *infra*.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229. The expense of repairing a public well falls under special expenses (*Witney v. Wycombe Union Rural Sanitary Authority* (1876), 40 J. P. 149), and also the expenses in connexion with the closing of wells, pumps etc.; see pp. 264 *et seq.*, *post*. As to special expenses, see title LOCAL GOVERNMENT, Vol. XIX., p. 335.

(*u*) *Horn v. Sleaford Rural Council*, [1898] 2 Q. B. 358.

(*w*) District Councils (Water Supply Facilities) Act, 1897 (60 & 61 Vict. c. 44); see p. 246, *ante*; title LAND IMPROVEMENT, Vol. XVIII., pp. 282, 283.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 283. Borrowing powers are usually conferred by the provisional order; see pp. 254, 255, *ante*; titles LOCAL GOVERNMENT, Vol. XIX., p. 339; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 373, 386.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 56.

(*c*) As to equality of rating throughout the district, compare *Northampton Corporation v. Ellen*, [1904] 1 K. B. 299, C. A. As to whether such rates may be based on a calculation to repay capital expenditure, compare *Horn v. Sleaford Rural Council*, *supra*; *Worcester Corporation v. Droitwich Assessment Committee* (1876), 2 Ex. D. 49, C. A.

(*d*) The full net annual value is taken to be the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the same in a state to command such rent (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4); see, generally, title RATES AND RATING, Vol. XXIV., pp. 1 *et seq.*

(*e*) As to general district rates, see title RATES AND RATING, Vol. XXIV., pp. 82, 83.

(*f*) 10 & 11 Vict. c. 17, ss. 69—74, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57.

(*g*) 26 & 27 Vict. c. 93, s. 21, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57.

recovering water rents or other payments accruing under such agreements as it has for recovering water rates (*h*).

**490.** Where a rural district council has provided a standpipe or standpipes for the supply of water to any portion of its district, it may recover water rates or water rents from the owner or occupier of every dwelling-house within 200 feet of any such standpipe, in the same manner in all respects as if the supply had been given on the premises. No such rate or rent can, however, be recovered from the owner or occupier of a dwelling-house whose inmates do not use the water from the standpipes, if such dwelling-house has within a reasonable distance and from other sources a supply of wholesome water sufficient for the consumption and use of the inmates of the house (*i*).

**491.** Where a local authority supplies water in any urban district or in any contributory place (*j*), and an application is made to the authority by any ten persons rated to the relief of the poor in such urban district, or by any five persons in such contributory place (*j*), to charge water rates or water rents in respect of the water so supplied, the authority must exercise the powers above mentioned of charging water rates or rents in respect of all water supplied by it in such urban district or in such contributory place (*k*).

**492.** Local authorities may in their discretion grant and furnish supplies of water for lodging-houses provided under the Housing of the Working Classes Act, 1890 (*l*), Part III., either with or without charge or on such other favourable terms as they think fit (*m*).

**493.** A local authority may agree with any person to supply water by measure (*n*), and as to the payment to be made, in the form of rent or otherwise, for every meter provided by it. The authority must at all times at its own expense keep all meters and other instruments for measuring water let by it for hire to any person in proper order for correctly registering the supply of water, and

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Standpipes  
in rural  
districts.

Duty to  
charge.

Lodging-  
houses.

Supply by  
measure.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 56. In the Oxford or Cambridge district the local authority may supply water to any hall, college or premises of the University within such district, on such terms with respect to the mode of paying for such supply as may from time to time be agreed on between such University, or any hall or college thereof, and the local authority (*ibid.*, s. 67). As to the formalities required in agreements with local authorities generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 229 *et seq.*

(*i*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 9. This power may be extended to urban districts (*ibid.*, s. 11).

(*j*) As to contributory places, see title LOCAL GOVERNMENT, Vol. XIX., pp. 335, 336.

(*k*) Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 10. For a form of such application, see Encyclopædia of Forms and Precedents, Vol. XV., p. 164. As to an exception in respect of certain baths and washhouses, see p. 260, *ante*.

(*l*) 53 & 54 Vict. c. 70; as to such houses generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 540.

(*m*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 69.

(*n*) For a form of agreement, see Encyclopædia of Forms and Precedents, Vol. XV., p. 187.

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Powers of  
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Authorities  
to Supply  
Water.

Interference  
with meters.

Waste of  
water.

Vesting of  
wells etc.  
in local  
authority.

in default of its so doing such person is not liable to pay rent for the same during such time as the default continues. The local authority for these purposes is entitled to have access to and be at liberty at all reasonable times to remove, test, and replace any such meter or other instrument (o). The register of the meter or other instrument for measuring water is *primâ facie* evidence of the quantity of water consumed. A dispute between the authority and the consumer as to the quantity consumed is determined, on the application of either party, by a court of summary jurisdiction (p).

Any person is liable to a penalty not exceeding 40s. who wilfully or by culpable negligence injures or suffers to be injured any meter or fittings belonging to a local authority, or who fraudulently alters the index to any meter, or prevents any meter from duly registering the quantity of water supplied, or fraudulently abstracts or uses water of the local authority (q).

**494.** The provisions commonly inserted in local water Acts with respect to the waste and misuse of water supplied by the undertakers are applicable also to local authorities supplying water (r).

SUB-SECT. 7.—*Wells, Pumps etc.*

**495.** All public cisterns, pumps, wells, reservoirs (s), conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants of the district of any local authority existing on the 11th August, 1875 (t), became on that date vested in and under the

(o) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 58. Power to let meters for hire, and also other instruments and apparatus, with a provision protecting them from distress, is conferred on local authorities by the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 14. There is also a further power to inspect the same given by *ibid.*, s. 15. As to these provisions, see pp. 317, 318, *post*. The whole of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), is incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57, for the purpose of enabling a local authority to supply water.

(p) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 59. The court may order the costs of the proceedings to be paid by either party, and its decision is final and binding (*ibid.*).

(q) *Ibid.*, s. 60. The existence of artificial means under the control of the consumer for causing any such alteration, prevention, obstruction or use is evidence that the consumer has fraudulently effected the same (*ibid.*). The authority may, in addition to the penalty, recover the amount of any damage sustained, and this and the right to recover a penalty are without prejudice to any other right or remedy of the local authority (*ibid.*). Such other right or remedy may exist under the agreement or under the incorporated provisions of the Waterworks Clauses Acts, 1847 (10 & 11 Vict. c. 17) and 1863 (26 & 27 Vict. c. 93). Water supplied by measure may also be the subject of larceny (*Ferens v. O'Brien* (1883), 11 Q. B. D. 21); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 643.

(r) These are the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 54—60, and the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), ss. 16—20, made applicable by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57. As to these provisions, see pp. 321 *et seq.*, *post*. For form of notice by a local authority to a person supplied with water to provide or repair a cistern, see Encyclopædia of Forms and Precedents, Vol. XV., p. 180.

(s) This may include a natural pond (*Leadgate Local Board v. Bland* (1881), 45 J. P. 526).

(t) The date of the passing of the Public Health Act, 1875 (38 & 39 Vict.



control of such authority (*u*), whether the same were on private property or not (*w*). By reason of this vesting the local authority is entitled to bring an action in respect of interference with any of the same (*x*); but such vesting does not enable the authority to grant a licence to persons to bottle and sell such water (*a*). The local authority may cause these wells and cisterns and works to be maintained and plentifully supplied with pure and wholesome water, and may substitute, maintain, and plentifully supply with pure and wholesome water other such works equally convenient (*b*); the authority may also, subject to the provisions of the Public Health Act, 1875 (*c*), construct any other such works for supplying water for the gratuitous use of any inhabitants who choose to carry the same away, not for sale, but for their own use (*d*).

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Water.

496. When any person represents (*e*) to a local authority that within its district the water in any well, tank, or cistern, public or private, or supplied from any public pump, and used or likely to be used by man for drinking or domestic purposes, or for manufacturing drinks for the use of man, is so polluted as to be injurious to health, the authority may apply to a court of summary jurisdiction (*f*) for an order to remedy the same. The court must thereupon

Pollution of  
wells etc.

c. 55). As to "existing" meaning existing at the date of the Act coming into operation, compare Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13; *Godden v. Hythe Burial Board*, [1906] 2 Ch. 270, C. A.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 64. A similar provision is contained in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 121, but only applies when incorporated in a local Act.

(*w*) *Holmfirth Local Board v. Shore* (1895), 59 J. P. 344, following *Smith v. Archibald* (1880), 5 App. Cas. 489. As to the right of the public to draw water and the acquisition of that right, see *Smith v. Archibald*, *supra*, per Lord BLACKBURN, at pp. 511—513. As to the powers of parish councils in regard to public wells, see p. 266, *post*.

(*x*) *Holmfirth Local Board v. Shore*, *supra*. Actions for injunctions or damages in respect of the public access to such a well or cistern must, however, be brought in the name of the Attorney-General (*ibid.*). As to whether the local authority can without the Attorney-General obtain a declaration of right, see *ibid.*, per WRIGHT, J., at p. 345. As to joining the Attorney-General as a party to an action generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 100, 101.

(*a*) *Mostyn v. Atherton*, [1899] 2 Ch. 360, per BYRNE, J., at p. 368.

(*b*) These powers appear to be independent of the restrictions as to competing with authorised statutory undertakers (*Smith v. Archibald*, *supra*, per Lord BLACKBURN, at p. 516); as to such restrictions, see pp. 256, 257, *ante*. If a landowner properly draws away the water, the authority may not trespass in order to obtain a supply (*Edwards v. Jolliffe*, [1877] W. N. 120). As to the powers of local authorities when the water is polluted, see the text, *infra*; as to their powers in respect of offensive ditches etc., see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 611, 612.

(*c*) 38 & 39 Vict. c. 55. This refers to the provisions as to construction and restriction on supply; see *ibid.*, ss. 51, 52; and pp. 255 *et seq.*, *ante*.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 64. As to charging rents or rates in respect of standpipes, see pp. 260, 263, *ante*; as to the right of persons to require rates or rents to be levied, see *ibid.*

(*e*) For a form of such representation, see Encyclopædia of Forms and Precedents, Vol. XV., p. 179.

(*f*) As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

SECT. 3.  
Powers of  
Local  
Authorities  
to Supply  
Water.

summon the owner or occupier of the premises to which the well, tank, or cistern belongs, if it be private, and in the case of a public well, tank, cistern, or pump, any person alleged in the application to be interested in it (*g*). The court may, if it sees fit, cause the water complained of to be analysed at the cost of the local authority, and may either dismiss the application or make an order directing the well, tank, cistern, or pump to be permanently or temporarily closed, or the water to be used for certain purposes only, or such other order as appears to the court to be requisite to prevent injury to the health of persons who may drink the water. If the person on whom such an order is made fails to comply therewith, the court may, on the application of the local authority, authorise the authority to do whatever may be necessary in the execution of the order, and any expenses incurred by the authority may be recovered from the person on whom the order is made (*h*).

SECT. 4.—*Powers of Parish Councils.*

Utilisation of  
wells etc.

**497.** A parish council has power to utilise any well, spring, or stream within its parish and to provide facilities for obtaining water therefrom, but so as not to interfere with the rights of any corporation or person (*i*). A parish council cannot, however, take proceedings in its own name to enforce a right of the inhabitants of the parish to the use of such well or spring (*k*), and a parish council is not authorised to acquire, otherwise than by agreement, any land for the purpose of any supply of water (*l*). The parish council may, however, complain in certain cases to the county council if the local authority makes default in regard to the water supply of the parish (*m*).

SECT. 5.—*Powers and Duties of Metropolitan Local Authorities.*

Acquisition  
of water  
supply for  
certain  
purposes.

**498.** The London County Council (*a*) and metropolitan borough councils (*b*) have power to purchase, or take on lease for such term as they think fit, the whole or any part of any streams or springs of water or any rights therein which it appears to them necessary to acquire and use for the purpose of cleansing sewers and drains and

(*g*) As to the wells etc. vested in the local authority, see pp. 264, 265, *ante*. The person interested may be the parish council, or the owner on whose land the well in question is situated.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 70. These expenses are recoverable before a court of summary jurisdiction (*ibid.*). Any expenses incurred by a rural district council, and not so recovered by it, are special expenses (*ibid.*).

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1). This power does not, however, derogate from the obligation of a district council with respect to a supply of water (*ibid.*, s. 8 (3)). As to the powers of a parish meeting, where there is no parish council, see title LOCAL GOVERNMENT, Vol. XIX., pp. 258, 259.

(*k*) *Stoke Parish Council v. Price*, [1899] 2 Ch. 277.

(*l*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 9, 15.

(*m*) See p. 247, *ante*.

(*a*) As to the London County Council, and the area of its jurisdiction, see title METROPOLIS, Vol. XX., pp. 393 *et seq.*, 418 *et seq.*

(*b*) As to the metropolitan borough councils, see *ibid.*, pp. 402 *et seq.*, 420 *et seq.*

the other purposes (*c*) of the Metropolis Management Acts (*d*), or any land which is deemed by them advisable to purchase or take on lease for the purpose of drawing or obtaining water from springs, or by sinking wells, and for making and providing reservoirs, tanks, aqueducts, watercourses and other works, or for any other purpose connected with the works for obtaining such supply of water. They may not, however, use or permit to be used any such works for the purpose of carrying water by supply pipes into any house or factory for domestic, manufacturing, or commercial purposes (*e*).

SECT. 5.  
Powers and  
Duties of  
Metro-  
politan  
Local  
Authorities.

**499.** An occupied house in the Metropolis without a proper and sufficient supply of water is a nuisance liable to be dealt with summarily and, if a dwelling-house, is deemed unfit for human habitation (*f*). Notice in writing of the water being lawfully cut off from any inhabited dwelling-house for non-payment of water rate or other cause must be given to the sanitary authority of the district within twenty-four hours by the Metropolitan Water Board (*g*).

Insufficient  
supply.

**500.** Every sanitary authority (*h*) must make bye-laws for securing the cleanliness and freedom from pollution of tanks, cisterns and other receptacles used for the storing of water used or likely to be used by man for drinking or domestic purposes, or for manufacturing drink for the use of man (*i*).

Bye-laws.

**501.** All public cisterns, reservoirs, wells, fountains, pumps, and works existing on the 1st January, 1892 (*k*), used for the gratuitous supply of water to the inhabitants of the district of any sanitary authority (*l*), and not vested in any person or authority

Vesting of  
wells etc. &  
in sanitary  
authority.

(*c*) As, for example, watering streets; see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 116.

(*d*) As to the Metropolis Management Acts, see title METROPOLIS, Vol. XX., p. 462, note (*i*).

(*e*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) s. 150. As to water supply in the Metropolis generally, see pp. 330 *et seq.*, *post*.

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 48. In the case of houses let in tenements a separate supply must be provided on each story unless it can be shown that such supply is not reasonably necessary (London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 74). The absence of certain water fittings from premises is also such a nuisance (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (*f*)); see title NUISANCE, Vol. XXI., p. 539.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 49. Failure to comply renders the Board liable to a penalty not exceeding £10, and it is the duty of the sanitary authority to take proceedings (*ibid.*). Cutting off temporarily for the purpose of stopping a leak is probably not such a stoppage (*Young v. Southwark and Vauxhall Water Co.* (1893), 69 L. T. 144). As to cutting off generally, see pp. 318 *et seq.*, 352, *post*.

(*h*) The sanitary authorities for London are primarily, in the City, the Common Council, and in the metropolitan boroughs, the borough council; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 372 *et seq.*

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 50; see title METROPOLIS, Vol. XX., p. 462. The expression "cistern" includes a water-butt (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 141).

(*k*) The date of coming into operation of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

(*l*) *Ibid.*, s. 51 (1); compare the similar provision in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 64; see pp. 264, 265, *ante*.



SECT. 5.  
Powers and  
Duties of  
Metro-  
politan  
Local  
Authorities.

other than the sanitary authority, were vested in and became under the control of the sanitary authority. The sanitary authority may maintain them and plentifully supply them with pure and wholesome water, or may substitute, maintain, and plentifully supply with pure and wholesome water other such works equally convenient, and may maintain and supply with water as aforesaid other public cisterns, reservoirs, wells, fountains, pumps, and other such works within their district (*m*). The sanitary authority (*a*) may provide and maintain public wells, pumps, and drinking fountains in such convenient and suitable situations as it deems proper (*b*).

Sanitary authorities (*a*) in London have also the like powers as regards the closing of polluted wells, tanks, cisterns, and public pumps as have local authorities outside London, and these powers extend also to such wells, tanks, cisterns or pumps as are likely to be so polluted as to be injurious or dangerous to health (*c*).

## Part II.—Grant of Special Statutory Powers.

### SECT. 1.—*In General.*

Undertakers.

**502.** Companies and persons carrying on, or desirous of carrying on, a water undertaking usually find it necessary to obtain powers from Parliament in addition to those which they possess under the general law (*d*). Subject to conditions, Parliament grants powers to break up streets, to acquire land and water rights compulsorily, to charge and recover rates and rents, to prevent waste and misuse of the water and to secure it from pollution (*e*). Parliament also grants privileges protecting the undertakers from undue competition (*f*). These powers can be obtained by a local

(*m*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 51 (1).

(*a*) As to the sanitary authorities, see note (*h*), p. 267, *ante*.

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 51 (2). If any person wilfully damages any of the above-mentioned wells, pumps or fountains, or any part thereof, he is required to pay to the sanitary authority the expenses of repairing or reinstating such well, fountain, pump or part thereof, in addition to any punishment to which he is liable (*ibid.*, s. 51 (3)). As to penalties and recovery of such payment before a court of summary jurisdiction, see *ibid.*, ss. 116, 117.

(*c*) *Ibid.*, s. 54, which is almost identical with the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 70; see p. 265, *ante*. The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 54, provides that the court, before making any order, must hear the owner or occupier of the premises to which the particular well etc. belongs, if it is private, and, if it is public, the person interested must be given an opportunity of being heard. This duty of the court is probably implied in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 70.

(*d*) See p. 245, *ante*. As to the liability of undertakers, see titles NEGLIGENCE, Vol. XXI., pp. 402, 464 *et seq.*; NUISANCE, Vol. XXI., pp. 517 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312, 313; TORT, Vol. XXVII., pp. 495 *et seq.*; pp. 295, 311, 312, *post*.

(*e*) See, generally, pp. 278 *et seq.*, *post*. Protection of meters is also granted.

(*f*) As regards competition of local authorities, see p. 256, *ante*. Parlia-

Act (*g*), and certain of them by provisional order confirmed by Parliament (*h*).

SECT. 1.  
In General.

**503.** Local authorities requiring extension of their powers may also obtain them from Parliament. Provisional orders can be obtained for the compulsory acquisition of land (*i*) or for certain variations of local Acts (*k*); but in order to acquire or interfere with water rights a local Act is necessary (*l*). A Bill for such an Act can be promoted by borough, urban district, and county councils at the expense of the rates, subject to the provisions of the Borough Funds Acts, 1872 and 1903 (*m*). A rural district authority cannot pay out of the rates the expenses of promoting a Bill, even to acquire water rights (*n*).

Local  
authorities.

**504.** Bills are frequently passed for constituting a water board for the areas of various local authorities, and for giving the board powers to acquire the waterworks of such authorities or of the companies supplying water within such area, and to construct other works, and generally to carry on the work of a water undertaking (*o*).

Water boards.

**505.** Many of the Bills which come annually before Parliament are promoted by existing companies or local authorities for the purpose of extending the powers contained in Acts previously passed at their instance (*p*). The Local Government Board may also alter and amend local Acts relating to water supply by local authorities by means of provisional order (*q*).

Extension  
of powers.

#### SECT. 2.—*By Local Act.*

**506.** Local Bills for making, maintaining, varying, extending, or enlarging any waterwork belong to the second class into which

Standing  
orders  
applicable.

ment protects statutory companies from unreasonable competition by other statutory bodies, and gives them the right to be heard against a private Bill on the ground of competition (Standing Orders of the House of Commons (Private Business), 1913, No. 129).

(*g*) See the text, *infra*.

(*h*) See pp. 271 *et seq.*, *post*.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 8.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303.

(*l*) See p. 255, *ante*.

(*m*) 35 & 36 Vict. c. 91; 3 Edw. 7, c. 14; see title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*

(*n*) *Cleverton v. St. Germain's Union Rural Sanitary Authority* (1886), 56 L. J. (Q. B.) 83; see title LOCAL GOVERNMENT, Vol. XIX., p. 380. If such a Bill is promoted and passed, the inclusion of a clause sanctioning the payment of such expenses out of the rates is usually accepted by Parliament.

(*o*) See Abertillery and District Water Board Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxv.); Metropolis Water Act, 1902 (2 Edw. 7, c. 41). As to the formation of such boards by provisional order of the Local Government Board, see pp. 254, 255, *ante*.

(*p*) Such Bills seek power to extend the area of supply, to raise additional capital, to construct new works and acquire a further supply of water, and for various other matters.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303; see title LOCAL GOVERNMENT, Vol. XIX., p. 384.

SECT. 2.  
By Local  
Act.  
—

private Bills are divided in both Houses of Parliament for the purpose of the standing orders relative to private Bills (*r*).

In addition to the standing orders generally applicable to that class, various orders apply more particularly to waterworks (*s*).

Notices.

**507.** Before the application for a Bill to abstract water from any stream for the purpose of supplying any waterwork, notice must be given to certain owners, lessees and occupiers of mills and works who would be affected (*t*).

Deposit of  
maps.

Where under the powers of any Bill any water may be taken, collected or impounded for the purpose of a water supply, the promoters must, on or before the 30th November, deposit at the office of the Local Government Board, and also at the office of the Clerk of the Parliaments (*u*), an ordnance map on the scale of six inches to the mile, showing by a distinguishing mark the position of each reservoir, well, conduit, or other work proposed to be authorised by the Bill; where the proposed source of supply is a river, stream, or lake, an ordnance map on the scale of not less than one inch to the mile, showing by a clearly marked line the catchment area or gathering ground from which the waters are derived, must be deposited (*w*).

Deposit of  
copy of Bill.

A printed copy of every Bill relating to water must be deposited at the office of the Board of Trade on or before the 18th December in the case of Bills before the House of Commons, and the 21st December in the case of Bills before the House of Lords (*x*).

(*r*) Standing Orders of the House of Lords (Private Business), 1913, No. 1; Standing Orders of the House of Commons (Private Business), 1913, No. 1; and see title PARLIAMENT, Vol. XXI., pp. 727, 728.

(*s*) As to the standing orders applicable to private Bills generally, see title PARLIAMENT, Vol. XXI., pp. 741 *et seq.*

(*t*) Standing Orders of the House of Lords (Private Business), 1913, No. 14; Standing Orders of the House of Commons (Private Business), 1913, No. 14; see title PARLIAMENT, Vol. XXI., p. 731. As to notices by advertisement of intention to divert water from an existing cut, canal, reservoir, aqueduct, or navigation, see Standing Orders of the House of Lords (Private Business), 1913, No. 7; Standing Orders of the House of Commons (Private Business), 1913, No. 7.

(*u*) As to the Clerk of the Parliaments, see title PARLIAMENT, Vol. XXI., p. 630.

(*w*) Standing Orders of the House of Lords (Private Business), 1913, No. 25c. Where under the powers of any Bill it is proposed to supply with water any area not previously included within the promoters' limits of supply, the promoters must similarly deposit an ordnance map on the scale of one inch to the mile showing respectively the existing limits of supply and the area proposed to be added thereto (*ibid.*). As to the deposit of plans and sections, generally, see title PARLIAMENT, Vol. XXI., pp. 732, 733.

(*x*) Standing Orders of the House of Lords (Private Business), 1913, No. 33; Standing Orders of the House of Commons (Private Business), 1913, No. 33. If the Bill proposes to make, extend or enlarge any dam, weir or obstruction to the passage of fish in any river or estuary, or the abstraction of water from any river, deposit must also be made at the office of the Board of Agriculture and Fisheries and at the office of any fishery board having jurisdiction over the river or estuary (*ibid.*). As to amended Bills, see title PARLIAMENT, Vol. XXI., p. 757, note (*n*); as to the deposit of bills generally, see *ibid.*, pp. 733, 734.



The municipal or other local authority of any town or district alleging in its petition that such town or district may be injuriously affected by the provisions of any Bill relating to the water supply or the raising of capital for such purpose (a), or the council of any administrative county alleging in its petition that such administrative county or any part thereof may be injuriously affected by the provisions of any Bill relating to the water supply of any town or district, whether situated within or without such county, is entitled to be heard against such Bill before a select committee (b).

SECT. 2.  
By Local  
Act.  
Opposition  
to Bill.

Any owner, lessee or occupier in the district of any conservancy or other authority charged with the control of river or other waters alleging in his petition against the Bill that under its provisions any water or water supply of which he may legally avail himself will be diminished or injuriously affected may be admitted to be heard against the Bill or any part of it (c).

In the case of every water Bill whereby it is proposed to impound or abstract the whole or any part of the water of any river or stream, the committee on the Bill must inquire into the expediency of making provision, so far as may be practicable, for giving a flow of water in compensation for the water so impounded or abstracted, and that the whole or a minimum amount of such compensation water be given in a continuous flow throughout the twenty-four hours of every day (d).

Abstraction  
of water  
from rivers.

**508.** In every Bill by which an existing water company is authorised to raise additional capital provision must be made for the offer of such capital by public auction or tender, at the best price which can be obtained, unless the committee on the Bill reports that such provision ought not to be required, with the reasons on which the opinion of the committee is founded (e).

Increase of  
capital.

### SECT. 3.—*By Provisional Order.*

**509.** Any company, companies, or person (f) may obtain a provisional order under the Gas and Water Works Facilities Act,

Purposes  
for which  
provisional  
order avail-  
able.

(a) Standing Orders of the House of Commons (Private Business), 1913, No. 134A.

(b) Standing Orders of the House of Lords (Private Business), 1913, No. 105D; Standing Orders of the House of Commons (Private Business), 1913, No. 134C.

(c) Standing Orders of the House of Commons (Private Business), 1913, No. 134D.

(d) Standing Orders of the House of Lords (Private Business), 1913, No. 110A; Standing Orders of the House of Commons (Private Business), 1913, No. 185, which further provides that the committee must report to the House of Commons accordingly; as to compensation water, see pp. 284, 285, *post*.

(e) Standing Orders of the House of Commons (Private Business), 1913, No. 188. As to such capital, see p. 327, *post*; as to the particular requirements as to the promotion of Bills by companies, see title PARLIAMENT, Vol. XXI., pp. 738, 739.

(f) This does not include local authorities. In respect of gas undertakings, they are expressly included by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161: see title GAS, Vol. XV., p. 312.

SECT. 3.  
By Pro-  
visional  
Order.

“ Water  
under-  
taking ” ;  
“ under-  
takers.”

1870 (*g*), for all or any of the following purposes :—(1) to construct or to maintain and continue waterworks and works connected therewith, or to supply water in any district within which there is not an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works and to supply water (*h*) ; (2) to raise additional capital for any such purpose ; (3) to enable two or more companies or persons duly authorised to supply water in any district or in adjoining districts to enter into agreements jointly to furnish such supply or to amalgamate their undertakings ; and (4) to authorise two or more companies supplying water in any district or in adjoining districts to supply water and to enter into agreements jointly to furnish such supply, and to amalgamate their undertakings (*i*). These purposes, or any one or more of them, are deemed to be included in the term “ water undertaking ” (*j*), and the term “ undertakers ” includes any such company, companies, or person (*k*).

Such provisional orders may be obtained for any district, exclusive of the Metropolis (*l*), and any water company being empowered as aforesaid may apply for these facilities within their own districts respectively (*i*).

Procedure.

**510.** The provisional order is made by the Board of Trade (*m*), after certain consents have been obtained (*n*), certain notices given, and certain documents deposited (*o*), and after hearing and considering objections, and, if necessary, holding an inquiry (*p*).

(*g*) 33 & 34 Vict. c. 70, amended by the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89). The area of the Metropolis as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (see title METROPOLIS, Vol. XX., p. 393, note (*h*)), is expressly excluded ; see Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 15 ; Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 15.

(*h*) If the existing company or local authority consents, the order may be made ; see, for example, Chelsham and Woldingham Water Order ; Water Orders Confirmation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. xciv.).

(*i*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 3.

(*j*) *Ibid.*

(*k*) *Ibid.*, s. 4.

(*l*) *Ibid.*, ss. 4, 15.

(*m*) *Ibid.*, s. 7 ; or by any other Government department substituted by Order in Council (*ibid.*, s. 14). The power to make a provisional order may be transferred to the council of a county or a county borough, or to such councils generally (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 10 ; Local Government (Transfer of Powers) Act, 1903 (3 Edw. 7, c. 15)) ; see title LOCAL GOVERNMENT, Vol. XIX., p. 379.

(*n*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 4. The consents are the same as in the case of an order for a gas undertaking by a company ; see title GAS, Vol. XV., p. 313.

(*o*) The notices are the same as in the case of an order for a gas undertaking by a company, with the substitution of “ water ” for gas (see title GAS, Vol. XV., pp. 313, 314), and with the following additions : Where it is proposed to abstract water from any stream for any waterwork the undertakers must give notice in writing of their intention to make such

(*p*) For note (*p*) see p. 273, *post*.

**511.** The provisional order must not contain any provision for empowering the undertakers, or any other person, to acquire lands otherwise than by agreement, or to acquire any lands, even by agreement, except to an extent therein limited (*q*). Where the order authorises a water undertaking, the provisions of the Waterworks Clauses Acts, 1847 (*r*) and 1863 (*s*), must be incorporated therewith, save where they are expressly varied or excepted (*t*).

The provisional order when made must be published (*a*), and it has no operation until confirmed by Parliament (*b*).

**512.** The powers granted by the provisional order to the undertakers for executing works or otherwise in relation thereto cease in certain cases, except as to so much thereof as is completed, unless the time is prolonged by the special direction of the Board of Trade. These cases are: (1) if the undertakers do not within three years from the date of the order, or within any shorter period prescribed therein, complete the works; or (2) if within one year from the date of the order, or within such shorter time as is prescribed in the order, the

application to the owners or reputed owners, lessees or reputed lessees and occupiers of all mills and manufactories or other works using the waters of such stream for a distance of twenty miles below the point at which such water is intended to be abstracted, such distance to be measured along the course of such stream, unless such waters shall within a less distance than twenty miles fall into or unite with any navigable stream, and then only to the owners or reputed owners, lessees or reputed lessees and occupiers of such mills and manufactories as aforesaid which shall be situated between the point at which such water is proposed to be abstracted and the point at which such waters shall fall into or unite with such navigable stream. Such notice must state the name, if any, by which the stream is known at the point at which such water is to be immediately abstracted, and also the parish in which such point is situated, and the time and place of deposit of the plans and sections required to be deposited (Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 5 (2)). A complete list of these mill-owners etc., and a certified copy of the notice served on them, must be deposited at the Board of Trade on the 23rd December (Board of Trade Rules, 1886, r. 11 (Stat. R. & O. Rev., Vol. VI., Gas, p. 1)). The plans and sections to be deposited on or before the 30th November with respect to waterworks are such plans and sections as would be required by the Standing Orders for the time being of either House of Parliament if the promoters, instead of applying for a provisional order, were proceeding by private Bill (*ibid.*, r. 9); see p. 270, *ante*; title PARLIAMENT, Vol. XXI., pp. 732, 733.

(*p*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 6; Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 13. As to the procedure generally, see title GAS, Vol. XV., p. 315; as to costs, see *ibid.*, p. 316.

(*g*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 7. The Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*) must be incorporated, with the exception of the provisions relating to compulsory purchase and entry upon land by the promoters (Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 10).

(*r*) 10 & 11 Vict. c. 17; see pp. 274 *et seq.*, *post*.

(*s*) 26 & 27 Vict. c. 93.

(*t*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 10. Clauses varying the general Acts are rarely inserted except by agreement, and for the protection of opponents to the order.

(*a*) *Ibid.*, s. 8.

(*b*) *Ibid.*, s. 9. As to publication and confirmation, see titles GAS, Vol. XV., p. 316; PARLIAMENT, Vol. XXI., pp. 727 *et seq.*

SECT. 3.

By Pro-  
visional  
Order.

Contents of  
provisional  
order.

Publication  
and confirma-  
tion.

Cesser of  
powers.



SECT. 3.  
By Pro-  
visional  
Order.

works are not substantially commenced; or (3) if the works are commenced, but, whilst the powers to carry them on exist, are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension (*c*). The Board of Trade may, by a further provisional order, from time to time revoke, amend, extend, or vary any such provisional order (*d*).

SECT. 4.—*Terms on which Powers Granted.*

SUB-SECT. 1.—*In General.*

Statutory  
provisions.

**513.** The terms upon which Parliament usually grants powers to construct and carry on water undertakings are contained in the Waterworks Clauses Acts, 1847 (*e*) and 1863 (*f*). Since the date of these Acts a further set of provisions, which are frequently inserted in special Acts relating to waterworks, have been formulated. These have not been consolidated by statute, but are for the most part to be found in the Model Bills and Clauses (*g*).

SUB-SECT. 2.—*The Waterworks Clauses Acts.*

Waterworks  
Clauses Act,  
1847.

**514.** The Waterworks Clauses Act, 1847 (*h*), extends only to such waterworks as may be authorised by an Act of Parliament passed after the 23rd April, 1847 (*i*), which declares that the Act is incorporated therewith. The Act authorising the construction of waterworks and incorporating the Waterworks Clauses Act, 1847 (*h*), is in that Act termed the special Act (*k*). All the clauses, save so far as

(*c*) Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70), s. 11. A statement in writing by the Board of Trade to the effect that such works have not been completed, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, is for the purposes of this provision conclusive evidence of such non-completion, non-commencement or suspension (*ibid.*). The Board of Trade Rules, 1886, made pursuant to the Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), contain directions for obtaining prolongation of the time for the commencement or completion of the work authorised.

(*d*) Gas and Water Works Facilities Act, 1870, Amendment Act, 1873 (36 & 37 Vict. c. 89), s. 13. The procedure as to application, making and confirmation is the same as for the original provisional order (*ibid.*); see title GAS, Vol. XV., p. 317.

(*e*) 10 & 11 Vict. c. 17.

(*f*) 26 & 27 Vict. c. 93. If land is authorised to be acquired, the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*) are also incorporated. As to incorporation in provisional orders, see note (*g*), p. 273, *ante*, and in the special Act, see notes (*p*), (*q*), p. 281, *post*. For the principles of construction to be applied to private Acts relating to waterworks, see *Bristol Guardians v. Bristol Waterworks Co.*, [1914] A. C. 379.

(*g*) These are published annually under the authority of the Chairman of Committees of the House of Lords, and are added to or varied according to the practice of Parliament. They include a Model Water Bill suitable for a corporation and sundry other clauses applicable to water undertakings. As to the provisions suitable to a company, see the Model Gas Bill.

(*h*) 10 & 11 Vict. c. 17.

(*i*) The date of the passing of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

(*k*) *Ibid.*, s. 2. Provision is commonly made in the special Act

they are expressly varied or excepted by the special Act, apply to the undertaking thereby authorised, so far as the same are applicable thereto (l).

The Act may be incorporated either as a whole or in part. For the purpose of incorporating part only, the Act has been divided into groups of clauses dealing with particular matters, each group having introductory headings (m). In order to incorporate part

SECT. 4.  
Terms on  
which  
Powers  
Granted.

Incorporation  
in part.

enabling persons interested and the public generally to have access thereto, and to make extracts or copies therefrom. Copies to which the public has access must be kept at the principal office of business of the undertakers and in the office of the clerk of the peace or county council of the county in which the undertaking is situated (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 90, 91). These provisions are practically identical with those in the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 45; see title GAS, Vol. XV., p. 319.

(l) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 1. These clauses, together with the clauses of every other Act which are incorporated therewith, form part of the special Act, and are construed therewith as forming one Act (*ibid.*). In cases to which these clauses are not directly applicable serious difficulties of construction may arise, as the Acts are construed strictly as against the promoters; see *Metropolitan Water Board v. New River Water Co.* (1904), 20 T. L. R. 687, H. L., *per* Lord MACNAGHTEN, at pp. 689, 690, and *per* Lord HALSBURY, L.C., at p. 692. "Undertaking" as used in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), means the waterworks and the works connected therewith by the special Act authorised to be constructed; "the undertakers" means the persons by the special Act authorised to construct the waterworks; "the lands and streams" means the lands and streams of water authorised by the special Act to be taken or used for the purposes thereof (*ibid.*, s. 2); the word "prescribed," used in reference to any matter, is construed to refer to such matter as the same is prescribed or provided for in the special Act, and the sentence in which such word occurs is construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used (*ibid.*). These definitions apply to the construction of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and must be distinguished from those in *ibid.*, s. 3, which apply to both that and the special Act; see *Metropolitan Water Board v. New River Water Co.*, *supra*, *per* Lord MACNAGHTEN, at p. 689. In the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), the special Act, and any Act incorporated therewith, certain words and expressions have meanings assigned to them, unless there is something in the subject or context repugnant to such construction; "streams" includes springs, brooks, rivers and other running waters; "the waterworks" means the waterworks and the works connected therewith by the special Act authorised to be constructed; "water rate" includes any rent, reward or payment to be made to the undertakers for a supply of water; the word "justice" means justice of the peace acting for the place where the matter requiring the cognisance of any such justice arises, and, if such matter arises in respect of lands or streams situated not wholly in one jurisdiction, means a justice acting for the county or place where any part of such lands or streams is situated (*ibid.*, s. 3). Other words and expressions are also defined, such as "lands," which includes messuages, lands, tenements and hereditaments, and heritages of any tenure; "street" includes any square, court, alley, highway, lane, road, thoroughfare, or public passage within the limits of the special Act; as to such limits, see pp. 276, 277, *post*. As to whether dock quays are "streets," see *Bristol Waterworks Co. v. Bristol Corporation* (1889), 5 T. L. R. 203, 551, C. A.

(m) These groups of clauses are headed with respect to:—(1) the construction of this Act and any Act incorporated therewith (Waterworks



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only, it is enough to describe the clauses with respect to any matter in the words introductory to the enactment with respect to such matter, and to enact that the clauses so described, or that the Act with the exception of the clauses so described, shall be incorporated in the special Act. All the clauses of this Act so incorporated, save so far as they are expressly varied or excepted by the special Act, thereupon form part of such Act, and such Act is construed as if such clauses were set forth therein with reference to the matter to which such Act relates (*n*).

Waterworks  
Clauses Act,  
1863.

**515.** The Waterworks Clauses Act, 1863 (*o*), applies to any waterworks to which any special Act, passed after the 28th July, 1863 (*p*), and incorporating this Act, relates (*q*). Terms used in this Act have the same meanings as the same terms (*r*) have when used in the Waterworks Clauses Act, 1847 (*s*). The Act consists of four groups of clauses relating, respectively, to security of reservoirs (*t*), supply of water (*u*), protection of water (*a*), and recovery of rates (*b*). The provisions respecting the recovery of penalties contained in the Waterworks Clauses Act, 1847 (*c*), are incorporated in this Act (*d*).

SUB-SECT. 3.—*The Limits of Supply.*

Supply  
within  
prescribed  
area.

**516.** In granting powers for water undertakings Parliament defines the area within which the supply may be given, and within

Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 2, 3); (2) citing this Act or any part thereof (*ibid.*, ss. 4, 5); (3) the construction of waterworks (*ibid.*, ss. 6—15); (4) the construction of works for the accommodation of lands adjoining the waterworks (*ibid.*, ss. 16, 17); (5) mines (*ibid.*, ss. 18—27); (6) the breaking up of streets for the purpose of laying pipes (*ibid.*, ss. 28—34); (7) the supply of water to be furnished by the undertakers (*ibid.*, ss. 35—43); (8) the communication pipes to be laid by the undertakers (*ibid.*, ss. 44—47); (9) the communication pipes to be laid by the inhabitants (*ibid.*, ss. 48—53); (10) waste or misuse of the water supplied by the undertakers (*ibid.*, ss. 54—60); (11) the provision for guarding against fouling the water of the undertakers (*ibid.*, ss. 61—67); (12) the payment and recovery of the water rates (*ibid.*, ss. 68—74); (13) the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit (*ibid.*, ss. 75—82); (14) the yearly receipt and expenditure of the undertakers (*ibid.*, s. 83); (15) the recovery of damages not specially provided for, and of penalties, and the determination of any other matter referred to the justices or to the sheriff (*ibid.*, ss. 85—89); (16) access to the special Act (*ibid.*, ss. 90, 91). *Ibid.*, ss. 92 and 93, relate to exemptions.

(*n*) *Ibid.*, s. 5. The same method of incorporation is adopted in regard to the various Clauses Consolidation Acts passed in 1845 and 1847; see, for example, as to the Lands Clauses Acts, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 13.

(*o*) 26 & 27 Vict. c. 93.

(*p*) The date of the passing of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93).

(*q*) *Ibid.*, s. 2. Every such special Act is referred to in that Act as "the special Act" (*ibid.*).

(*r*) *Ibid.*

(*s*) 10 & 11 Vict. c. 17; see note (*l*), p. 275, *ante*.

(*t*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), ss. 3—11.

(*u*) *Ibid.*, ss. 12—15.

(*a*) *Ibid.*, ss. 16—20.

(*b*) *Ibid.*, s. 21.

(*c*) 10 & 11 Vict. c. 17, ss. 85, 87, 88; see pp. 324, 325, *post*.

(*d*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 2.



the limits of supply so defined occupiers of dwelling-houses are commonly entitled on certain conditions to receive on demand a supply of water for domestic purposes (*e*). Within these limits undertakers receive a certain amount of statutory protection from competition (*f*).

Companies and corporations are authorised in some special Acts to supply water in bulk beyond these limits for any purpose, under agreements with local authorities, companies, or persons (*g*). Supply to persons outside the limits and in excess of these powers may be restrained at the instance of the Attorney-General (*h*), or by persons or companies suffering special or particular injury (*i*).

SECT. 4.  
Terms on  
which  
Powers  
Granted.

Supply  
outside  
prescribed  
area.

SUB-SECT. 4.—*Cesser of Powers.*

**517.** Special Acts sometimes contain a provision limiting the term within which the statutory powers for the construction of the works may be exercised (*j*), or they may provide that if within a certain time the undertakers are not furnishing or prepared to furnish on demand a sufficient supply of water, local authorities within the limits of supply may do so in accordance with the provisions of the Public Health Act, 1875 (*k*), or any company, body, or person may apply for an Act of Parliament or provisional order for the purpose of supplying water in any part of the district not properly supplied (*l*).

Period within  
which powers  
are to be  
exercised.

(*e*) See p. 300, *post*. In some Bills the compulsory supply is confined to a certain part of the area within the limits of supply, and outside water is supplied by agreement; see *Pitts v. Plymouth Corporation*, [1912] 3 K. B. 301.

(*f*) See p. 256, *ante*.

(*g*) Model Water Bill, 1913, clause 23. The clause also provides that such supply must not be given except with the consent of any company or person supplying water under parliamentary authority within the area to be supplied, and of the local authority of the district comprising that area, nor if and so long as such supply would interfere with the supply of water for domestic purposes within the limits of the Act. As to local authorities obtaining or giving such supply, see also p. 261, *ante*.

(*h*) *A.-G. v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338, C. A. (where it was also held that the fact that the junction of the pipes of the person supplied with the mains of the company is inside the limits is immaterial); *Wakefield Union v. Morley Corporation and Great Northern Rail. Co.* (1894), *Journal of Gas Lighting*, 6th March; compare the cases cited in title GAS, Vol. XV., p. 376, notes (*s*), (*u*). Supply in bulk to a company within the area for purposes of distribution therein is not *ultra vires* (*Ticehurst and District Water and Gas Co. v. Gas and Waterworks Supply and Construction Co., Ltd.* (1911), 55 Sol. Jo. 459).

(*i*) *Preston Corporation v. Fullwood Local Board* (1885), 53 L. T. 718; *Cardiff Corporation v. Cardiff Waterworks Co.* (1859), 5 Jur. (N. S.) 953. An injunction is not granted at the instance of persons not having special interest (*Liverpool Corporation v. Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.; *Stockport District Waterworks Co. v. Manchester Corporation* (1862), 9 Jur. (N. S.) 266; see title INJUNCTION, Vol. XVII., p. 229; and compare *Pudsey Coal Gas Co. v. Bradford Corporation* (1873), L. R. 15 Eq. 167).

(*j*) As to cesser of powers in the case of provisional orders, see pp. 273, 274, *ante*.

(*k*) 38 & 39 Vict. c. 55. As to these, see p. 254, *ante*.

(*l*) Model Water Bill, 1913, clause 24. The clause also provides that if any difference arises between the undertakers and any such local

## Part III.—Construction and Maintenance of Waterworks.

### SECT. 1.

#### Powers Conferred.

Special  
powers.

### SECT. 1.—Powers Conferred.

**518.** The special Act authorising a water undertaking usually empowers the undertakers (*m*) to make and maintain the various works in the lines and situation and upon the lands delineated in the deposited plans and described in the deposited book of reference (*n*). These specified works are usually certain tanks, reservoirs, wells, or pumping stations, and certain conduits or lines of pipes; in addition the undertakers are given power to make and maintain other works necessary or subsidiary thereto, such as channels, culverts, shafts, wells, filter beds, embankments, engines, machines, and appliances (*o*). There is usually a special provision that these powers do not exonerate the undertakers from any action, indictment, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them (*p*). The undertakers are commonly empowered to enter upon, take, and use such of the lands described in the deposited plans and books of reference as may be required for these purposes (*q*), and further to collect, impound, take, use, divert, and appropriate certain definite streams and waters, and such other springs, streams, and waters as may be intercepted by the authorised works (*r*). In constructing the works the undertakers are allowed to deviate from the position shown in the plans, but only within clearly defined limits (*s*).

Time limit.

A time limit is usually fixed within which the compulsory powers

authority, company or person, as to the sufficiency of the supply of water in any part of the district, such difference is to be settled by an arbitrator to be appointed on the application of either party by the Local Government Board if the undertakers are a local authority, and by the Board of Trade where they are a company; compare Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52; see pp. 256, 257, *ante*.

(*m*) For the meaning of "undertakers," see note (*l*), p. 275, *ante*.

(*n*) As to the deposit of plans and books of reference, see p. 270, *ante*; title PARLIAMENT, Vol. XXI., pp. 732, 733; as to the correction of errors and omissions in plans, and deposit of plans as altered by Parliament or otherwise, see p. 283, *post*.

(*o*) See the Model Water Bill, 1913, clause 2.

(*p*) *Ibid.*; compare *Charing Cross, West End and City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 446. As to the liability of undertakers for nuisance, see title NUISANCE, Vol. XXI., pp. 516 *et seq.*; compare note (*d*), p. 268, *ante*.

(*q*) For these purposes the Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12) are incorporated in the special Act, and compliance with their provisions is necessary before entering upon any land. As to the power to take land generally, see *ibid.*, pp. 1 *et seq.*; as to land required for the purposes of the undertaking, see *ibid.*, pp. 23 *et seq.*; as to conditions as to entry, see *ibid.*, pp. 97 *et seq.* Power is also given to the undertakers to acquire additional land by agreement; see p. 290, *post*.

(*r*) These may be described specifically in the Act or by reference to the deposited plans and books of reference; see the Model Water Bill, 1913, clause 4.

(*s*) As to the limits of deviation, see p. 284, *post*.

must be exercised (*t*), and another limit within which the specified works must be completed.

SECT. 1.  
Powers  
Conferred.

General  
powers.

**519.** Further powers of a general nature in regard to construction and maintenance are conferred upon the undertakers by the incorporated provisions of the Waterworks Clauses Act, 1847 (*u*). Subject to the provisions of that Act and the special Act, the undertakers may execute any of the following works for constructing the waterworks (*a*):—They may enter upon any lands and other places described in the said plans and books of reference (*b*), take levels of the same, set out such parts thereof as they think necessary (*c*), dig and break up the soil of such lands, and trench and sough the same, and remove or use all earth, stones, mines, minerals (*d*), trees, or other things dug or gotten thereout. They may from time to time (*e*) sink such wells or shafts, and make and maintain, alter or discontinue, such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, sluices, pipes (*f*), culverts, engines, and other works, and erect such buildings upon the lands and streams authorised to be taken by them, as they think proper for supplying the inhabitants of the town or district within the prescribed limits with water. They may not, however, do these acts on lands which they are only authorised to use for a particular purpose (*g*), and in erecting buildings they must conform to the

(*t*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 63.

(*u*) 10 & 11 Vict. c. 17, s. 12. This provision relates only to the specific works on the specific sites authorised by the special Act (*A.-G. v. Frimley and Farnborough District Water Co.*, [1908] 1 Ch. 727, C. A., *per* FLETCHER MOULTON, L.J., at p. 739; *A.-G. v. Barnet District Gas and Water Co.* (1910), 102 L. T. 546, H. L.). As to the application of this provision to works on additional lands, see p. 290, *post*.

(*a*) For the definition of "waterworks," see note (*l*), p. 275, *ante*.

(*b*) As to such plans and books of reference, see p. 270, *ante*; as to the taking of lands, see p. 281, *post*.

(*c*) Any person who wilfully obstructs any person acting under the authority of the undertakers in setting out the line of the works, or pulls up or removes any poles or stakes driven into the ground for the purpose of setting out the line of such works, or defaces or destroys any works made for the same purpose, is liable to a penalty not exceeding £5 for each offence (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 13).

(*d*) As to mines and minerals, see pp. 286 *et seq.*, *post*.

(*e*) As to the meaning of "from time to time," compare *Emsley v. North Eastern Rail. Co.*, [1896] 1 Ch. 418, C. A. (decision on a corresponding provision in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16).

(*f*) As to laying pipes generally, see pp. 290, 291, *post*.

(*g*) Thus, they may not sink wells and erect permanent machinery on land authorised to be used only for a temporary purpose (*Simpson v. South Staffordshire Waterworks Co.* (1865), 11 Jur. (N. S.) 453), nor can they execute different works from those specifically authorised; a private individual whose interests are not injured is not, however, entitled to an injunction to restrain them, and proceedings should be taken in the name of the Attorney-General (*Liverpool Corporation v. Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A.). It is otherwise if private rights are injured by unauthorised acts of undertakers (*Cardiff Corporation v. Cardiff Waterworks Co.* (1859), 5 Jur. (N. S.) 953; *Marriott v. East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70 (both cases relating to wrongful laying of pipes)).



SECT. 1.  
Powers  
Conferred.

Conditions  
of exercise.

provisions of the Public Health Acts (*h*) and to the bye-laws made thereunder (*i*). They may also from time to time divert and impound the water from the streams mentioned for that purpose in the special Act or the said plans or books of reference, and alter the course of any such streams not being navigable, and also take such waters as may be found in or under or on the lands to be taken for constructing the works (*j*).

In the exercise of these general powers the undertakers must do as little damage as can be (*k*), and in all cases, where it can be done, they must provide other watering places, drains, and channels for the use of adjoining lands, in place of those taken away or interrupted by them (*l*), and they must make full compensation to all parties for all damage sustained by them through the exercise of such powers (*m*).

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(*h*) As to the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*).

(*i*) Nothing in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), or the special Act exempts the undertakers from any Act for improving the sanitary condition of towns and populous districts passed in the same session of Parliament in which the special Act is passed (*ibid.*, s. 93), or in a subsequent session. Undertakers must therefore conform to the provisions of the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52) (*Grand Junction Waterworks Co. v. Hampton Urban Council*, [1898] 2 Ch. 331), and to the bye-laws under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157 (*Uckfield Rural Council v. Crowborough District Water Co.*, [1899] 2 Q. B. 664).

(*j*) As to taking streams generally, see p. 281, *post*; as to sinking wells and abstracting water from lands acquired for additional purposes, see p. 290, *post*. Persons who illegally divert the waters supplying streams which have been taken, or do any unlawful act diminishing the supply, and do not forthwith make good the injury when so required by the undertakers, are liable to forfeit to the undertakers a sum to be fixed by two justices, not exceeding £5 for any day during which the supply is interfered with, such sum to be in addition to the sum they may be adjudged to pay for any damage sustained in consequence by the undertakers; the sum so forfeited does not bar or affect the right of the undertakers to bring an action (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 14). Owners and occupiers of lands through or by which such streams flow are, however, entitled to use the water as they might have done before the passing of the special Act, unless they have received compensation (*ibid.*, s. 15; see *Bradford Corporation v. Pickles*, [1895] A. C. 587; *Brymbo Water Co. v. Lesters Lime Co.* (1894), 8 R. 329).

(*k*) The undertakers in carrying out these works are entitled to do such things as are reasonably necessary, and they will not be restrained if in executing any work in a reasonable manner they cause a nuisance (*Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; see title NUISANCE, Vol. XXI., p. 519). They must, however, in maintaining their works exercise their common law and statutory powers in a reasonable manner, so as to prevent damage or nuisance (*Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; see title NEGLIGENCE, Vol. XXI., pp. 464 *et seq.*).

(*l*) As to compensation water generally, see pp. 284, 285, *post*; as to accommodation works, see p. 289, *post*. As to the construction of a covenant to supply water to a farm part of which has been purchased for waterworks, see *Hadham Rural District Council v. Crallan*. [1914] 2 Ch. 138.

(*m*) As to compensation for lands and streams taken or injuriously affected, see p. 281, *post*. If the undertakers wrongfully divert the water they are liable to be restrained by injunction (*A.-G. of the Prince of Wales v. Bristol Waterworks Co.* (1855), 10 Exch. 884).

SECT. 2.—*Lands and Streams.*SUB-SECT. 1.—*Application of Lands Clauses Acts.*

## SECT. 2.

Lands and  
Streams.

—  
Compensation  
in case of  
compulsory  
powers.

**520.** When the undertakers are authorised by the special Act to take and use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they are, in exercising these powers, made subject to the provisions and restrictions contained in the Waterworks Clauses Act, 1847 (*n*), and in the Lands Clauses Acts (*o*), except in so far as these are expressly varied (*p*). They must make full compensation to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the execution of the powers thereby conferred, for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by the special Act and any Act incorporated therewith (*q*). The construction of accommodation works may also be required (*r*).

(*n*) 10 & 11 Vict. c. 17; including those of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), so far as applicable. As to incorporation of the Acts, see p. 274, *ante*.

(*o*) As to the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq*.

(*p*) This is so provided in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6, which is invariably incorporated in Acts authorising water undertakings. The Lands Clauses Acts are also commonly incorporated in express terms, but in view of this provision and of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 1, such express incorporation would appear not to be necessary. A variation sometimes made in the special Act enables the undertakers to sell superfluous land while retaining the water rights and other easements connected therewith, and also subject to reservations and conditions for the protection of the water supply; see Lisburn Urban District Council Act, 1909 (9 Edw. 7, c. lvi.iii.), s. 46.

(*q*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6. The Acts incorporated with the special Act include the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which contains (*ibid.*, s. 12) express powers of executing works, and also provides that the undertakers must make full compensation to all parties interested for all damage sustained by them through the exercise of such powers; see p. 280, *ante*. A like provision in regard to laying pipes is contained in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 28; see p. 292, *post*. As to the remedy of a riparian proprietor being under the general law and not under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), see *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125. The compensation payable is not limited to damage caused by construction of the works, but extends to cases where the damage arises from acts done for maintenance of the works or in order to obtain a supply of water, as where a house is damaged by pumping running silt (*Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, C. A., distinguishing *Hammersmith etc. Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171, on the ground of the different construction of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), from that of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16); compare *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A.; and see title COMPULSORY PURCHASE OF

(*r*) For note (*r*) see p. 282, *post*.



SECT. 2.  
Lands and  
Streams.

Determina-  
tion of com-  
pensation.

**521.** The compensation provided in recent special Acts in respect of intercepted water very frequently takes the form of "compensation water" (*s*); but, unless otherwise provided in the special Act (*t*) or Acts incorporated therewith, the compensation as regards both lands and streams is determined in the manner provided by the Lands Clauses Acts (*u*) for determining questions of compensation with regard to lands. All the provisions of these Acts are applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction therefor (*w*). It follows that where undertakers are authorised to take the whole of a stream, and not merely so much as they may think expedient from time to time, they must give notice of their intention to take the whole and pay compensation for the whole, and the proceedings to be adopted are those provided for a purchase of land (*a*), but where they divert part only of a stream, the rights of riparian owners are merely injuriously affected, and the procedure in regard to compensation corresponds with that in respect of lands injuriously affected (*b*). The principles of compensation generally applicable to lands taken or injuriously affected for statutory undertakings apply to lands and streams taken for waterworks (*c*).

LAND AND COMPENSATION, Vol. VI., p. 48; *Rothés (Countess) v. Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, commented on in *Re Manchester and Milford Rail. Co.*, [1897] 1 Ch. 276; as to damage to mill-owners, see *Tatton v. Staffordshire Potteries Waterworks Co.* (1879), 44 J. P. 106.

(*r*) See p. 289, *post*.

(*s*) See pp. 284, 285, *post*.

(*t*) For examples of such a provision in special Acts, see *Rothés (Countess) v. Kirkcaldy Waterworks Commissioners*, *supra*; *Evan-Thomas v. Neath Corporation* (1912), 76 J. P. 397. Provision has also been inserted in special Acts requiring the undertakers to purchase mills and other works on a stream, if it can be shown that the business thereof cannot be satisfactorily carried on by reason of the powers contained in the Act; see *Rochdale Corporation Water Act*, 1898 (61 & 62 Vict. c. ccxxxvi.), s. 38 (2) (*b*).

(*u*) As to the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq*.

(*w*) *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 6.

(*a*) *Ferrand v. Bradford Corporation* (1856), 21 Beav. 412; *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99, C. A. It is immaterial that the undertakers allow part of the stream to continue to flow (*Stone v. Yeovil Corporation*, *supra*). Streams once acquired may be subsequently diverted without compensation (*Girdwood v. Belfast Water Commissioners* (1877), 1 L. R. Ir. 28).

(*b*) *Bush v. Trowbridge Waterworks Co.* (1875), 10 Ch. App. 459. Such a case falls within the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 12 (*Bush v. Trowbridge Waterworks Co.*, *supra*, per JAMES, L.J., at p. 462). If part of the water is returned after use, this must be taken into consideration in assessing the compensation (*Page v. Kettering Waterworks* (1892), 8 T. L. R. 228). As to compensation for diversion of water, see also *Little v. Dublin and Drogheda Rail. Co.* (1857), 7 I. C. L. R. 82; *Mortimer v. South Wales Rail. Co.* (1859), 1 E. & E. 375; as to removal of a weir, see *R. v. Nottingham Old Water Works Co.* (1837), 6 Ad. & El. 355.

(*c*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 31 *et seq*. The adaptability of land for the purpose of waterworks is a matter to be considered in assessing the compensation (*ibid.*, p. 39). As to what should be taken into account in assessing the value



SUB-SECT. 2.—*Correction and Deposit of Plans.*

## SECT. 2.

Lands and  
Streams.—  
Procedure for  
correction.

**522.** If any omission, misstatement, or wrong description has been made of any lands or streams, or of the owners, lessees, or occupiers of any lands or streams described in the plans or books of reference deposited in compliance with the Standing Orders of either House of Parliament (*d*), or in the schedule to the special Act, the undertakers, after giving ten days' notice to the owners, lessees, and occupiers of the lands and streams affected by such proposed correction, may apply to two justices for the correction. If it appear to them that the omission, misstatement, or wrong description arose from mistake, they must certify the same accordingly. Such certificate, with the other documents to which it relates, must be deposited with the clerk to the county council of the several counties in which the lands or streams affected thereby are situated, and thereupon such plan, book of reference, or schedule is deemed to be corrected according to the certificate, and the undertakers may make the works in accordance therewith (*e*).

**523.** The undertakers must not begin to execute the waterworks unless they have previously deposited with the clerk of the county council of any county (*f*) in which the works are situated a plan and section of all such alterations from the original plan and section, if any, as have been approved of by Parliament, and also with the parish clerk, or in rural parishes with the clerk to the parish council when there is a council (*g*), of the several parishes in which such alterations have been authorised to be made, copies or extracts of or from such plans and sections as relate to such parishes respectively (*h*).

Deposit  
of plans.

The clerks of the various authorities concerned must (*i*) receive these plans and sections of alterations and the copies and extracts thereof respectively, and keep the same as well as the original plans and sections, and allow all persons interested to inspect any of them and to make copies and extracts of or from them, in the like

Inspection  
of plans.

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of a stream, see *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99, C. A., per COCKBURN, C.J., at p. 108. As to laying pipes and acquiring easements, see pp. 290, 291, *post*.

(*d*) See p. 270, *ante*.

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 7. The certificate and documents must be kept by the clerk of the county council (*ibid.*). A similar provision exists as regards railways; see title RAILWAYS AND CANALS, Vol. XXIII., p. 649.

(*f*) A "county" includes a county of a city or county of a town (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 3); see title LOCAL GOVERNMENT, Vol. XIX., pp. 300, 340. As to the substitution of clerks of the county council for clerks of the peace, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6); and title LOCAL GOVERNMENT, Vol. XIX., p. 343.

(*g*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (7); see title LOCAL GOVERNMENT, Vol. XIX., pp. 253, 254.

(*h*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 8. The plans and sections must be on the same scale and contain the same particulars as the original plan and section (*ibid.*).

(*i*) *Ibid.*, s. 9; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (6); Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17 (7).

SECT. 2. manner, and upon the like terms, and under the like penalty for  
 Lands and default, as is provided in the case of the original plans and sections  
 Streams. by the Parliamentary Documents Deposit Act, 1837 (*k*).

Certified  
 copies.

524. Copies of the plans and books of reference or of any alteration or correction thereof or extracts therefrom certified by the clerk to the county council, which certificate the clerk must give to all parties interested when required, must be received in all courts of justice or elsewhere as evidence of the contents thereof (*l*).

SUB-SECT. 3.—*Deviation.*

Limits of  
 deviation.

525. The undertakers in constructing the waterworks must not deviate (*m*) from the line of works laid down in the deposited plans (*n*) as authorised by Parliament more than the prescribed number of yards, and where no number of yards is prescribed not more than 10 yards, nor in any case to any greater extent than the line of lateral deviation described in the said plans with respect to such works. The undertakers cannot take or use for the purpose of such deviation (*m*) the lands of any person not mentioned in the book of reference (*n*) without his previous consent in writing, unless the name of such person has been omitted by mistake, and the fact that such omission happened from mistake has been duly certified (*o*).

SUB-SECT. 4.—*Compensation Water.*

Provision of  
 compensation  
 water.

526. In the place of the water intercepted or abstracted by the construction and maintenance of waterworks, provision is now commonly made in special Acts whereby riparian owners and occupiers become entitled to what is termed "compensation water," and so long as there is no default on the part of the undertakers in regard to this water, these owners and occupiers may be entitled to no other compensation in respect of their water rights (*p*). By "compensation water" is meant a regular and definite flow of water throughout the year which the undertakers must send down the bed of the stream. This amount is usually stated in the special Act in gallons per day, hour

(*k*) 7 Will. 4 & 1 Vict. c. 83, s. 2; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 18.

(*l*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 10; see also title EVIDENCE, Vol. XIII., p. 524.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 11. As to the limits of deviation, and as to taking lands for the purpose of deviation generally, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 21, 23. The right to deviate is a right to move the situation of the works, and does not authorise a deviation from the size or nature of the works, as by making a reservoir of less size than that authorised (*Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498).

(*n*) See pp. 278, 280, *ante*.

(*o*) See p. 283, *ante*.

(*p*) *Gough v. Aspatria, Silloth and District Joint Water Board* (1903), as reported 67 J. P. 137; *Blantyre (Lord) v. Babtie* (1888), 13 App. Cas. 631; see Model Water Bill, 1913, clause 5.

or minute, but is calculated as being one-third, or sometimes one-fourth, of the mean available rainfall during three consecutive dry years (*q*). The water may be required to be discharged into the stream continuously during every twenty-four hours (*r*), or during certain specified hours of each working day (*s*). For the purpose of this flow the undertakers are empowered to construct a special or compensation reservoir, and until this is completed (*t*) they are authorised to take water from the stream only when the flow exceeds a definite amount measured by gauge (*u*).

For neglect or default in connexion with the discharge of compensation water the undertakers are liable for penalties for each day's default (*a*). These penalties are recoverable by the persons affected (*b*), and the undertakers may also be required to make compensation for loss or injury sustained by such persons (*c*). In the absence of negligence, the undertakers are not liable for damage due to the water sent down being polluted from accidental causes (*d*).

SECT. 2.  
Lands and  
Streams.

Penalties.

Watering  
places etc.

**527.** Apart from the special Act, undertakers must provide

(*q*) In order to arrive at the available rainfall, 14 or 15 inches is usually deducted from the average rainfall over the catchment area during three consecutive dry years. This deduction is to allow for evaporation and absorption. It will vary with the nature of the country. If the statistics for three consecutive dry years are not available for purposes of calculation, the average annual rainfall is utilised, and four-sixths or four-fifths of this is taken as representing the mean rainfall of three consecutive dry years.

(*r*) As to the duty of committees on Water Bills in regard to this flow, see p. 271, *ante*.

(*s*) See Huddersfield Corporation Waterworks Act, 1890 (53 & 54 Vict. c. cxv.), s. 26. As to the meaning of "working days," see *Hanbury v. Llanfrechfa Upper Urban District Council* (1911), 75 J. P. 307.

(*t*) As to the duty of undertakers to complete, see *Davies-Cooke v. Hawarden and District Waterworks Co.* (1907), 71 J. P. 223; as to the remedy of mill-owners for non-completion, see *Waller v. Manchester Corporation* (1861), 6 H. & N. 667.

(*u*) See Model Water Bill, 1913, clause 5 (1).

(*a*) If these penalties are recoverable before a court of summary jurisdiction and are punitive in their nature, that court has power to reduce the amount (*Davies-Cooke v. Hawarden and District Waterworks Co.*, *supra*). Under some special Acts they are compensatory and not punitive, and in the absence of express provision are recoverable in the High Court and not before justices (*Meltham Spinning Co., Ltd. v. Huddersfield Corporation* (1903), 67 J. P. 445, C. A.; *Beaumont v. Huddersfield Corporation* (1902), 67 J. P. 57, C. A.).

(*b*) Questions have arisen as to whether each person affected can recover the full penalty (*Beaumont v. Huddersfield Corporation*, *supra*; compare *Huddersfield Corporation Act*, 1902 (2 Edw. 7, c. cxxxvii.), s. 57), or whether it can only be recovered by one of the persons affected (*Lewis v. Swansea Corporation* (1888), 4 T. L. R. 706, C. A.). The matter depends on the wording of the special Act.

(*c*) Compare Model Water Bill, 1913, clause 5 (3). Non-user of the water by the works for which the water was intended will not release the undertakers, but the owners may be entitled only for damage actually suffered (*Hanbury v. Llanfrechfa Upper Urban District Council*, *supra*).

(*d*) *Edinburgh Water Trustees v. Somerville & Son* (1906), 95 L. T. 217, H. L.



SECT. 2. watering places, drains and channels for the use of adjoining lands, Lands and in the place of any taken away or interrupted by them (e). Streams.

SUB-SECT. 5.—*Mines and Minerals.*

Rules applicable to mines and minerals :

(1) purchase of minerals ;

(2) map of underground works ;

(3) deposit of map ;

**528.** The relations of the undertakers with the owners, lessees and occupiers of mines and minerals (*f*) lying under or near the waterworks and works connected with them are governed by a statutory code which forms part of the Waterworks Clauses Act, 1847 (*g*). This code, with some modifications, applies also to works for water supply constructed by local authorities (*h*). It corresponds to, and in some respects is identical with, that applicable to other undertakings, such as railways (*i*). Its provisions may be summarised as follows :—

(1) Mines and minerals do not pass to the undertakers on the purchase of land, except such as may be duly dug or carried away or used in the construction of the waterworks, unless expressly purchased (*j*).

(2) The undertakers must from time to time, within six months from the laying or making of any pipes, conduits, or underground works, cause a map of the district to be made showing the same and all their underground works within the district, and cause it to be from time to time corrected, and they must keep the map at their office, and it must be open to the inspection of all persons interested (*k*).

(3) Within three months from the making or correction of such map the undertakers must deposit with the clerk of the county council and with the clerks of the parish councils or parish clerks of the county and parishes respectively in which the works are situated, copies of such particulars, corrections and additions so far as relate to such counties and parishes respectively (*l*). The clerks must keep

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 12; see p. 280, *ante*.

(*f*) As to the substances included under the term “minerals,” see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 502 *et seq.*

(*g*) 10 & 11 Vict. c. 17, ss. 18—27. As to the incorporation of these provisions in special Acts, see pp. 274 *et seq.*, *ante*.

(*h*) See pp. 255, 259, *ante*; compare Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37); title SEWERS AND DRAINS, Vol. XXV., pp. 748 *et seq.*

(*i*) See, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 49 *et seq.*, where the authorities are cited. As to the meaning of “minerals,” see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 503, note (*e*); as to the application of the code to small holdings, see *Carlisle's (Earl) Executrix v. Northumberland County Council* (1911), 75 J. P. 539; title SMALL HOLDINGS AND SMALL DWELLINGS, Vol. XXVI., p. 680. The provisions contained in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18, 22, 23, 24, 25, 26, correspond respectively to those contained in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78, 79, 80, 81, 83.

(*j*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18; *Consett Waterworks Co. v. Ritson* (1889), 22 Q. B. D. 318, 702, C. A.; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 50.

(*k*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 19. The plan must be on a scale of not less than one foot to a mile, and a copy with the date thereon when it was last corrected must be available for inspection in the undertakers' office (*ibid.*).

(*l*) *Ibid.*, s. 20.

three copies and allow all persons interested to inspect them and take copies or extracts (*m*).

(4) Unless otherwise provided for by agreement (*n*), if the owner, lessee or occupier of mines or minerals lying under the reservoirs or buildings of the undertakers, or under any of their pipes or works which are underground, and are described in the map to be left and deposited as above mentioned (*o*), or within the prescribed distance, or, if no distance is prescribed, within forty yards therefrom (*p*), be desirous of working the same, such owner, lessee and occupier must give the undertakers notice, but under certain conditions the owner, occupier or lessee is restrained from working the mines or minerals (*q*).

(5) If before the expiration of the thirty days the undertakers do not give the required notice stating their willingness to pay compensation, the owner, lessee or occupier may work the mines, and drain the same by means of engines or otherwise, so that no wilful damage is done to the waterworks and the mines are not worked in an unusual manner (*r*).

(6) If the working of the mines under the waterworks or within the prescribed distance is prevented by reason of apprehended injury to such works, the owners, lessees and occupiers of such mines may cut and make such airways, headways, gateways or water levels through the mines, measures, or strata the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work any mines or minerals on each side thereof (*s*).

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Lands and  
Streams.

(4) notice  
to work  
minerals ;

(5) when  
right to work  
minerals  
arises ;

(6) restric-  
tions on  
working ;

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 21. The provisions of the Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83), apply to such custody and to the taking of copies etc. (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 21) ; see, further, titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 18 ; LOCAL GOVERNMENT, Vol. XIX., pp. 253, 254.

(*n*) If the land is purchased by agreement on a voluntary sale, the common law rights of support apply (*New Moss Colliery, Ltd. v. Manchester Corporation*, [1908] A. C. 117).

(*o*) If the map is not so made, kept and deposited, the owners, lessees and occupiers are not bound to give notice, and are not liable for injury caused by their workings (*South Staffordshire Waterworks Co. v. Mason & Sons* (1886), 56 L. J. (Q. B.) 255).

(*p*) As to the rights of support from minerals beyond the prescribed distance, see *Howley Park Coal and Cannel Co. v. London and North Western Railway*, [1913] A. C. 11.

(*q*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 22 ; see, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 51, 53.

(*r*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 23. If any damage or obstruction is caused to the waterworks by the mines being worked in an unusual manner, the same must be forthwith repaired and removed, and the damage made good by the owner, lessee or occupier of the mines, and at his expense ; if the repair or removal is not done forthwith, the undertakers may execute the same and recover the expenses from such owner, lessee or occupier by action in the High Court (*ibid.*) ; see also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 52.

(*s*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 24 ; such works must not exceed the prescribed dimensions or sections, and if none are prescribed, 8 feet wide and 8 feet high, nor may they be cut or made

## SECT. 2.

## Lands and Streams.

(7) compensation payable;

(7) Unless otherwise provided by agreement, the undertakers must from time to time pay to the owner, lessee or occupier of mines lying on both sides of the waterworks, and other works connected therewith, all such additional expenses and losses incurred by him by reason of the severance of the lands over such mines, by such works or of the continuous working being interrupted as aforesaid, or by reason of the same being worked under the restrictions contained in the special and incorporated Acts, and for any mines and minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works of the undertakers, or by reason of such apprehended injury (*t*) from the working thereof (*u*).

(8) right of inspection;

(8) In order to ascertain whether the mines are being worked so as to damage the waterworks, the undertakers, after giving twenty-four hours' notice in writing, may enter and inspect the mines and works, and use any apparatus or machinery of the owner, lessee or occupier, and use all necessary means for discovering the distance from the said works to the parts of such mines which are being worked or about to be worked (*a*).

(9) liability of undertakers.

(9) Compensation in the form of damages may be claimed from water undertakers by owners, lessees and occupiers of mines, notwithstanding that the works were constructed and maintained under an Act of Parliament (*b*).

SUB-SECT. 6.—*Underground Water.*

Position at common law.

**529.** The common law confers no rights in respect of underground water running in undefined or unknown channels (*c*), except that an owner of land may sink wells in his own land and so obtain a supply, but another owner may by doing the same draw off the water from his neighbours. In the absence of special provision water undertakers can exercise this power in regard to their

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upon any part of the waterworks so as to injure them (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 24); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 52, 53.

(*t*) This means injury anticipated by the undertakers in consequence of which they have stopped the works, and not injury anticipated by the owner, lessee or occupier, who cannot recover for such anticipated injury until it arises (*Holliday v. Wakefield Corporation*, [1891] A. C. 81).

(*u*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 25. Disputes as to the amount of compensation payable are to be settled by arbitration under the Lands Clauses Acts (*ibid.*). This provision is similar to the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 81, but contains certain variations; see also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 53.

(*a*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 26.

(*b*) *Ibid.*, s. 27; see, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 53; *Holliday v. Wakefield Corporation*, *supra*, per Lord HALSBURY, L.C., at pp. 89, 90.

(*c*) *Chasemore v. Richards* (1859), 7 H. L. Cas. 349 (underground water prevented from reaching a river); *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588 (well below surface of stream, but stream affected). As to water flowing in definite but unknown channels, see *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655; *Black v. Ballymena Township Commissioners* (1886), 17 L. R. Ir. 459; and, generally, title WATERS AND WATERCOURSES, p. 430, *post*.



own land, and are not liable to pay compensation for any loss they thereby inflict on their neighbours (*d*); in the same way an owner of land can drain off the water in his land, and so prevent it reaching the springs from which the undertakers draw their supply (*e*).

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Lands and  
Streams.

**530.** In consequence of the loss suffered by neighbouring owners from the pumping operations of water undertakers, such owners are allowed to be heard before committees of Parliament on these Bills (*f*), and clauses are now inserted for the protection of wells (*g*). Such a clause may limit the powers of the undertakers to taking water only from such of their lands as are specifically mentioned in the special Act (*h*), or may give the owner of any well within a certain radius which is affected compensation either in water or money (*i*). Such a clause may give the owner whose well is injured the right to require the undertakers to lay at their own expense the pipes necessary to give a supply to his house, and to charge him for the water at a reduced rate (*k*). Clauses have also been inserted in order to protect water undertakers from having the water in their area pumped from wells and conveyed for sale or use beyond their area of supply (*l*).

Statutory  
provisions.

#### SUB-SECT. 7.—*Accommodation Works.*

**531.** The special Act may require the undertakers to erect works for making good the interruption of access caused to any lands adjoining or near the waterworks, or otherwise for the accommodation of such lands (*m*). If any difference arises respecting the construction of any such accommodation works, or the kind or size or sufficiency thereof, or respecting the maintenance thereof, it must be determined by two justices, who must also appoint the time within which such accommodation works shall be begun and finished by the undertakers (*n*).

When  
accommoda-  
tion works  
necessary.

(*d*) *New River Co. v. Johnson* (1860), 2 E. & E. 435; *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710. As to the power of water companies to sink wells, see p. 279, *ante*.

(*e*) *Bradford Corporation v. Pickles*, [1895] A. C. 587; *Blackrod Urban District Council v. Crankshaw (John) Co., Ltd.* (1913), 136 L. T. Jo. 239.

(*f*) Standing Orders of the House of Commons (Private Business), 1913, No. 134D; *South Shields Waterworks Co. v. Cookson* (1845), 15 L. J. (EX.) 315; see p. 271, *ante*.

(*g*) See the report of a joint committee of both Houses of Parliament on a Bill introduced in 1910 to deal generally with this subject (Parliamentary Paper, No. 226, 1910). The effect of the report was that each case should be dealt with on its merits, but the committee recommended the establishment of a central administrative authority to control the water supply of the country.

(*h*) See Model Water Bill, 1913, clause 8. As to the power of undertakers to sink wells on "additional lands" acquired by them, see p. 290, *post*.

(*i*) See Selby Urban District Council Act, 1904 (4 Edw. 7, c. cccxxxiii.), s. 27; Holderness Water Act, 1908 (8 Edw. 7, c. xcix.), s. 55; Frimley and Farnborough District Water Act, 1909 (9 Edw. 7, c. xlvii.).

(*k*) See South Lincolnshire Water Act, 1906 (6 Edw. 7, c. cxcvi.), s. 38.

(*l*) See Sutton District Waterworks Act, 1906 (6 Edw. 7, c. clxxxviii.).

(*m*) These are in addition to the making good of watering places etc., as to which see pp. 280, 285, 286, *ante*. As to interruption of access to a road, see *Blagrove v. Bristol Waterworks Co.* (1856), 1 H. & N. 369.

(*n*) Waterworks Clauses Act, 1847 (10 & 11 Viet. c. 17), s. 16. As to

## SECT. 2.

Lands and  
Streams.Effect of  
default.

If the undertakers fail to begin such works for fourteen days next after the time appointed by the justices for their beginning, or, having begun such works, fail diligently to execute the same in a sufficient manner, the person aggrieved by such failure may execute such works or repairs, and the reasonable expenses thereof must, on demand, be repaid by the undertakers to the person by whom the same shall have been so executed. Disputes as to the nature or amount of such expenses are required to be settled by two justices (o).

SUB-SECT. 8.—*Additional Lands.*Acquisition  
by agreement.

**532.** The special Act usually authorises the undertakers to acquire a certain amount of land in addition to that specified in the Act (p); they are empowered to acquire this land by agreement, and the provisions of the Lands Clauses Acts applicable to purchase by agreement extend thereto (q). In recent special Acts it has been provided that the undertakers must not cause or permit any nuisance on such lands (r). Undertakers are not generally authorised to sink wells and erect pumping stations upon such additional lands, and in the absence of clear provision to the contrary (s) the execution and making of such works may be restrained by injunction (t).

SECT. 3.—*Laying of Pipes.*SUB-SECT. 1.—*In Private Lands.*Extent of  
power.

**533.** The Waterworks Clauses Act, 1847 (u), and other incorporated Acts do not authorise the undertakers to enter upon and lay pipes or construct underground works in any land not dedicated to public use unless by agreement with the owner and occupier (v), or unless they acquire the land (a). Some special Acts authorise

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the like provisions in regard to railways, see title RAILWAYS AND CANALS, Vol. XXIII., pp. 666 *et seq.*

(o) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 17.

(p) The amount of such land is usually specifically stated in the special Act, and is sometimes described as land for extraordinary purposes.

(q) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 25, 61.

(r) See Frimley and Farnborough District Water Act, 1893 (56 & 57 Vict. c. clxxxv.), s. 30.

(s) The special Act may authorise such works on the additional land, as by making the powers of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 12, applicable thereto (*A.-G. v. Barnet District Gas and Water Co.* (1910), 74 J. P. 193, H. L.); as to such powers, see p. 279, *ante*.

(t) *A.-G. v. Frimley and Farnborough District Water Co.*, [1908] 1 Ch. 727, C. A.; *A.-G. v. South Staffordshire Waterworks Co.* (1909), 25 T. L. R. 408. As to injunctions generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(u) 10 & 11 Vict. c. 17.

(v) *Ibid.*, s. 29. The undertakers may, however, at any time enter upon, and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe has been already lawfully laid down under statutory powers, and they may repair and alter any pipe so laid down (*ibid.*). The undertakers may substitute other pipes without removing the old pipes if the owner suffers no damage thereby (*Bridges v. Fraserburgh Commissioners of Police* (1887), 25 Sc. L. R. 151).

(a) Under the Lands Clauses Acts, in the absence of special provision, a

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limited owners to grant easements and rights in land to the undertakers, and more recently special Acts have authorised the undertakers to acquire compulsorily easements only in land for the purpose of underground works, and have made the provisions of the Lands Clauses Acts (*b*) applicable to such compulsory purchase. This power has, however, been granted subject to the proviso that the owner, in his particulars of claim, may require the undertakers to acquire the lands in respect of which a notice to treat has been given for an easement only (*c*).

SUB-SECT. 2.—*In Streets.*

**534.** Subject to certain supervision (*d*), powers are conferred on undertakers by the Waterworks Clauses Act, 1847 (*e*), to open and break up the soil and pavement of the streets (*f*) and bridges (*g*) dedicated to public use (*h*), within the limits of the special Act (*i*), and to open and break up any sewers, drains, or tunnels (*k*) within or under such streets and bridges, and to lay

Powers in  
public streets.

stratum only of land cannot be purchased; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 22. Under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), local authorities may in certain cases lay pipes through private land upon making compensation subsequently; see pp. 259, 260, *ante*. In special Acts authorising local authorities to construct waterworks, a clause extending this power to such works has been inserted; see Burnley Corporation Act, 1908 (8 Edw. 7, c. lxxxix.), s. 12.

(*b*) As to the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*c*) See the Model Water Bill, 1913, clause 9.

(*d*) See pp. 292, 293, *post*.

(*e*) 10 & 11 Vict. c. 17, ss. 28—34. These powers also apply to local authorities where they have not the control of the streets; see p. 259, *ante*.

(*f*) The word “street” is defined as including any square, court, or alley, highway, lane, road, thoroughfare, or public passage or place within the limits of the special Act (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 3). As to the rights of undertakers to break up streets, see also titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 573 *et seq.*; GAS, Vol. XV., pp. 325 *et seq.*; SEWERS AND DRAINS, Vol. XXV., pp. 731 *et seq.*; TELEGRAPHS AND TELEPHONES, Vol. XXVII., pp. 360 *et seq.*; TRAMWAYS AND LIGHT RAILWAYS, Vol. XXVII., pp. 788 *et seq.*; as to interference by undertakers with the works of water undertakings, see p. 294, *post*.

(*g*) As to bridges, compare title GAS, Vol. XV., p. 326. The clauses as to laying gas pipes are in many respects similar to those relating to water pipes.

(*h*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 29. Although the subsoil is not dedicated to public use, pipes can nevertheless be laid in it under this provision (*Schweder v. Worthing Gas Light and Coke Co.* (No. 2), [1913] 1 Ch. 118). Persons laying pipes in private streets may be restrained by injunction (*Goodson v. Richardson* (1874), 9 Ch. App. 221; compare title GAS, Vol. XV., pp. 307, 327; see also *Andrews v. Abertillery Urban Council*, [1911] 2 Ch. 398, C. A.).

(*i*) As to the limits of the special Act, see p. 276, *ante*.

(*k*) The word “tunnels” does not include railway tunnels, but only those of the same class as sewers and drains (*Caledonian Rail. Co. v. Glasgow Corporation* (1901), 3 F. (Ct. of Sess.) 526, followed in *Schweder v. Worthing Gas Light and Coke Co.*, [1912] 1 Ch. 83 (tunnel connecting two sides of a road); see also *Thompson v. Sunderland Gas Co.* (1877), 2



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down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time to alter and remove the same (*l*). For these purposes the undertakers may remove and use all earth and materials in and under such streets and bridges, and do all other acts which they from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits (*m*). They can, however, only exercise these powers for the purposes of their authorised works (*n*), and cannot lay down pipes within their limits of supply for the purpose of carrying water for an unauthorised supply beyond these limits (*o*).

Powers in  
private  
streets.

**535.** In recent special Acts the general powers of laying pipes in public streets are extended to streets laid out but not dedicated to public use, for the purpose of supplying water to the premises of any owner or occupier of premises abutting on or being erected in any such street who makes application, and the general provisions are made applicable to such street (*p*).

Compensation  
for damage.

**536.** In the execution of these powers, whether in the special Act or in the incorporated Acts, the undertakers must do as little damage as possible, and make compensation for any damage done (*q*).

Notice to road  
authority.

**537.** Before the undertakers open or break up any street, bridge, sewer, drain, or tunnel they must give to the persons under whose control or management the same are (*r*), or to their

Ex. D. 429, C. A.). As to railway bridges, see *Glasgow Corporation v. Glasgow and South Western Rail. Co.*, [1895] A. C. 376.

(*l*) This includes the right to execute works on the surface of the road, so long as no nuisance is caused (*East London Waterworks Co. v. St. Matthew, Bethnal Green (Vestry)* (1886), 17 Q. B. D. 475, C. A.). As to laying communication pipes with premises, see p. 307, *post*.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 28.

(*n*) *Marriott v. East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70; *Clippens Oil Co., Ltd. v. Edinburgh and District Water Trustees* (1897), 25 R. (Ct. of Sess.) 370.

(*o*) *Cardiff Corporation v. Cardiff Waterworks Co.* (1859), 5 Jur. (N. S.) 953. When undertakers are empowered to supply water in bulk outside the limits (as to which see p. 313, *post*), the clause usually contains a proviso that they are not to be authorised to lay mains beyond the limits of the Act (Model Water Bill, 1913, clause 23).

(*p*) See *ibid.*, clause 22.

(*q*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 28. If the pipes are properly laid, and damage to the highway ensues some time afterwards in consequence of the pipes being there, the land is injuriously affected within *ibid.*, s. 6, and the justices have no jurisdiction if the claim is above £50 (*Harpur v. Swansea Borough Council*, [1913] A. C. 597). Compensation may be recoverable in respect of interference with the access to premises, whereby a person's trade is injured; compare *Lingké v. Christchurch Corporation*, [1912] 3 K. B. 595, C. A.

(*r*) As to persons having the control and management of streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 200, 201, 211 *et seq.* A rural district council is not the person having the control or management of highways which, although dedicated to the public, are not

clerk, surveyor, or other officer, notice in writing of their intention to do so, not less than three clear days before beginning such work, except in cases of emergency arising from defects in any of the pipes or other works, and then so soon as is possible after the beginning of the work or the necessity for the same arises (s).

Except in cases of such emergency, no such street, bridge, sewer or tunnel may be opened or broken up, except under the superintendence of the persons having the control or management thereof or of their officer, and according to such plan as shall be approved of by such persons or their officer. The plan must show how the underground work is to be executed, and the position and depth at which the pipes are intended to be laid (t). If the persons having such control and management do not approve, they may make a counter proposal by plan or otherwise, and in case of difference the works must be carried out according to such plan as shall be determined by two justices. If, however, the persons having such control or management and their officer fail to attend at the time fixed for the opening of any such street, bridge, sewer, drain, or tunnel, after having had notice as aforesaid, or if they do not propose any plan for breaking up or opening the same, or refuse or neglect to superintend the operation, the undertakers may carry out the work specified in such notice without the superintendence of such persons or their officers (a).

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Pipes.

Supervision  
of road  
authority.

**538.** When the undertakers open or break up the road or pavement of any street or bridge or any sewer, drain, or tunnel, they must with all convenient speed complete the work for which the same shall be broken up and fill in the ground and reinstate and make good the road or pavement, or the sewer, drain, or tunnel, so opened or broken up (b), and carry away the rubbish occasioned thereby (c).

Reinstatement on  
completion.

repairable by the inhabitants at large (*Redhill Gas Co. v. Reigate Rural Council*, [1911] 2 K. B. 565; *Postmaster-General v. Hendon Urban Council*, [1914] 1 K. B. 564, C. A.).

(s) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 30.

(t) *Edgware Highway Board v. Colne Valley Water Co.* (1877), 46 L. J. (CH.) 889; *East Molesey Local Board v. Lambeth Waterworks Co.*, [1892] 3 Ch. 289, C. A.

(a) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 31. As to the construction of this provision, see *East Molesey Local Board v. Lambeth Waterworks Co.*, *supra*, per LINDLEY, L.J., at pp. 304, 305. Two justices may, on the application of the persons having the control or management of any such sewer or drain or their officer, require the undertakers to make such temporary or other works as they may think necessary for guarding against any interruption of the drainage during the execution of any works which interfere with any such sewer or drain (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 31).

(b) Leaving a pipe in the structure of a tunnel is not a reinstatement (*Schweder v. Worthing Gas Light and Coke Co.*, [1912] 1 Ch. 83). As to the liability of undertakers for injuries caused by their failure to reinstate, see pp. 311, 312, *post*.

(c) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 32. Undertakers breaking up streets to lay water pipes are under the same obligations as to lighting by night and subsequent repair as undertakers laying gas pipes; see *ibid.*; and title GAS, Vol. XV., p. 328.

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## Penalties.

**539.** If the undertakers open or break up any street or bridge or any sewer, drain, or tunnel without complying with the above provisions, they are liable to forfeit to the persons having the control or management of the street, bridge, sewer, drain, or tunnel in respect of which such default is made a sum not exceeding £5 for every such offence, and an additional sum of £5 for each day during which any delay in reinstating the street, bridge, sewer, drain, or tunnel, or in carrying away the rubbish, continues after they have received notice thereof (*d*).

If such delay or omission takes place, the persons having the control or management of the street, bridge, sewer, drain, or tunnel in question may cause the work so delayed or omitted to be executed, and the undertakers must repay the expenses of executing the same (*e*).

SUB-SECT. 3.—*Interference by Other Undertakers.*When  
interference  
authorised.

**540.** Persons who interfere with the works of the undertakers are in general guilty of an offence (*f*); but such interference sometimes becomes necessary when it is desired to lay sewers, drains, gas pipes, electric mains and such like works in the streets where water pipes exist. It may be also necessary to alter their position in connexion with public improvements, or in the making of railways or construction of tramways. Special or general Acts authorising such other undertakings or improvements usually contain provisions allowing for these necessary alterations in regard to water pipes, but subject to the rights of the undertakers being properly protected and the water supply maintained (*g*).

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 33; for the similar provisions in the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 11, 12, see title GAS, Vol. XV., p. 329; as to cases where the local authority agrees to reinstate, see *ibid.*, note (*t*); *Metropolitan Water Board v. Westminster Corporation* (1905), 75 L. J. (K. B.) 384, C. A.; as to damages for defective works, see *Cattle v. Stockton Waterworks* (1875), L. R. 10 Q. B. 453.

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 34. The expenses are recovered in the same way as damages (*ibid.*); see pp. 324, 325, *post*.

(*f*) See p. 324, *post*.

(*g*) As to such provisions, see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 579 *et seq.*; GAS, Vol. XV., pp. 330, 358; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 212; RAILWAYS AND CANALS, Vol. XXIII., p. 679; SEWERS AND DRAINS, Vol. XXV., p. 732; TELEGRAPHS AND TELEPHONES, Vol. XXVII., p. 366, note (*p*); TRAMWAYS AND LIGHT RAILWAYS, Vol. XXVII., pp. 791 *et seq.* As regards housing schemes, see Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 22, 39 (8), as amended by the Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), s. 27. The powers in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 18—23 (as to which see title RAILWAYS AND CANALS, Vol. XXIII., pp. 679 *et seq.*), relating to the interference with gas and water pipes, are commonly extended to pipes and mains of local authorities by the special Act of the railway company; see Model Railway Bill, 1913, clause 33. If a local authority, by lowering the level of a street, thereby brings the pipes nearer to the surface, but does not interfere with the pipes themselves, it is not required to relay them (*Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.).



SECT. 4.—*Security of Reservoirs.*

SECT. 4.

**Security of Reservoirs.**

Extent of liability.

**541.** Where undertakers in pursuance of their statutory powers collect large quantities of water in reservoirs they are not liable for injury caused by the escape thereof, unless there is either provision in their special Act to the contrary (*h*), or they are guilty of negligence in the exercise of their powers (*i*).

**542.** Certain general provisions providing for the prompt repair of reservoirs believed to be insecure are incorporated in special Acts authorising waterworks (*j*). Statutory provisions.

Any person interested may complain to two justices that any reservoir constructed by the undertakers is in a dangerous state. The justices must thereupon make inquiry forthwith into the truth of this complaint (*k*). If on such inquiry they are satisfied that the complaint is well founded, and that the reservoir is in a dangerous state, and that the danger is so imminent as not to admit of delay in removing the cause of complaint, they must order such person as they think fit to enter on the property of the undertakers and to lower the water in the reservoirs, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint (*l*). Complaint of insecurity.

If, however, the justices, while being satisfied that there is good cause of complaint, are not satisfied that the reservoir is in Powers of justices.

(*h*) See Birmingham Corporation Water Act, 1892 (55 & 56 Vict. c. clxxiii.), s. 46; Bury Corporation Waterworks Act, 1889 (52 & 53 Vict. c. clxxxii.), s. 7; Lincoln Corporation (Water, etc.) Act, 1908 (8 Edw. 7, c. xxxiii.), s. 39. These clauses vary in form, but generally require the undertakers to make full compensation to all persons for all damage or loss sustained in consequence of the bursting or giving way of the reservoir authorised by the special Act. This liability is sometimes extended to aqueducts, embankments, and other works; see *Dunn v. Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42. As to the liability of persons acting under statutory authority generally, see titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312 *et seq.*; TORT, Vol. XXVII., p. 481.

(*i*) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; *Blaggrave v. Bristol Waterworks Co.* (1856), 1 H. & N. 369. As to the liability at common law of persons collecting water, see *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Roths (Countess) v. Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694; and titles NEGLIGENCE, Vol. XXI., pp. 401, 466; WATERS AND WATERCOURSES, pp. 453 *et seq.*, *post.* The same principle applies to damage caused by the bursting of water mains (*Green v. Chelsea Waterworks Co.* (1894), 70 L. T. 547, C. A.; *Snook v. Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308). As to evidence in cases of escape of water, see *Steggles v. New River Co.* (1865), 13 W. R. 413, Ex. Ch.; but as to water under high pressure for hydraulic purposes, see *Charing Cross Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442; on appeal (1914), 30 T. L. R. 441, C. A.

(*j*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), ss. 3—11. These provisions also apply to reservoirs constructed by local authorities under their general powers; see p. 257, *ante*. They apply to England and Ireland, and with the necessary sanction to Scotland (Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 11).

(*k*) *Ibid.*, s. 3. Two justices may, on their own view, and without complaint by any person, proceed under these provisions as if a complaint had been made to them (*ibid.*).

(*l*) *Ibid.*, s. 4. The order must be in writing under the hands of the justices, and may be in the statutory form with such variations as circumstances require (*ibid.*, s. 6, Schedule).

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such an imminently dangerous state as not to admit of delay in removing such cause, they must issue their summons to the undertakers to answer the complaint. Upon hearing the parties the justices may, or upon default of appearance of the undertakers must, order the undertakers, within such time as the justices think reasonable and specify in the order, to lower the water in the reservoir and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint (*m*).

Failure to  
remedy  
defects.

**543.** If the undertakers fail to execute or do within the prescribed period any such work or thing, the justices who made the order, or any other two justices, on being satisfied of such failure, may either order such persons as they think fit to enter on the property of the undertakers and to lower the water in the reservoir, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint, or may, if they think fit, by order impose on the undertakers a penalty not exceeding £10 for every day during which such failure continues after the making of the order imposing the penalty (*n*).

Persons acting in pursuance of any such order are not to be deemed trespassers, and any person who wilfully obstructs any person so acting, or wilfully does or instigates or suffers to be done anything in contravention of the order, is liable for each offence to a penalty not exceeding £50 (*o*).

Costs and  
expenses.

**544.** The justices may order all or such part as they think fit of the cost of and incident to the applying for and obtaining of any such order to be paid by the undertakers, and also all or such part as the justices think fit of the expenses of the works and things executed in pursuance of any such order by any person other than the undertakers, to be paid by the undertakers to such person as the justices appoint. If, on the other hand, the justices think there is no sufficient ground of complaint, they may order the complainant to pay the whole or part of the costs (*p*).

Appeal.

**545.** The undertakers have a right of appeal from any of the above orders or determinations to the court of quarter sessions for the county or place where the cause of appeal arises, but the order or determination appealed against continues in force pending the appeal (*q*).

Protection to  
undertakers.

**546.** The undertakers are not liable to pay any damages,

(*m*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 5.

(*n*) *Ibid.* As to the form of these orders, see note (*l*), p. 295, *ante*.

(*o*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 7.

(*p*) *Ibid.*, s. 8. In the form in the schedule there is nothing said as to costs.

(*q*) *Ibid.*, s. 9. The court may either affirm or quash the order or determination, or make such other order as may seem fit, and may make such order as to the costs of the original proceedings and of the appeal as it thinks fit. The procedure on appeal is that prescribed by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), in the case of appeals in respect of penalties (Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 9); see title RAILWAYS AND CANALS, Vol. XXIII., p. 736. As to appeals to quarter sessions generally, see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

penalties, costs, charges, or expenses for or in respect of, nor are they answerable or accountable for any diminution or cessation of the supply of water or any other breach or non-performance of any of their duties, liabilities, or obligations under the special Act which may be occasioned by or result from the execution of any such order (*r*).

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SECT. 5.—*Protection of Water against Fouling.*

**547.** Many general enactments exist for the purpose of preventing the pollution of rivers and streams, and their enforcement is of great importance to water undertakers (*s*). Local Acts have been passed with the same object (*t*). Express provisions have also been made to prevent the water supply from being fouled or contaminated by the carrying on of works by other statutory undertakers (*a*). In addition to these, certain general provisions for guarding against fouling the water of the undertakers (*b*) are inserted in special Acts relating to water, while these Acts themselves often contain express provisions for the same purpose (*c*). General provisions.

**548.** Every person commits an offence and is liable to a penalty under the provisions of the Waterworks Clauses Act, 1847 (*d*), (1) who bathes in any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or washes, or throws, or causes to enter therein any dog or other animal; (2) who throws rubbish, dirt, filth, or other noisome thing into any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or washes or cleanses therein any cloth, wool, leather, or skin of any animal, or any clothes or other things; (3) who causes the water of any sink, sewer or drain, steam engine, boiler, or other filthy Offences.

(*r*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 10.

(*s*) As, for example, Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 17, 68, 69, 332; Public Health Act Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 47; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 52, 53; Rivers Pollution Prevention Acts, 1876 (39 & 40 Vict. c. 75) and 1893 (56 & 57 Vict. c. 31); Rivers Pollution Prevention (Border Councils) Act, 1898 (61 & 62 Vict. c. 34); see title WATERS AND WATERCOURSES, pp. 438 *et seq.*, *post*. Water undertakers have been authorised by their special Acts to enforce in default the Acts against river pollution; see Bury and District Joint Water Board Act, 1903 (3 Edw. 7, c. cexxxiv.).

(*t*) As, for example, Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.); Mersey and Irwell Joint Committee Act, 1892 (55 & 56 Vict. c. cxc.); West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.).

(*a*) Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 21—28; Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 52, 53; Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), ss. 51, 52; see title GAS, Vol. XV., pp. 359 *et seq.*; Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 20—22; see title BURIAL AND CREMATION, Vol. III., p. 517; see also titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 212; SEWERS AND DRAINS, Vol. XXV., pp. 731, 732. As to damage to works generally, see pp. 324, 325, *post*.

(*b*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 61—67 (see the text, *infra*); Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 16; see p. 321, *post*.

(*c*) See p. 298, *post*.

(*d*) 10 & 11 Vict. c. 17.



SECT. 5.  
Protection of Water  
against  
Fouling.

Fouling by  
gas.

Powers of  
undertakers.

water belonging to him or under his control, to run or be brought into any stream, reservoir, aqueduct or other waterworks belonging to the undertakers, or does any other act whereby the water of the undertakers is fouled (*e*).

The same Act imposes penalties on every person making and supplying gas within the limits of the special Act who causes the water of the undertakers to be fouled, and power is given to the undertakers to dig up and examine the gas pipes (*f*).

**549.** Various powers are now conferred upon the undertakers in special Acts to prevent the water being fouled. They are authorised to make and carry into effect agreements with the owners, lessees and occupiers of any lands within the drainage area of the reservoirs and works authorised by the special Act with reference to the execution by either party of such works as may be necessary for the purpose of draining such lands or any of them, or for more effectually collecting, conveying and preserving the purity of the waters authorised by the special Act to be diverted, collected, and appropriated by the undertakers, flowing to, upon or from such lands directly or derivatively into such reservoirs and works (*g*).

The undertakers are also authorised in some special Acts to hold lands acquired by them under the powers of their Act which they may deem necessary for the purpose of protecting their waterworks against pollution, fouling and contamination, and so long as such necessity continues the lands are not deemed to be superfluous lands within the meaning of the Lands Clauses Acts (*h*). In certain cases water undertakers have been authorised to acquire a very large portion or the whole of the catchment area in order to protect the supply. The power generally authorises such land to be acquired by agreement, but part may also be authorised to be taken compulsorily (*i*).

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 61. The penalty is, for each offence, to forfeit to the undertakers a sum not exceeding £5, and in respect of the last-mentioned offence, a further sum of 20s. for each day, if more than one, that it continues (*ibid.*). The undertakers have also power to cut off the pipes supplying water to persons contaminating their water (Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 16); see p. 322, *post*.

(*f*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 62—67; see title WATERS AND WATERCOURSES, p. 442, *post*. These provisions are almost identical with the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 21—28 (see title GAS, Vol. XV., pp. 360 *et seq.*); but while the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 21—28, apply only to gas undertakers in whose special Act they are incorporated, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 62—67, apply to all persons making or supplying gas whether under statutory powers or otherwise. For a form of notice by a local authority to a gas company of fouling its water supply, see Encyclopædia of Forms and Precedents, Vol. XV., p. 178.

(*g*) Model Water Bill, 1913, clause 6.

(*h*) *Ibid.*, clause 7. The undertakers must not create or permit a nuisance on any such lands nor erect any buildings thereon other than offices and dwellings for persons in their employ, and such buildings and works as may be incidental to or connected with their water undertaking (*ibid.*). As to superfluous lands, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*

(*i*) See Manchester Corporation Waterworks Act, 1879 (42 & 43 Vict. c. xxxvi.), ss. 9, 20, 21, 63; Liverpool Corporation Waterworks Act, 1880

**550.** A clause which has also been inserted in special Acts enables undertakers to make bye-laws for preventing the pollution, fouling or contamination of the water they are authorised to take. By these bye-laws they may prescribe the construction, maintenance and use of proper drains, sewers and works, and make provision for the prevention of any act or thing tending to pollution of the water (*k*). Such bye-laws are subject to the approval of the council of every district comprising any part of the area within which it is proposed that they are to be in force, but if such consent is withheld unreasonably, and the Local Government Board so considers, such consent becomes unnecessary. The owners and other persons interested in the lands are entitled to compensation if their lands are injuriously affected by reason of the restrictions in these bye-laws (*l*).

SECT. 5.  
Protection  
of Water  
against  
Fouling.

Bye-laws.

## Part IV.—Supply of Water by Undertakers.

### SECT. 1.—*In General.*

**551.** Undertakers authorised by special Act to supply water are required by the general Acts to afford within the prescribed area a supply for domestic purposes (*m*), for various public purposes (*n*), and for the extinction of fires (*o*). They are not required to supply water for non-domestic or trade purposes, but are authorised by the special Act to do so, provided that the supply for domestic purposes is not interfered with (*p*). Subject to the same proviso, and to certain other restrictions, undertakers are often allowed to supply water in bulk for any purpose beyond their prescribed area of supply (*q*).

Purposes of  
supply.

### SECT. 2.—*Domestic Supply.*

**552.** The undertakers must (*r*) provide and keep in their mains (*s*) a supply of pure and wholesome water sufficient for the

Water for  
domestic  
use.

(43 & 44 Vict. c. cxliii.); *Liverpool Corporation v. Chorley Union Assessment Committee*, [1913] A. C. 197 (rating of such lands).

(*k*) See Model Water Bill, 1911, clause 9. This clause is omitted in later model Bills, and was allowed only in respect of waterworks of large towns. The provisions in the Public Health Act, 1875 (38 & 39 Vict. c. 58), relating to urban bye-laws are made applicable to these bye-laws (Model Water Bill, 1911, clause 9); see also title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 388.

(*l*) Model Water Bill, 1911, clause 9, which also provides that the amount of the compensation in disputed cases is to be settled by arbitration in accordance with the Arbitration Act, 1889 (52 & 53 Vict. c. 49); see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*m*) See the text, *infra*.

(*n*) See pp. 303, 304, *post*.

(*o*) See pp. 304 *et seq.*, *post*.

(*p*) See pp. 312, 313, *post*.

(*q*) See p. 313, *post*.

(*r*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35.

(*s*) The words "in the pipes to be laid down by them" (*ibid.*) mean the main pipes, and do not include the service pipes (*Milnes v. Huddersfield Corporation* (1886), 11 App. Cas. 511). An injunction may be granted restraining undertakers supplying impure water (*A.-G. v. North Shields*

SECT. 2.  
Domestic  
Supply.

domestic use of all the inhabitants of the town or district within the limits of the special Act (*t*), who are entitled, as hereinafter mentioned, to demand a supply, and are willing to pay water rate for the same (*a*). In the absence of express provision in the special Act, water will be deemed to be pure and wholesome even if it contains ingredients which may, on passing through lead service pipes, cause the water to become deleterious (*b*).

Right to  
demand  
supply.

**553.** Every owner or occupier of any dwelling-house, or part of a dwelling-house, within the limits of the special Act is entitled, subject to certain conditions as to having laid or laying pipes (*c*) and paying or tendering the water rate payable in respect thereof (*d*) and to the provisions of the special Act, to demand and receive from the undertakers a sufficient supply of water for domestic purposes (*e*). The term "dwelling-house" is not limited to the dwelling-houses of private families, but may include lodging-houses (*f*), boarding-schools (*g*), and workhouses (*h*), provided that the supply is to be used for a domestic purpose.

*Waterworks Co.* (1892), *Times*, 12th May, C. A. (water obtained from a disused colliery); *A.-G. v. Rhymney and Aber Valley Gas and Water Co.* (1907), 71 J. P. 435 (reservoirs unfenced and polluted, and no filtration). As to the necessity of proceeding in the name of the Attorney-General, see *A.-G. v. Pontypridd Waterworks Co.*, [1908] 1 Ch. 388; and see also title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 100, 101. As to whether damages can be recovered, see *Milnes v. Huddersfield Corporation* (1886), 11 App. Cas. 511. A like provision as to supplying pure and wholesome water is contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 55; see p. 260, *ante*.

(*t*) As to the limits of the special Act, see pp. 276, 277, *ante*.

(*a*) As to rates, see pp. 313 *et seq.*, *post*.

(*b*) *Milnes v. Huddersfield Corporation*, *supra*. Special provisions are now occasionally inserted in special Acts providing for the treatment of the water to prevent it acting on lead pipes; see *Skipton Water and Improvement Act*, 1904 (4 Edw. 7, c. civ.), s. 16; *Northallerton Waterworks Act*, 1909 (9 Edw. 7, c. lxxxiii.), s. 19.

(*c*) As to communication pipes, see p. 307, *post*.

(*d*) See pp. 314 *et seq.*, *post*. This provision does not apply if the special Act provides that a supply in certain parts of the area is to be given on terms to be agreed (*Pitts v. Plymouth Corporation*, [1912] 3 K. B. 301). As to the payment where the premises are not rated, see *Postmaster-General v. Nenagh Urban District Council*, [1913] 1 I. R. 238.

(*e*) *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), ss. 44, 53. As to penalties, see *ibid.*, s. 43; p. 306, *post*. For a form of application and agreement for a supply of water by a water company for domestic purposes, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 185.

(*f*) *Pidgeon v. Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310. As to the liability of local authorities to see that lodging-houses are supplied with water, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 511, 512; as to the power of undertakers to supply water to lodging-houses on special terms, see *ibid.*, p. 540.

(*g*) *Frederick v. Bognor Water Co.*, [1909] 1 Ch. 149; *Barnard Castle Urban Council v. Wilson*, [1902] 2 Ch. 746, C. A.; *South-West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174 (poor law school).

(*h*) *Liskeard Union v. Liskeard Waterworks Co.* (1881), 7 Q. B. D. 505; *Chester Waterworks Co. v. Chester Union Guardians* (1908), 98 L. T. 701, C. A.; *Dublin Corporation v. South Dublin Guardians*, C. A. (undated), cited in *Michael and Will, Gas and Water*, 6th ed., pp. 495, 496. A workhouse is not, however, a "private dwelling-house," if that term is used in a special Act (*Bristol Guardians v. Bristol Waterworks Co.*, [1914]



**554.** No very definite meaning can be attached to the terms “domestic use” or “domestic purposes.” They include the use of water for the ordinary and reasonable purposes of domestic life (*i*), and, in the absence of provision in the special Act to the contrary, include the use of water for fixed baths, water-closets (*k*), urinals, hot water, heating, and fire hydrants (*l*), and for the watering of gardens forming part of the amenities of a house (*m*), or for the washing of horses and carriages kept for private use (*n*). Most special Acts contain provisions declaring that a supply for certain specific purposes is not to be deemed a supply for domestic purposes. The provision may take the form of a separate clause, or the object of the undertakers may be accomplished by the incorporation of the Waterworks Clauses Act, 1863 (*o*), which, however, is sometimes varied by other provisions. Under that Act a supply of water for domestic

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**Domestic Supply.**

Meaning of  
“domestic  
purposes.”

A. C. 379). As to whether a warehouse can be a dwelling house, compare *Cooke v. New River Co.* (1888), 38 Ch. D. 56, C. A., affirmed on another ground (1889), 14 App. Cas. 698. In some recent special Acts provision has been made for the water being supplied to certain public institutions by meter; see Selby Urban District Council Act, 1904 (4 Edw. 7, c. cxxxiii.), s. 19; Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 20; and pp. 317, 340, 341, *post*.

(*i*) *Barnard Castle Urban Council v. Wilson*, [1902] 2 Ch. 746, C. A., *per* ROMER, L.J., at p. 756; *Pidgeon v. Great Yarmouth Waterworks Co.*, [1902] 1 K. B. 310, *per* Lord ALVERSTONE, C.J., at p. 314; *South-West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174, *per* BUCKLEY, J., at p. 183; *Busby v. Chesterfield Waterworks and Gas Light Co.* (1858), E. B. & E. 176, *per* ERLE, J., at p. 182. As to the meaning of the expressions when used in other statutes, see *St. Martin's Vestry v. Gordon*, [1891] 1 Q. B. 61, C. A.; *Smith v. Müller*, [1894] 1 Q. B. 192.

(*k*) *Weaver v. Cardiff Corporation* (1883), 48 L. T. 906. In many special Acts the undertakers have power to charge additional rates in respect of baths and for certain water-closets, and in such cases the supply for such purposes will be excluded from the supply for domestic purposes included in the water rate (*Walker v. Lambeth Waterworks* (1894), 8 R. 622; *Sheffield Waterworks Co. v. Bingham* (1880), 25 Ch. D. 446, n.); but it may, nevertheless, be compulsory (*Sheffield Waterworks Co. v. Carter, Same v. Brooks* (1882), 8 Q. B. D. 632). There appears to be some doubt as to whether a private swimming-bath is a domestic purpose, but if attached to a school for the purpose of teaching swimming it would fall within a provision in a special Act excluding trade purposes from domestic use (*Barnard Castle Urban Council v. Wilson*, *supra*). As to the power of water undertakers to supply public swimming-baths with water at special rates, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 496. In some recent Acts the capacity of the bath which is included in domestic purposes is defined; see Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 25; p. 340, *post*.

(*l*) *South-West Suburban Water Co. v. St. Marylebone Union*, *supra*, *per* BUCKLEY, J., at pp. 181 *et seq.* Water for the supply of boilers for generating power would not be used for a domestic purpose (*ibid.*).

(*m*) *Grand Junction Waterworks Co. v. Davies*, [1897] 2 Q. B. 209; *Bristol Waterworks Co. v. Uren* (1885), 15 Q. B. D. 637; see *Brown v. Bristol Waterworks Co.* (1883), 41 Journal of Gas Lighting, 972, and *Low v. Lambeth Waterworks Co.* (1875), unreported, both cited in Michael and Will's Gas and Water, 6th ed., pp. 470, 471; and compare *West Middlesex Waterworks Co. v. Coleman*, *Coleman v. West Middlesex Waterworks Co.* (1885), 14 Q. B. D. 529.

(*n*) *Busby v. Chesterfield Waterworks and Gas Light Co.* (1858), E. B. & E. 176; as to motor cars, see note (*p*), p. 302, *post*.

(*o*) 26 & 27 Vict. c. 93.

SECT. 2.  
Domestic  
Supply.

purposes does not include a supply of water for cattle or for horses, or for washing carriages where such horses or carriages are kept for sale or hire, or by a common carrier, or a supply for any trade, manufacture, or business, or for watering of gardens, or for any ornamental purpose (*p*). If a trade or business is carried on in a house, the residents in such house are, under that provision, entitled to water for domestic purposes therein (*q*). It is common now to insert in Water Acts a provision that the undertakers are not to be bound to supply with water otherwise than by measure any building used by an occupier as a dwelling-house whereof any part is used by the same occupier for any trade or manufacturing purpose for which water is required (*r*). Water supplied for domestic purposes incidental to a trade is not water supplied for the purposes of such trade within the meaning of that provision (*s*), nor does such a provision extend to water supplied for non-domestic purposes to public institutions like workhouses (*t*). Such water is usually supplied and charged for by meter (*u*). Undertakers are also commonly authorised by their special Act to supply water for domestic purposes by measure (*a*); and this is done by agreement between them and the consumer (*b*).

Pressure.

**555.** The supply for the domestic use of the inhabitants must be constantly laid on at such a pressure as will make the water reach the top story of the highest houses within the said limits, unless it is provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure (*c*).

(*p*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12. Some of these purposes may be deemed domestic, others non-domestic, while a third class are trade purposes. Water used for washing a carriage or motor car used by a medical man in connexion with his practice is not used for a trade or business (*Harrogate Corporation v. Mackay*, [1907] 2 K. B. 611).

(*q*) *Barnard Castle Urban Council v. Wilson*, [1902] 2 Ch. 746, C. A.; *Chester Waterworks Co. v. Chester Union Guardians* (1908), 98 T. L. 701, C. A.; *South-West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174. The test laid down in these cases is the purpose for which the water is used and not the character of premises; see the cases cited in note (*s*), *infra*.

(*r*) See *Chester Waterworks Act*, 1874 (37 & 38 Vict. c. lxxv.), s. 22; *Model Water Bill*, 1913, clause 16; *Metropolitan Water Board (Charges) Act*, 1907 (7 Edw. 7, c. clxxi.), s. 20.

(*s*) *Chester Waterworks Co. v. Chester Union Guardians* (1908), 98 L. T. 701, C. A.; see *Colley's Patents, Ltd. v. Metropolitan Water Board*, [1912] A. C. 24; *South Suburban Gas Co. v. Metropolitan Water Board*, [1909] 2 Ch. 666; *Metropolitan Water Board v. Avery*, [1914] A. C. 118 (all cases decided under the *Metropolitan Water Board (Charges) Act*, 1907 (7 Edw. 7, c. clxxi.), as to which see p. 340, *post*). A distinction under that Act has been drawn in connexion with railways; see *Metropolitan Water Board v. London, Brighton, and South Coast Railway*, [1910] 2 K. B. 890, C. A.; but see *Colley's Patents, Ltd. v. Metropolitan Water Board*, *supra*, per Lord LOREBURN, L.C., at p. 29.

(*t*) *Chester Waterworks Co. v. Chester Union Guardians*, *supra*; compare *Bristol Guardians v. Bristol Waterworks Co.*, [1914] A. C. 379.

(*u*) *Chester Waterworks Co. v. Chester Union Guardians*, *supra*, and see the cases cited in note (*s*), *supra*.

(*a*) See *Model Water Bill*, 1913, clause 15. As to such an agreement, see *Southwark and Vauxhall Water Co. v. Dickenson* (1889), 5 T. L. R. 251, C. A.

(*b*) For a form of such agreement, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 190.

(*c*) *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 35. As to

**556.** The undertakers must cause pipes to be laid down and water to be brought to every part of the town or district within the limits of the special Act whereunto they are required by so many owners or occupiers of houses in that part of the town or district as that the aggregate amount of water rate payable by them annually, at the rates specified in the special Act, is not less than one-tenth part of the expense of providing and laying down such pipes. No such requisition is, however, binding on the undertakers unless such owners or occupiers severally execute an agreement binding themselves to take such supply for three successive years at least (*d*).

SECT. 2.  
Domestic  
Supply.

Laying of  
pipes.

If for twenty-eight days after demand in writing made to the undertakers, and tender made of an agreement, signed by such number of owners and occupiers as aforesaid, to take and pay for a supply of water for three years or more, the undertakers refuse or neglect to lay down pipes and to provide such supply of water as aforesaid, or as provided by the special Act, they become liable to forfeit to each of such owners and occupiers the amount of rate which he would be liable to pay under such agreement, and also the sum of forty shillings for every day during which they shall refuse or neglect to lay down such pipes or to provide such supply of water. The undertakers are not liable to any penalty for not supplying water if the want of such supply arises from frost, unusual drought, or other unavoidable cause or accident (*e*).

Failure to  
lay pipes.

### SECT. 3.—*Public Purposes.*

**557.** In all the pipes to which any fire-plug is fixed (*f*) the undertakers must provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident (*g*), or during necessary repairs, a sufficient supply of water for the following purposes: for cleansing the sewers and drains, for

Street  
cleansing etc.

when a special Act otherwise provides, see *Purnell v. Wolverhampton New Water Works Co.* (1861), 10 C. B. (N. S.) 576. These provisions do not extend to a supply in bulk (*Wombwell Urban District Council v. Dearne Valley Waterworks Co.* (1907), 71 J. P. 415); as to supply in bulk, see p. 313, *post*. Questions on constant supply also arise under the provisions of special Acts; see *Liverpool Corporation v. Brady* (1897), 14 T. L. R. 11; *Dublin Corporation v. Bray Township Commissioners*, [1900] 2 I. R. 88. As to penalties for not keeping the pipes charged under pressure, see *Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), s. 43; p. 306, *post*.

(*d*) *Waterworks Clauses Act, 1847* (10 & 11 Vict. 17), s. 35.

(*e*) *Ibid.*, s. 36; as to the penalties, see *ibid.*, s. 43. Unusual drought or excessive consumption in the district is a valid defence to proceedings for a penalty (*Industrial Dwellings Co. v. East London Waterworks Co.* (1894), 58 J. P. 430). The fact that a fire-plug is open and being used for extinguishing a fire is a good defence to a claim by another owner in respect of water from the same plug to extinguish another fire (*Campbell v. East London Waterworks* (1872), 26 L. T. 475). As to stoppage to repair a leak, see *Young v. Southwark and Vauxhall Water Co.* (1893), 69 L. T. 144.

(*f*) As to such pipes, see pp. 305 *et seq.*, *post*; as to injuries caused to persons falling over them, see pp. 311, 312, *post*.

(*g*) See note (*e*), *supra*.



SECT. 3.  
Public  
Purposes.

cleansing and watering the streets (*h*), and for supplying any public pumps, baths, or washhouses that may be established for the free use of the inhabitants, or paid for out of any poor rates or borough rates levied within the limits of the special Act (*i*). Such supply must be provided at such rates, in such quantities, and upon such terms and conditions as may be agreed upon by the persons having the control and management of the streets (*k*) and the undertakers, or, in case of disagreement, as shall be settled by two justices, until an inspector be appointed, and thereafter by such inspector (*l*).

Baths and  
washhouses.

The undertakers may also in their discretion grant and furnish supplies of water for public baths and washhouses, bathing places and swimming baths, either without charge or on such other favourable terms as they shall think fit (*m*). They have a like power in regard to lodging-houses provided under the Housing of the Working Classes Act, 1890 (*n*), Part III.

SECT. 4.—*Extinction of Fires.*

Fire-plugs in  
streets.

558. The undertakers, at the request of the persons having the control and management of the streets (*o*), must fix proper

(*h*) As to the powers of a local authority in respect of watering of streets, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 42; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 256, 257; as to street cleaning generally, see *ibid.*; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 608 *et seq.*

(*i*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 37. As to the power of a local authority to supply water for public baths or washhouses, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 65; p. 260, *ante*; as to the duty of sanitary authorities with regard to the water supply for water-closets, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 601; as to the power of local authorities to supply public lavatories with water, see *ibid.*, p. 602; as to the provision of baths and washhouses, open bathing places, and covered swimming baths, see *ibid.*, pp. 486 *et seq.*

(*k*) The expression used in the Act is "town commissioners," but that term is defined as the persons so defined in the special Act, and if none are so defined, then the persons having the control and management of the streets under any Act for paving or improving the town or district to be supplied with water under the special Act (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 3).

(*l*) *Ibid.*, s. 37. The word "inspector" is defined as meaning an officer appointed under any local Act relating to the town or district supplied with water under the special Act for the purpose of inspecting or superintending works connected with the paving, drainage, or supply of water of such town or district, or an officer appointed under any general Act for executing the like duties with respect to such town or district, together with other towns or districts (*ibid.*, s. 3). As to rates for watering public gardens, see *Metropolitan Board of Works v. New River Co.* (1877), 37 L. T. 124; as to supply to a public fountain, see *Hildreth v. Adamson* (1860), 8 C. B. (N. S.) 587; as to the construction of local Acts on supply for public purposes, see *Oldham Union Guardians v. Oldham Corporation* (1854), 2 W. R. 590; *Finchley Local Board v. Barnet District Gas and Water Co.* (1893), 9 T. L. R. 264.

(*m*) Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74), s. 28; Baths and Washhouses Act, 1878 (41 & 42 Vict. c. 14), s. 3; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 496.

(*n*) 53 & 54 Vict. c. 70, s. 69; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 540.

(*o*) See note (*k*), *supra*. It is the duty of urban authorities to cause

fire-plugs in the main and other pipes belonging to them at such convenient distances, not more than one hundred yards from each other (*p*), and at such places as may be most proper for the supply of water for extinguishing any fire which may break out within the limits of the special Act. Disputes as to the number and position of such fire-plugs are to be settled by two justices, or, if an inspector is appointed, by such inspector (*q*).

SECT. 4.  
Extinction  
of Fires.

**559.** The undertakers must from time to time renew and keep in effective order every such fire-plug; and as soon as any such fire-plug is completed they must deposit a key thereof at each place within the limits of the special Act where any public fire-engine is kept, and in such other places as may be appointed by the persons having the control and management of the streets, and must put up a public notice in some conspicuous place in each street in which such fire-plug is situated showing its situation. This notice the undertakers may put up on any house or building in such street (*r*).

Renewal of  
fire-plugs;  
provision  
of keys;  
  
indication  
of positions.

**560.** The cost of such fire-plugs, and the expense of fixing, placing, and maintaining them in repair and of providing the keys, must be defrayed by the persons having the control and management of the streets (*a*). Such persons are not, however, liable for these costs and expenses if the undertakers have placed the fire-plugs without being requested to do so (*b*).

Expenses.

**561.** The undertakers must also, at the request and expense of the owner or occupier of any work or manufactory situated in any street in which there is a pipe of the undertakers, place and maintain in effective order a fire-plug as near as conveniently may be to such work or manufactory. Such fire-plug may only be used for extinguishing fires (*c*).

Fire-plugs  
near works.

fire-plugs to be provided and maintained (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66; see p. 249, *ante*). As to the request by a local authority being under seal, see *Grand Junction Waterworks Co. v. Brentford Local Board*, [1894] 2 Q. B. 735, C. A., *per* LINDLEY, L.J., at p. 740. As to the liability of the undertakers for penalties for neglect to fix fire-plugs, see p. 306, *post*; as to the duties of local authorities in connexion with the provision of fire appliances generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 548 *et seq.*

(*p*) Unless another distance is prescribed in the special Act (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 38).

(*q*) *Ibid.* As to such inspector, see note (*l*), p. 304, *ante*. If any pipe is not of sufficient size to take a proper fire-plug, the justices cannot require the undertakers to lay a pipe that will be sufficient (*R. v. Wells Water Co.* (1886), 55 L. T. 188).

(*r*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 39. In urban districts it is the duty of the local authority to see that such marks are affixed (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 548, 549), and they are liable for damage due to error in the indication plate (*Dawson & Co. v. Bingley Urban Council*, [1911] 2 K. B. 149, C. A.).

(*a*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 40; see note (*k*), p. 304, *ante*.

(*b*) *Grand Junction Waterworks Co. v. Brentford Local Board*, *supra*.

(*c*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 41.

## SECT. 4.

**Extinction  
of Fires.**

Supply of  
water to  
fire-plugs.

**562.** The undertakers must at all times keep charged with water all their pipes to which fire-plugs are fixed, unless prevented by frost, unusual drought, or other unavoidable cause, or during necessary repairs, and at such a pressure as will make the water reach the top story of the highest house within the limits of supply (*d*), unless otherwise provided in the special Act (*e*). Failure to comply with this provision renders the undertakers liable to penalties, but not to an action for damages (*f*). The undertakers must allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same, but such gratuitous supply can only be taken from pipes of the undertakers to which fire-plugs have been affixed (*g*).

SECT. 5.—*Penalties for Failure to Supply.*

When  
penalties  
incurred.

**563.** The undertakers are liable to a penalty of £10 if, except when prevented as aforesaid (*h*), they (1) neglect or refuse to fix, maintain, or repair such fire-plugs; or (2) neglect or refuse to furnish to the persons having the control or management of the streets a sufficient supply of water for the public purposes aforesaid upon such terms as shall have been agreed on or settled as aforesaid (*i*); or (3) neglect to keep their pipes charged under such pressure as aforesaid (*j*); or (4) neglect or refuse to furnish a supply of water to any owner or occupier entitled under the special or incorporated Acts to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered (*k*). In addition to the said penalty, they forfeit to the persons having the control and management of the streets and to every person having paid or tendered the rate the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing has been given to the undertakers of the want of supply (*l*).

How far  
right of action  
affected.

If any person is injured by reason of the neglect or refusal of the undertakers in respect of any of the above matters, he cannot

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35.

(*e*) *Ibid.*, s. 42. As to unavoidable cause or accident, see note (*e*), p. 303, *ante*.

(*f*) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; *M'Colla v. Clacton-on-Sea Gas and Water Co.* (1889), 5 T. L. R. 690, C. A.; and compare *Clegg, Parkinson & Co. v. Earley Gas Co.*, [1896] 1 Q. B. 592; *Purnell v. Wolverhampton New Water Works Co.* (1861), 10 C. B. (N. S.) 576.

(*g*) *Weardale and Consett Water Co. v. Chester-le-Street Co-operative Society*, [1904] 2 K. B. 240 (where the water was taken from a service pipe, and there was no evidence that fire-plugs had been fixed in the company's mains).

(*h*) As to prevention by frost or drought etc., see the text, *supra*; note (*e*), p. 303, *ante*.

(*i*) See pp. 303, 304, *ante*.

(*j*) See p. 302, *ante*.

(*k*) As to rates and cutting off the supply of water, see pp. 314, 318, 319, *post*. In order that the penalty may be recovered, it is not enough that the supply should be insufficient: the supply must be completely interrupted (*Simpson v. South Oxfordshire Water and Gas Co.*, [1908] 1 K. B. 917). As to when penalties are recoverable, see *Sheffield Waterworks Co. v. Carter*, *Same v. Brooks* (1882), 8 Q. B. D. 632.

(*l*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 43.



recover damages in an action, but his remedy in respect of such injury is confined to the recovery of these penalties (*m*). In respect of matters for which a penalty is not specifically prescribed the remedy is by action for damages (*n*).

SECT. 5.  
Penalties  
for Failure  
to Supply.

#### SECT. 6.—*Communication or Service Pipes.*

##### SUB-SECT. 1.—*Duties of Undertakers.*

**564.** Before the owners and occupiers of premises can become entitled to demand a supply of water from the undertakers, communication or service pipes must be laid between the premises to be supplied and the mains of the undertakers. These may be laid by the owners or occupiers themselves, subject to the regulations and superintendence of the undertakers (*o*), but in regard to houses of small value the undertakers may be required to do this work at the expense of the owner or occupier (*p*). In laying these pipes, the undertakers have the same powers of breaking up the streets as they have in respect of their mains (*q*).

Provision of  
service pipes.

The general provisions in regard to the laying of these communication pipes apply also, with slight variations, to local authorities supplying water under their general powers; but they apply only in districts or parts of districts where the local authority lays any pipes for the supply of any of the inhabitants thereof (*r*).

**565.** The undertakers must upon the request of the owner of any dwelling-house (*s*) in any street in which pipes have been laid down by them (*t*), the annual value of which house does not exceed £10, or upon the request of the occupier, with the consent in writing of the owner or reputed owner of any such house or of the agent of any such owner (*a*), and upon payment or tender of

Small houses.

(*m*) See the cases cited in note (*f*), p. 306, *ante*. It is not clear that the person injured would not also be entitled to an injunction; see *Gale v. Rhymney and Aber Valleys Gas and Water Co.* (1903), 67 J. P. 430, C. A.; and compare *Weale v. West-Middlesex Waterworks* (1820), 1 Jac. & W. 358; *Low v. Lambeth Waterworks Co.* (1875), cited in Michael and Will's *Gas and Water*, 6th ed., p. 471.

(*n*) See the cases cited in note (*f*), p. 306, *ante*, note (*m*), *supra*; *Simpson v. South Oxfordshire Water and Gas Co.*, [1908] 1 K. B. 917; *Gale v. Rhymney and Aber Valleys Gas and Water Co.*, *supra*.

(*o*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 48—53.

(*p*) *Ibid.*, ss. 44—47. It is now a common provision in special Acts that the undertakers are not to be bound to supply more than one house by means of the same communication pipe; they may require a separate pipe to be laid from the main pipe into each house supplied by them by water (*Model Water Bill*, 1913, clause 12; see *Gale v. Rhymney and Aber Valleys Gas and Water Co.*, *supra*).

(*q*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28—34; see pp. 290, 291, *ante*. As to the distinction between mains and service pipes, see *Whittington Gas Light and Coke Co., Ltd. v. Chesterfield Gas and Water Board*, [1914] 1 Ch. 270, affirmed, [1914] 2 Ch. 146, C. A.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57; see p. 259, *ante*.

(*s*) As to the meaning of “dwelling-house,” see p. 300, *ante*.

(*t*) As to the rights of owners to require pipes to be laid by the undertakers in streets, see p. 303, *ante*.

(*a*) The words “with the consent in writing of the owner or reputed owner of any such house, or of the agent of such owner” are deemed to be omitted in the application of the provision in the text to local authorities

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the proportion of water rate in respect of such house by the special or incorporated Acts made payable in advance (*b*), lay down and keep in repair communication pipes and other necessary works for the supply of such house with water for domestic or other purposes, and thereupon the occupier of such house is entitled to have a sufficient supply of water for his domestic purposes from the undertakers (*c*). If the undertakers neglect or refuse to lay down such communication pipes or other works when the terms above mentioned have been complied with, they are liable to forfeit to the person making the request the sum of £5, and a further sum of 40s. for every day the refusal or neglect continues after seven days from the making of the request and tender (*d*).

Rent for  
service pipes.

**566.** The undertakers may charge for the pipes and works, in addition to the water rate, such reasonable annual rent as may be agreed upon or, in case of dispute, as shall be settled by two justices, or by an inspector when one is appointed (*e*). The rent is chargeable on and recoverable from the occupier, or on his default from the owner, of the house at the same times and in the same manner as water rates (*f*). Such pipes and other works are not subject to distress or to be taken in execution under process of law or sequestration in bankruptcy against the occupier or owner, unless he becomes the proprietor thereof (*g*).

Purchase of  
service pipes.

The owner or reputed owner of any house to which such communication pipes or other works have been laid by the undertakers may at any time become the proprietor thereof by paying off the amount then due to the undertakers in respect of the costs of providing and laying such pipes and works and all rent at that time due in respect thereof (*h*).

Failure to  
pay for water  
supply.

**567.** If the occupier for the time being of the house in which any communication pipes or other works or engines have been laid down by the undertakers refuses to pay for a supply of water, or if the house is unoccupied for twelve months, the undertakers may demand from the owner the amount of money expended

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supplying water under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*ibid.*, s. 57). They are also omitted in special Acts of local authorities; see Model Water Bill, 1913, clause 1. Any rent for pipes and works paid by an occupier under that provision may be deducted by him from any rent from time to time due from him to such owner (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57).

(*b*) As to payment of rates, see pp. 314, 316, *post*.

(*c*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 44; as to the meaning of "domestic purposes," see p. 301, *ante*; as to penalties for refusing to give a supply, see pp. 303, 306, *ante*.

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 45.

(*e*) As to an inspector, see p. 304, *ante*. In the case of local authorities supplying water under their general powers, such disputes are to be settled by a court of summary jurisdiction (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57).

(*f*) As to the recovery of water rates, see p. 318, *post*.

(*g*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 44; see title DISTRESS, Vol. XI., p. 141; and pp. 317, 318, *post*.

(*h*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 47. All further rent then ceases to accrue to the undertakers (*ibid.*).

by them in laying down the pipes, works and engines. If the owner after ten days' notice from the undertakers neglects or refuses to pay such money, the undertakers may enter the house and remove the pipes and works. The balance of the money, less the value of the pipes and works and arrears of rent in respect thereof, is recoverable, with the costs incurred, from the owner, or from the occupier for the time being, in the same manner as water rates. No greater sum, however, is recoverable from an occupier than the amount of rent for the time being owing by him, unless he refuse to disclose the amount of rent owing by him. The occupier is entitled to deduct from the rent payable by him the sum so recovered or which he shall have paid on demand (*i*).

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SUB-SECT. 2.—*Pipes to be Laid by Owners and Occupiers.*

**568.** Any owner or occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act who wishes water from the works of the undertakers brought into his premises, and who has paid or tendered to the undertakers the proportion of water rate in respect of such premises by the special or incorporated Acts directed to be paid in advance, may open the ground between the pipes of the undertakers and his premises, having first obtained the consent of the owners and occupiers of such ground (*j*), and lay any leaden or other pipes from such premises to communicate with the pipes of the undertakers (*k*). These pipes must be of a strength and material approved by the undertakers, or in case of dispute settled by two justices, or by an inspector when one is appointed (*l*).

Rights of  
owner or  
occupier.

**569.** Before an owner or occupier begins to lay any such pipe he must give the undertakers fourteen days' notice of his intention to do so (*m*); and before making the communication with the pipes of the undertakers he must give two days' notice to the undertakers of the day and hour when it is intended to make such communication (*n*).

Notices.

The communication must be made under the superintendence

Superintend-  
ence of  
surveyor.

(*i*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 46.

(*j*) As to his power to break up the streets, see p. 310, *post*. This, presumably, carries with it the right to lay the pipes in the subsoil of the street; see *Schweder v. Worthing Gas Light and Coke Co.* (No. 2), [1913] 1 Ch. 118. Apart from statutory powers, an owner of houses cannot lay pipes in the subsoil of streets without the consent of the owner of such subsoil, even with the consent of the local authority (*Goodson v. Richardson* (1874), 9 Ch. App. 221).

(*k*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 48.

(*l*) *Ibid.* Regulations or bye-laws are usually made by undertakers in respect of these pipes. The Local Government Board has issued a series of model bye-laws or regulations dealing with this and other matters in regard to which undertakers have power to make bye-laws.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 48. For a form of notice, compare *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 161, 162; for a form of consent by the owner or occupier of the intervening ground, see *ibid.*, p. 160.

(*n*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 49. For a form of notice, compare *Encyclopædia of Forms and Precedents*, Vol. XV., p. 162.



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Bore of  
service pipes.

Removal of  
service pipes.

Power to  
break up  
pavement.

and according to the directions of the surveyor or other officer appointed for the purpose by the undertakers, unless he fails to attend at the time mentioned in the said notice (o).

The bore of any such communication pipe must not exceed the prescribed limits, and where no limits are prescribed it must not exceed half an inch, except with the consent of the undertakers (p). This restriction must, however, be subject to the right of the owner or occupier of a dwelling-house to have a sufficient supply of water for domestic purposes (q).

**570.** Any person who has laid down any pipe or other works, or who has become the proprietor thereof, may remove the same after having first given six days' notice in writing to the undertakers of his intention to do so and of the time of such proposed removal. He must also make compensation to the undertakers for any injury or damage to their pipes caused by the removal (r).

**571.** Any owner or occupier may open or break up so much of the pavement(s) of any street as is between the pipe of the undertakers and his house, building, or premises, and any sewer or drain therein, for any of the above purposes (t). He must do as

(o) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 49. Disputes as to the manner in which such pipe shall be made to communicate are settled by two justices, or by the inspector where one is appointed (*ibid.*). In the case of local authorities supplying water under their general powers the dispute is settled by a court of summary jurisdiction (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 57). If the communication is properly made, and the undertakers subsequently cut the connexion, they are liable for damages in respect of trespass and to be restrained by injunction from preventing the communication from being made; in this case the remedy is not recovery of a penalty for failure to supply water (*Gale v. Rhymney and Aber Valleys Gas and Water Co.* (1903), 67 J. P. 430, C. A.). The cost of certain works, such as valves to regulate the supply, if inserted in communication pipes to suit the requirements of the undertakers, may be payable by the undertakers (*Ward v. Folkestone Waterworks Co.* (1890), 24 Q. B. D. 334).

(p) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 50.

(q) Thus, in the absence of provision to the contrary, the owner or occupier may lay several pipes of the prescribed bore (*South-West Suburban Water Co. v. St. Marylebone Union*, [1904] 2 K. B. 174, per BUCKLEY, J., at p. 184; *Dublin Corporation v. South Dublin Guardians*, C. A. (undated), cited in Michael and Will's Gas and Water, 6th ed., p. 495).

(r) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 51. For a form of notice, compare Encyclopædia of Forms and Precedents, Vol. XV., p. 162. Removal of the pipes or works without giving such notice to the undertakers makes the person so doing liable to forfeit to the undertakers a sum not exceeding £5 over and above the damage to their pipes and works, damages for which can be recovered by action (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 51).

(s) The word "pavement" is not confined to the foot pavement (*Glover v. East London Water Works Co.* (1868), 16 W. R. 310).

(t) It is only for the above purposes, namely, for the laying or removal of service pipes and works, that an owner or occupier may open or break up a street. Only the undertakers may do so for purposes of repair, except where the right to do so is conferred on owners by statute, as for instance by the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 19; see pp. 339, 340, *post*. An owner may, however, open or break up a street to

little damage as possible, and make compensation for any damage done in the execution of any such work (*u*). Every such owner or occupier desiring to break up the pavement of any street, or any sewer or drain therein, is subject to the same necessity of giving previous notice to the persons having the control or management of the same, and to the same control, restriction, and obligations in and during the time of breaking up and reinstating, and to the same penalties for any delay in regard thereto, as the undertakers are subject to by virtue of the special Act and the Acts incorporated therewith (*a*).

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No owner or occupier of premises may make any alteration in any communication or service pipe, or in any apparatus connected therewith, without the consent of the undertakers (*b*).

Alteration  
in service  
pipes.

SUB-SECT. 3.—*Liability for Defective Works in Streets.*

**572.** Where the undertakers, in the performance of their statutory duties, place a fire-plug (*c*) or stopcock (*d*) in a street, and persons are injured by falling over the fire-plug or stopcock, either because of its defective condition, or because of the defective state of the highway in which it is placed (*e*), the liability of the undertakers depends upon whether or not they have been guilty of

Tripping over  
fire-plugs  
etc.

lay a communication pipe to connect indirectly with the pipes of the undertakers through another service pipe if the undertakers consent (*Pearson v. Tenterden Corporation* (1910), 74 J. P. 405). As to breaking up to restore a connexion which has been severed, see *Sheffield Waterworks Co. v. Wilkinson* (1879), 4 C. P. D. 410.

(*u*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 52.

(*a*) *Ibid.* As to these provisions, see *ibid.*, ss. 29—34; and pp. 274, 291, *ante*. The owner is therefore liable for improper reinstatement (*Glover v. East London Water Works Co.* (1868), 16 W. R. 310). For a form of notice of intention to break up pavement, compare *Encyclopædia of Forms and Precedents*, Vol. XV., p. 163.

(*b*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 19; see p. 323, *post*. It is still a doubtful question whether an owner of premises or the undertakers are liable to repair communication pipes in the absence of provision in the special Act. As to the special provisions in the metropolitan area, see pp. 339, 340, *post*. If the undertakers break up the street, an owner may be liable to pay the cost of repairing a leak (*Grand Junction Waterworks Co. v. Rodocanachi*, [1904] 2 K. B. 230, distinguishing *Chapman v. Fylde Waterworks Co.*, [1894] 2 Q. B. 599, C. A.). If the undertakers do the work, they cannot recover from the owner of the premises unless they show that he is the owner of the pipe (*Colne Valley Water Co. v. Hall* (1907), 72 J. P. 25, C. A.); and it is doubtful if they can recover then (*ibid.*; see S. C. (1907), 71 J. P. 173). On the other hand, if the owner or occupier does the repair, he cannot recover the cost from the undertakers unless he proves that they are the owners of the pipe (*Parnell v. Portsmouth Waterworks Co.* (1910), 75 J. P. 99).

(*c*) See pp. 304, 305, *ante*.

(*d*) See p. 292, *ante*.

(*e*) The same principles apply to damage caused by the bursting of fire-plugs; see *Hancock v. Southwark and Vauxhall Waterworks Co.*, [1889] W. N. 198; *Steggles v. New River Co.* (1865), 13 W. R. 413, Ex. Ch., where it was held that a water company must take precautions to prevent bursting from ordinary frost. A water company will not, however, be liable for bursting due to exceptional frost (*Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781).

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negligence (*f*). They are not, therefore, liable if the fire-plug or stopcock has been properly laid and constructed in the first instance, and has been maintained in a reasonably proper condition, and the injury is caused by the fire-plug or stopcock subsequently projecting above the pavement solely by reason of the ordinary wearing away of the highway (*g*). To render them liable it must be shown that the fire-plug or stopcock was improperly laid or constructed (*h*), or that the pavement was improperly reinstated (*i*), or that they have failed to keep the fire-plug or stopcock in proper repair (*k*). In the case of a stopcock, they are liable for failure to repair it even though it belongs to the owner of the house supplied, provided that the duty to repair is not cast upon the owner (*l*). If, however, the duty of keeping it in repair is cast upon the owner of the house (*a*), the undertakers are not liable (*b*).

SECT. 7.—*Water for Trade and Non-domestic Purposes.*

Extent of  
right to be  
supplied.

**573.** Undertakers are commonly authorised to supply water for trade and other non-domestic purposes on such terms and conditions as they think fit. No person, however, is entitled to a supply of water for other than domestic purposes if such supply would interfere with the sufficiency of the supply for domestic purposes (*c*). The water is usually supplied by measure, and the special Act

(*f*) See, generally, titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 133 *et seq.*, 153; NEGLIGENCE, Vol. XXI., pp. 376 *et seq.*; and compare *Blagrove v. Bristol Waterworks Co.* (1856), 1 H. & N. 369; *Cattle v. Stockton Waterworks* (1875), L. R. 10 Q. B. 453. As to the liability of the undertakers for nuisance, see p. 278, *ante*; titles NUISANCE, Vol. XXI., pp. 525 *et seq.*; WATERS AND WATERCOURSES, p. 456, *post*.

(*g*) *Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462, C. A.; compare *Kent v. Worthing Local Board* (1882), 10 Q. B. D. 118, overruled by *Thompson v. Brighton Corporation*, *Oliver v. Horsham Local Board*, [1894] 1 Q. B. 332, C. A.

(*h*) *Hendra v. Chelsea Waterworks Co.* (1891), 8 T. L. R. 101; *Osborn v. Metropolitan Water Board* (1910), 102 L. T. 217.

(*i*) *Hartley v. Rochdale Corporation*, [1908] 2 K. B. 594.

(*k*) *Bayley v. Wolverhampton Waterworks Co.* (1860), 6 H. & N. 241; *Stockings v. Lambeth Waterworks Co.* (1891), 7 T. L. R. 460, C. A.; *Rosenbaum v. Metropolitan Water Board* (1910), 103 L. T. 284; S. C., 103 L. T. 739, C. A., where a new trial was ordered; compare *Blackmore v. Mile End Old Town Vestry* (1882), 9 Q. B. D. 451, C. A.; *Strute v. Southwark and Vauxhall Water Co.* (1889) 53 J. P. 424.

(*l*) *Strute v. Southwark and Vauxhall Water Co.*, *supra*; *Chapman v. Fylde Waterworks Co.*, [1894] 2 Q. B. 599, C. A.; compare *Colne Valley Water Co. v. Hall* (1907), 98 L. T. 398, C. A. As to the right of the owner to open the street to repair, see note (*t*), p. 310, *ante*; and as to his liability to repair, see note (*b*), p. 311, *ante*.

(*a*) As, for instance, by the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 19; see p. 340, *post*.

(*b*) *Batt v. Metropolitan Water Board*, [1911] 2 K. B. 965, C. A., distinguishing *Chapman v. Fylde Waterworks Co.*, *supra*; *Stacey v. Gas Light and Coke Co.*, *Metropolitan Water Board and West End Tailoring Co.* (1910), 9 L. G. R. 174.

(*c*) See Model Water Bill, 1913, clause 15. As to the distinction between domestic and non-domestic purposes, see p. 301, *ante*. Water required for domestic purposes in a workshop or factory, or like place, is not water required for trade purposes; see p. 302, *ante*. Local authorities, under their general powers, can also supply water for trade and non-domestic purposes; see p. 260, *ante*; see also Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 122, 123, which apply when incorporated.



prescribes a limit of price per 1,000 gallons (*d*). Where the undertakers are authorised by their special Act to supply water for other than domestic purposes, they are not liable, in the absence of express stipulation under any agreement for such supply, to any penalty or damages for not supplying such water, if the want of such supply arises from frost, unusual drought, or other unavoidable cause or accident (*e*).

SECT. 7.  
Water for  
Trade and  
Non-  
domestic  
Purposes.

SECT. 8.—*Supply in Bulk.*

**574.** Undertakers are also commonly authorised to supply water in bulk outside their limits of supply, and to enter into agreements for the purpose with any local authority, company or persons. The supply may be for any purpose and for such remuneration and on such terms and conditions and for such period as may be agreed upon (*f*). It is provided, however, that such supply is not to be given except with the consent of any company or person supplying water under parliamentary authority within the area to be supplied and of the local authority of the district comprising that area, or if and so long as such supply would interfere with the supply of water for domestic purposes within the limits of the special Act (*g*). Any water company may also contract to supply water to any local authority (*h*), or to another company within its area, who will distribute it (*i*).

Supply outside limits.

SECT. 9.—*Charges for Supply.*

SUB-SECT. 1.—*Water Rates.*

**575.** The charge made for water supplied for domestic purposes does not usually depend upon the quantity consumed, but takes the form of a rate based upon the value of the premises to which the supply is given (*k*). The special Act may also authorise the

Rate based on value of premises.

(*d*) Model Water Bill, 1913, clause 17; as to the supply of meters and recovery of price, see pp. 317, 318, *post*.

(*e*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 13; as to such unavoidable causes, see p. 303, *ante*.

(*f*) Model Water Bill, 1913, clause 23. For a form of agreement to supply water outside the district of the undertakers, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 199. As to the construction of such an agreement in relation to pressure, see *Wombwell Urban District Council v. Dearne Valley Waterworks Co.* (1907), 71 J. P. 415; *Soothill Upper Urban Council v. Wakefield Rural Council*, [1905] 2 Ch. 516, C. A. A local authority agreeing to take a supply of water may, in the absence of stipulation to the contrary, sell part of it at a profit to another authority (*Halifax Corporation v. Soothill Upper Local Board* (1874), 31 L. T. 6). Local authorities have also power to supply water in bulk to adjoining authorities (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 61; see p. 261, *ante*).

(*g*) Model Water Bill, 1913, clause 23; see p. 300, *ante*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 63. For a form of agreement, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 195.

(*i*) *Ticehurst and District Water and Gas Co., Ltd. v. Gas and Waterworks Supply and Construction Co., Ltd.* (1911), 55 Sol. Jo. 459.

(*k*) A water rate is not a rate in the sense of being a local tax (*Northampton Corporation v. Ellen*, [1904] 1 K. B. 299, C. A.; *Smith v. Birmingham (Churchwardens etc.)* (1888), 22 Q. B. D. 211, 703). It is defined as

SECT. 9. undertakers to charge, in addition to the rate, certain fixed sums for every water-closet beyond the first, and for fixed baths and other services (*l*).  
 Charges for Supply.

Annual value.

**576.** Under the provisions of the Waterworks Clauses Act, 1847 (*m*), the water rates, except as otherwise provided, must be paid by and are recoverable from the person requiring, receiving, or using the supply of water, and are payable according to the annual value of the tenement supplied with water (*n*). Any dispute arising as to such value is determined by two justices (*o*). Such determination, in the case of a *bonâ fide* dispute, must be made before the rates can be recovered (*p*), and undertakers may be restrained from cutting off the water supply for non-payment of rates while such a dispute is pending (*q*). The expression "annual value," in the absence of other provision in the special Act, means the net annual value, that is to say, the gross value after deducting the burdens the premises have to bear (*r*), and it is the net annual value of the premises as they stand and are occupied (*s*). In some

including "any rent, reward, or payment to be made to the undertakers for a supply of water" (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 3). A rent for water supplied under an agreement with a local authority, made pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 56 (see p. 262, *ante*), is a rate within the meaning of *ibid.*, s. 256; see title RATES AND RATING, Vol. XXIV., p. 29. A covenant by a lessor to pay all rates and taxes, in some cases includes a water rate for domestic purposes; see title LANDLORD AND TENANT, Vol. XVIII., p. 492; *Spanish Telegraph Co. v. Shepherd* (1884), 13 Q. B. D. 202; *Badcock v. Hunt* (1888), 22 Q. B. D. 145, C. A.; *Bourne and Tant v. Salmon and Gluckstein, Ltd.*, [1907] 1 Ch. 616, C. A.

(*l*) See Model Water Bill, 1913, clause 10. A closet connected with the sewers, but to which water is not laid on, is not chargeable as a water-closet (*Roberts v. South Essex Waterworks Co.* (1903), 67 J. P. 404). As to supply at a high level, see *West Middlesex Water-works Co. v. Suwerkrop* (1829), 4 C. & P. 87.

(*m*) 10 & 11 Vict. c. 17.

(*n*) *Ibid.*, s. 68. As to the time of payment, see p. 316, *post*.

(*o*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68.

(*p*) *New River Co. v. Mather* (1875), L. R. 10 C. P. 442. Justices can, however, determine the annual value in the same proceedings as are taken for the recovery of the rate (*Lea v. Abergavenny Improvement Commissioners* (1885), 16 Q. B. D. 18). If the special Act authorises a minimum lump sum to be charged, as alternative to a rate, this sum can be recovered although there may have been a dispute as to the annual value (*Colne Valley Water Co. v. Treharne* (1884), 48 J. P. 279).

(*q*) *Hayward v. East London Waterworks Co.* (1884), 28 Ch. D. 138; compare *Postmaster-General v. Nenagh Urban District Council*, [1913] 1 I. R. 238. The owner or occupier must act with reasonable diligence to have the value determined (*ibid.*). Until the amount is determined the owner or occupier cannot recover the excess paid, or recover penalties for non-supply (*Whiting v. East London Waterworks Co.* (1884), Cab. & El. 331; compare *Slater v. Burnley Corporation* (1888), 59 L. T. 636; *Slater v. Burnley Corporation* (No. 2) (1889), 53 J. P. 535).

(*r*) *Dobbs v. Grand Junction Waterworks Co.* (1883), 9 App. Cas. 49; *Warrington Waterworks Co. v. Longshaw* (1882), 9 Q. B. D. 145; and see *Rook v. Liverpool Corporation* (1859), 7 C. B. (N. S.) 240; *R. v. Dodd* (1865), L. R. 1 Q. B. 15; *R. v. Bilston* (1865), L. R. 1 Q. B. 18; *Sheffield Water-works Co. v. Bennett* (1873), L. R. 8 Exch. 196, Ex. Ch.

(*s*) Thus, if they are occupied as a public-house, the rate for domestic

special Acts other terms are used, such as “rent” or “annual rent,” but these, in the absence of qualifying provisions, mean net annual value (*t*).

SECT. 9.  
Charges for  
Supply.

**577.** In more recent special Acts the water rate for domestic purposes is based on the rateable value ascertained by the valuation list in force at the commencement of the quarter for which the rate accrues, or, if there is no such list in force, then by the last rate made for the relief of the poor (*a*). The special Act provides the maximum rates which the undertakers may charge, and these rates are frequently proportionately smaller as the premises increase in value (*b*). In the absence of special provision, undertakers are not bound to charge equal rates to owners or occupiers of houses of the same value (*c*).

Rateable  
value.

**578.** When several houses or parts of houses in the separate occupation of several persons are supplied by one common pipe, the several owners or occupiers of such houses or parts of houses are liable to the payment of the same rates for the supply of water

Houses  
supplied by  
common pipe.

purposes is based on the annual value of the house as licensed premises (*West Middlesex Waterworks Co. v. Coleman*, *Coleman v. West Middlesex Waterworks Co.* (1885), 14 Q. B. D. 529; compare *Airdrie, Coalbridge and District Water Trustees v. Flanagan* (1906), 8 F. (Ct. of Sess.) 932). A garden attached to a house is taken into account in estimating the value (*Bristol Waterworks Co. v. Uren* (1885), 15 Q. B. D. 637; *Grand Junction Waterworks Co. v. Davies*, [1897] 2 Q. B. 209). As to the supply of water for watering a garden, see p. 302, *ante*.

(*t*) *Sheffield Waterworks Co. v. Bennett* (1873), L. R. 8 Exch. 196, Ex. Ch.; and see the cases cited in note (*s*), p. 314, *ante*; compare also *Rose v. Watson*, [1894] 2 Q. B. 90; *Smith v. Birmingham Corporation* (1883), 11 Q. B. D. 195, which must, however, be read subject to *Dobbs v. Grand Junction Waterworks Co.* (1883), 9 App. Cas. 49. The expression “annual rack-rent” has been given different meanings according to the context; see *Bristol Waterworks Co. v. Uren*, *supra*; *Stevens v. Barnett Gas and Water Co.* (1888), 57 L. J. (M. C.) 82; *Wilkinson v. Bury Water Board* (1905), 92 L. T. 417. Where the provisions in two special Acts make the basis of charge ambiguous, the one more in favour of the public will be adopted (*South Staffordshire Waterworks Co. v. Barrow* (1897), 61 J. P. 661, C. A.); compare title STATUTES, Vol. XXVII., p. 153. As to the interpretation of conflicting enactments generally, see *ibid.*, pp. 136, 138, note (*e*), 139 *et seq.* As to valuation in the Metropolis, see pp. 346, 347, *post*.

(*a*) Model Water Bill, 1913, clause 10. If the water rate is chargeable on the rateable value of a part only of any hereditament entered in the valuation list, such rateable value must be fairly apportioned to the part, the apportionment in case of dispute to be ascertained by a court of summary jurisdiction (*ibid.*); see also Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 56; Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 13; and p. 262, *ante*, p. 347, *post*. As to the valuation list, see title RATES AND RATING, Vol. XXIV., pp. 47 *et seq.*; as to the rateable value of property for poor rate, see *ibid.*, pp. 25 *et seq.*; as to payment where premises do not appear in the valuation list, see *Postmaster-General v. Nenagh Urban District Council*, [1913] 1 I. R. 238.

(*b*) Model Water Bill, 1913, clause 10.

(*c*) Thus, they may charge the houses in one part of their district at a higher rate than in another, provided that they do not exceed the prescribed maximum rate (*Northampton Corporation v. Ellen*, [1904] 1 K. B. 299, C. A.; compare *Hungerford Market Co. v. City Steamboat Co.* (1860), 3 E. & E. 365).



SECT. 9.  
Charges for  
Supply.

When owner  
liable.

Dates of  
payment.

as they would be liable to if each house or part was supplied with water from the works of the undertakers by a separate pipe (*d*).

**579.** The owners of all dwelling-houses or parts of dwelling-houses occupied as separate tenements, the annual value of which houses or tenements does not exceed the sum of £10, are liable to the payment of the rates instead of the occupiers thereof. The provisions for the recovery of rates from occupiers apply to the owners of such houses and tenements (*e*). In recent special Acts it has been provided that in the case of houses let to monthly or weekly tenants, or tenants holding for any period less than a quarter of a year, the undertakers may require the owner, instead of the occupier, to pay the rate; but it may be recovered from the occupier, and may be deducted by him from the rent due from time to time from him to the owner (*f*).

**580.** The rates are payable in advance by equal quarterly payments at Christmas Day, Lady Day, Midsummer Day and Michaelmas Day, and the first payment must be made at the time when the pipe by which the water is supplied is made to communicate with the pipes of the undertakers, or at the time when the agreement to take water from the undertakers is entered into (*g*). An occupier who takes possession in the course of a quarter is only liable from the day of his occupation, and for so much of that quarter's rate as is proportionate to the length of the occupation (*h*).

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 69. As to the power of the undertakers to refuse supply by a common pipe, see note (*p*), p. 307, *ante*.

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72. The person receiving the rents of any such house or tenement from the occupier, either on his own account or as agent or receiver for any person interested therein, is to be deemed the owner of such house or tenement (*ibid.*). The person who collects the rents for a mortgagor or receiver, and not the receiver or mortgagor, is, therefore, to be deemed the owner (*Metropolitan Water Board v. Brooks* (1910), 75 J. P. 41, C. A.). An owner who pays the rates under this provision may be liable in respect of waste of the water supplied (*Brock v. Harrison*, [1899] 1 Q. B. 958). In the area of the Metropolitan Water Board the limit has been raised to £20 rateable value (*Metropolitan Water Board (Charges) Act, 1907* (7 Edw. 7, c. clxxi.), s. 4). Where an owner, under the provision in the text, pays any such rate in respect of a house or part thereof occupied by a tenant under any lease or agreement made previously to the passing of the special Act, the tenant must repay to the owner all sums so paid by him during the continuance of the lease, unless the owner has agreed to pay the water rates. Such sums can be recovered as arrears of rent (*Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), s. 73). As to cutting off the supply from such houses for non-payment, see p. 320, *post*.

(*f*) See Model Water Bill, 1913, clause 11. No greater sum may be recovered at any one time from any such occupier than the amount of rent owing by him, or which has accrued due from him subsequent to the service upon him of a notice to pay the rate (*ibid.*).

(*g*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 70. As to the dates of payment in the Metropolis, see note (*f*), p. 348, *post*; as to the right of the undertakers to recover under a special Act before their works are completed, but where a supply has been given, see *Sidebottom v. Glossop Reservoir Commissioners* (1847), 1 Exch. 611, Ex. Ch.

(*h*) *East London Waterworks Co. v. Foulkes*, [1894] 1 Q. B. 819 (where

**581.** The occupier of any dwelling-house or part of a dwelling-house liable to the payment of any water rate who gives notice (i) of his intention to discontinue the use of the water supplied by the undertakers, or who removes from his dwelling between any two quarterly days of payment, must pay the water rate in respect of such dwelling-house or part of a dwelling-house for the quarter ending on the quarterly day of payment next after his quitting the same or giving such notice (k). Where the owner is required to pay the rate in respect of small tenements, his liability ceases on the quarterly day of payment next after the house has become unoccupied (l).

SECT. 9.  
Charges for  
Supply.

Payment on  
removal.

SUB-SECT. 2.—*Supply by Meter.*

**582.** Special Acts commonly authorise undertakers to supply water by measure either for domestic or other purposes, and provide that the moneys payable in respect thereof are recoverable in the same manner as water rates, and the maximum price per gallon is prescribed (m). If a person desires to be so supplied, he must measure the amount supplied at his own expense and record that measurement (n).

Power to  
supply by  
measure.

**583.** Where the undertakers are so authorised to supply by measure, they may let for hire (o) to any consumer so supplied any meter or instrument for measuring the quantity of water supplied and consumed, and any pipes and apparatus for the conveyance, reception and storage of water, for such remuneration in money as may be agreed upon between them and the consumer, which remuneration is recoverable in the same manner as water rates. These meters, instruments, pipes, and apparatus are not subject to distress for rent of the premises where the same are used; nor are they liable to be attached or taken in execution under any process of law, or in pursuance of any proceedings in bankruptcy, against the consumer of the water or the occupier

Hire of  
apparatus.

it was held to be immaterial that the company was unaware that the premises were unoccupied).

(i) In recent special Acts it is provided that such notice of discontinuance has no effect unless it is in writing, signed by or on behalf of the consumer, and left at or sent by post to the office of the undertakers; see Model Water Bill, 1913, clause 13; Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 30. For form of notice, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 164.

(k) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 71.

(l) *British Empire Mutual Life Assurance Co. v. Southwark and Vauxhall Water Co.* (1888), 59 L. T. 321.

(m) See Model Water Bill, 1913, clauses 15, 17. As to agreements fixing the price, see *Southwark and Vauxhall Water Co. v. Dickenson* (1889), 5 T. L. R. 251, C. A.; as to recovery, see p. 318, *post*.

(n) *Sheffield Waterworks Co. v. Bingham* (1883), 25 Ch. D. 443; *Sheffield Waterworks Co. v. Bingham (J. E.)* (1880), 25 Ch. D. 446, n.; *Sheffield Waterworks v. Carter, Same v. Brooks* (1882), 8 Q. B. D. 632; *Dublin Corporation v. Bray Township Commissioners*, [1900] 2 I. R. 88.

(o) Recent special Acts also authorise undertakers to sell meters and any fittings connected therewith, upon and subject to such terms, pecuniary or otherwise, and conditions as they think fit; see Model Water Bill, 1913, clauses 18, 21.

SECT. 9. of the premises or other person in whose possession they may be (*p*).

#### Supply.

Right of entry.

**584.** The officers of the undertakers may enter any house, building or lands, to, through, or into which water is supplied by them by measure, in order to inspect the meters, instruments, pipes, and apparatus for the measuring, conveyance, reception, or storage of water, or for the purpose of ascertaining the quantity of water supplied or consumed. They may also from time to time enter for the purpose of removing any meter etc. the property of the undertakers. If any person hinders any such officer from entering, or making such inspection, or effecting such removal, he is liable to a penalty not exceeding £5 for each offence, but, except with the consent of a justice, this power of entry may only be exercised between the hours of 10 a.m. and 4 p.m. (*q*).

Interference with pipes or meters.

**585.** Special Acts also make persons liable to penalties who wilfully, fraudulently, or by culpable negligence injure, or suffer to be injured, any pipe, meter or other instrument for measuring water, or any other fittings belonging to the undertakers, and also who fraudulently alter the index of any such meter or instrument, or prevent it properly registering the amount of water supplied (*r*).

#### SUB-SECT. 3.—*Recovery of Rates and Charges.*

Recovery by action.

**586.** If any person refuses or neglects to pay to the undertakers any rate or sum due to them under their special Act, they may recover the same with costs in any court of competent jurisdiction (*s*).

Cutting off supply.

**587.** If any person supplied with water by the undertakers, or liable under the special or incorporated Acts to pay the water

(*p*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 14; see title DISTRESS, Vol. XI., p. 141; and p. 308, *ante*. Recent water Acts extend the provisions of this enactment so as to authorise the undertakers to let for hire any water fittings to any person supplied by them with water; fittings are protected from distress and execution if conspicuously marked as belonging to the undertakers; see Model Water Bill, 1913, clause 21.

(*q*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 15.

(*r*) See Model Water Bill, 1913, clause 20. The undertakers may also recover the damage sustained by them, and may enter the premises of the offender and repair the injury, and do such things as are necessary to ensure the proper registering of the water supplied, and the expense of doing so is payable by the person offending and may be recovered as water rates (*ibid.*). Any person connecting or disconnecting any meter may also be required to give twenty-four hours' notice in writing to the undertakers of his intention to do so, and all alterations or repairs, and the connecting or disconnecting of meters, must be done at his expense, and under the superintendence of an officer of the undertakers; otherwise he may be liable to a penalty not exceeding 40s. (*ibid.*, clause 19).

(*s*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21. The remedy under this provision is in addition to any other remedies for the recovery of these rates or sums (*ibid.*). As to a remedy by distress under a special Act, see *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660. As to the jurisdiction of the courts, generally, see titles COUNTRY COURTS, Vol. VIII., pp. 428 *et seq.*; COURTS, Vol. IX., pp. 52 *et seq.*



SECT. 9.  
Charges for  
Supply.

rate (*t*), neglects to pay the same at any of the designated times of payment (*a*), the undertakers may, except in the cases mentioned hereafter (*b*), stop the water from flowing into the premises in respect of which such rate is payable by cutting off the pipe to such premises, or by such means as the undertakers think fit (*c*), and may recover the rate due from such person, if less than £20, with the expenses of cutting off the water and costs of recovering the rate, before two justices, who may order the same to be paid, and on the expiration of seven days after demand of the amount so ordered by warrant of distress (*d*). If the rate due amounts to £20 or upwards, the undertakers may recover the same, with the expenses of cutting off the water, in any court of competent jurisdiction (*e*). It is not a condition precedent to recovering the amount of the water rate before two justices that the water should be cut off (*f*). The Summary Jurisdiction Acts (*g*) apply to these proceedings before justices, so that the complaint must be made to the justices within six months from the time when such matter of complaint arose (*h*), but the limitation does

(*t*) "Water rate" includes any rent, reward or payment to be made to the undertakers for a supply of water (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 3), and includes a sum payable for a bath (*Sheffield Waterworks Co. v. Carter, Same v. Brooks* (1882), 8 Q. B. D. 632), or under an implied agreement (*Trowbridge Water Co. v. Wilts County Council*, [1909] 1 K. B. 824).

(*a*) See p. 316, *ante*.

(*b*) See p. 320, *post*.

(*c*) A company may be restrained if it threatens improperly to cut off the water (*Hayward v. East London Waterworks Co.* (1884), 28 Ch. D. 138), or if, having done so, it prevents communication being made (*Gale v. Rhymney and Aber Valleys Gas and Water Co.* (1903), 67 J. P. 430, C. A.).

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 73. The undertakers may recover the rate and costs of cutting off in the same manner as any damages for the recovery of which no special provision is made are recoverable by that or the special Act (*ibid.*). By *ibid.*, s. 85, it is provided that the clauses of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, are to be incorporated for this purpose. Such damages are ascertained and determined by two justices and may be recovered by distress (*ibid.*, s. 140). The determination of the sum to be paid amounts to an order to pay the sum (*East London Waterworks Co. v. Charles*, [1894] 2 Q. B. 730, *per WILLS, J.*, at p. 733). The costs of the recovery appears to be in the discretion of the justices (*Ruabon Water Co. v. Evans* (1906), 22 T. L. R. 541). If the special Act prescribes another method of recovering the rate, these provisions do not apply (*Meltham Spinning Co., Ltd. v. Huddersfield Corporation* (1903), 89 L. T. 403, C. A.).

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 74. As to the jurisdiction of the courts, generally, see titles COUNTY COURTS, Vol. VIII., pp. 428 *et seq.*; COURTS, Vol. IX., pp. 52 *et seq.*

(*f*) *R. v. Hulton, Ex parte Metropolitan Water Board*, [1907] 2 K. B. 578.

(*g*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*h*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11; *East London Waterworks Co. v. Charles, supra*. It is not quite clear whether or not a demand is required before proceedings can be taken. When a local authority supplying water under its general powers seeks to recover a water rate, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 256, is applicable, and a written demand is required, and fourteen days must elapse before proceedings are begun before justices. In such a case the six months' limit runs from the expiration of such

SECT. 9.  
Charges for  
Supply.

When cutting  
off supply  
prohibited.

not apply to proceedings before other courts of competent jurisdiction (*i*).

**588.** A water company which is a trading company and supplying water for profit, and whose special Act or provisional order incorporates any part of the Waterworks Clauses Act, 1847 (*k*), must not cut off the supply of water for non-payment of the water rate where the owner and not the occupier is liable by law or by agreement with the company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement (*l*). Such water rate, however, with interest thereon at the rate of 5 per cent. per annum, computed from the expiration of one month from the time when the same has been claimed by the company until receipt thereof, becomes a charge on such dwelling-house in priority to all other charges affecting the premises (*m*). The amount may also be recovered, with the costs incurred, from the owner or from the occupier for the time being, in the same manner as water rates may by law be recovered. Proceedings against the occupier cannot, however, be taken until notice has been given to him, or left at his dwelling-house, to pay the amount due for water rate out of the rent then due, or that may thereafter become due from him, and he has omitted to pay such rate (*n*).

demand (*Elliott v. Russell*, [1902] 2 K. B. 748). If the amount due is known to the person owing the money, it seems that a formal demand in writing or otherwise is not necessary (*East London Waterworks Co. v. Kyffin*, [1895] 1 Q. B. 55); but if the amount is not so known a demand seems to be necessary; see *Elliott v. Russell*, *supra*, per Lord ALVERSTONE, C.J., at p. 753; and compare *Labalmondiere v. Addison* (1858), 1 E. & E. 41. As to cases where there is a dispute as to the annual value of the house, see p. 314, *ante*.

(*i*) *Metropolitan Water Board v. Bunn*, [1913] 3 K. B. 181, C. A., following *Blackburn Corporation v. Sanderson*, [1902] 1 K. B. 794, C. A., and distinguishing *Tottenham Local Board v. Rowell* (1876), 1 Ex. D. 514, 517, C. A., which followed *West Ham Local Board v. Maddams* (1876), 1 Ex. D. 516, n.; compare *Bolton Corporation v. Scott* (1913), 77 J. P. 193, C. A.; and see p. 318, *ante*.

(*k*) 10 & 11 Vict. c. 17.

(*l*) Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), ss. 3, 4; *South West Suburban Water Co. v. Hardy* (1913), 77 J. P. 283. The company cannot cut off the supply even if the premises become vacant after the date when the water rate became due (*Metropolitan Water Board v. Bibbey*, [1911] 2 K. B. 74; see p. 352, *post*). A company may, however, cut off the water for other reasons than non-payment of rate, as, for example, where a tenant after notice to quit refuses to go and the owner requests the company to cut off the supply (*Chelsea Waterworks Co. v. Paulet* (1888), 52 J. P. 724). If the company cuts off the supply wrongly it is liable to penalties for failure to supply, and a dispute as to compliance with new regulations relating to communication pipes affords no answer if not properly determined (*South West Suburban Water Co. v. Hardy*, *supra*). As to cutting off the supply by reason of waste or misuse of water, see p. 322, *post*.

(*m*) Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), s. 4. This is without prejudice to the other remedies of the company for enforcing payment of the rate from the owner (*ibid.*).

(*n*) *Ibid.* The right of recovery is without prejudice to such charge. No greater sum can at any one time be recovered from any such occupier than the amount of rent owing by him or which shall have accrued due from him since such notice was given. The occupier is entitled to deduct from the rent payable by him the sum so recovered from him or which he has so paid on demand (*ibid.*). The effect of the provision in the text is

A company cutting off the supply contrary to the above provision becomes liable to a penalty not exceeding £5 for each day during which the water remains cut off. The penalty, which is recoverable summarily, is paid to the person aggrieved (*o*).

SECT. 9.<sup>1</sup>  
Charges for  
Supply.

**589.** If a company demands a sum in excess of that to which it is entitled, the person paying can recover back the overcharge if paid by him under a mistake of fact (*p*), but not if under a mistake of law (*q*).

Overcharges.

#### SECT. 10.—*Waste and Misuse of Water Supplied.*

**590.** Provisions against the waste and misuse of water by consumers are contained in the Waterworks Clauses Acts, 1847 (*r*) and 1863 (*s*). Where both are incorporated in special Acts, as is the usual practice, some of the provisions in the earlier Act are displaced by the more extended provisions in the later Act (*t*). In cases where a constant supply of water is to be afforded there is usually inserted in the special Act or provisional order a power enabling the undertakers to make bye-laws or regulations for the purpose of preventing the waste, undue consumption, misuse, or contamination of water, and by such bye-laws to prescribe the size, nature, materials, workmanship, and strength and mode of arrangement, connexion, disconnexion, alteration and repair of pipes, meters, cocks, ferrules, valves, soil-pans, water-closets, baths, cisterns, and other apparatus to be used, and to forbid any arrangements or use of these which may tend to waste, undue consumption, misuse, erroneous measurement, or contamination (*a*).

Statutory  
provisions.

to make a purchaser of such dwelling-houses liable for arrears of water rate (*East London Waterworks Co. v. Kellerman*, [1892] 2 Q. B. 72). As to who is the owner under the terms of a special Act, see *Metropolitan Water Board v. Brooks*, [1911] 1 K. B. 289, C. A.

(*o*) Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), s. 5. The occupier is *prima facie* the person aggrieved, but the owner may also be so if by reason of the wrongful cutting off of the water he is unable to let his premises (*Metropolitan Water Board v. Bibbey*, [1911] 2 K. B. 74, *per* Lord ALVERSTONE, C.J., at p. 79); see also *Sheffield Waterworks Co. v. Wilkinson* (1879), 4 C. P. D. 410. As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*; *Stanley Brothers, Ltd. v. Nuneaton Corporation* (1913), 77 J. P. 349.

(*p*) *Slater v. Burnley Corporation* (1888), 59 L. T. 636; *Slater v. Burnley Corporation* (No. 2) (1889), 53 J. P. 535; *Henderson v. Folkestone Waterworks Co.* (1885), 1 T. L. R. 329.

(*q*) *Meadows v. Grand Junction Waterworks Co.* (1905), 69 J. P. 255. As to the distinction between mistake of fact and mistake of law, see title MISTAKE, Vol. XXI., pp. 4 *et seq.*

(*r*) 10 & 11 Vict. c. 17, ss. 54—60.

(*s*) 26 & 27 Vict. c. 93, ss. 16—20.

(*t*) Thus, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 55, 59, are repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), so far as they relate to special Acts with which the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), is incorporated.

(*a*) Model Water Bill, 1913, clause 14. The clause limits the application of the bye-laws to the case of premises to which the undertakers are bound to afford, and do in fact afford, or are prepared on demand to afford, a constant supply. The provisions relating to the making of bye-laws in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 182—186 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 388 *et seq.*), are usually



SECT. 10.  
Waste and  
Misuse of  
Water  
Supplied.

Entry and  
cutting off  
supply.

**591.** If both of the above Acts are incorporated, the following provisions apply:—(1) any person acting under the authority of the undertakers may between 9 a.m. and 4 p.m. enter any house or premises supplied with water under the special Act, in order to examine if there is any waste or misuse of such water (*b*); (2) if any person supplied with water by the undertakers wrongfully does, or causes or permits to be done, anything in contravention of any of the provisions of the special Act, or wrongfully fails to do anything required by such provisions to be done for the prevention of waste, misuse, undue consumption or contamination of the water of the undertakers, the undertakers may cut off any of the pipes by which the water is supplied to him and cease to supply him so long as the cause of injury remains or is not remedied (*c*).

Penalties :

waste or  
contamina-  
tion ;

**592.** If both Acts are incorporated the following persons are liable to penalties :—

(1) any person supplied with water who wilfully or negligently causes or suffers any pipe, valve, cock, cistern, bath, soil-pan, water-closet or other apparatus or receptacle to be out of repair or to be so used or contrived as that the water supplied is or is likely to be wasted, misused, unduly consumed or contaminated, or so as to occasion or allow the return of foul air or other noisome or impure matter into any pipe belonging to or connected with the pipes of the undertakers (*d*);

supply to  
persons not  
entitled ;

(2) any owner or occupier of any tenement supplied with water under the special Act who supplies to any other person, or wilfully permits him to take, any such water from any cistern or pipe in such tenement unless for the purpose of extinguishing fire, or unless he is a person supplied with water by the undertakers, and the pipes belonging to him are out of repair without his default (*e*);

wrongful  
taking ;

(3) any person not being supplied with water by the undertakers who wrongfully takes or uses any water from any reservoir, water-course, conduit or pipe, belonging to the undertakers, or from

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made to apply to the making of these bye-laws subject to the necessary modifications. The Local Government Board has issued a model series of such bye-laws or regulations. Recent special Acts empower undertakers, including local authorities as well as companies, if required by the consumer, to supply, repair or alter, but not to manufacture, pipes, valves, cocks, cisterns, baths, meters, soil-pans, water-closets, and other fittings required or permitted by their regulations, and to charge the consumer in respect thereof. If let for hire they are protected from distress and from being taken in execution, provided that they have a distinguishing mark on them to show that they are the property of the undertakers. Provision is also made limiting the charges to be made for such fittings (Model Water Bill, 1913, clause 21).

(*b*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 57. If the surveyor is refused admission or prevented from making the examination, the undertakers may turn off the water supplied by them from such houses or premises (*ibid.*).

(*c*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 16. This power is without prejudice to any other remedy (*ibid.*).

(*d*) *Ibid.*, s. 17. The penalty for every such offence is a fine not exceeding £5 (*ibid.*).

(*e*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 58. Such person is liable to forfeit to the undertakers for every such offence a sum not exceeding £5 (*ibid.*).

any such reservoir, watercourse, conduit or pipe, or from any cistern or other like place containing water belonging to the undertakers, or supplied by them for the use of any consumer of their water (*f*);

(4) any person who, not having from the undertakers a supply of water for other than domestic purposes, uses for other than domestic purposes any water supplied to him by them (*g*);

(5) any person who, having from the undertakers a supply of water for any other than domestic purposes, uses for any purposes other than those for which he is entitled to use the same any water supplied to him by the undertakers (*h*);

(6) any owner or occupier of premises supplied with water by the undertakers, any consumer of the water of the undertakers, or any other person who affixes, or causes or permits to be affixed, any pipe or apparatus to a pipe belonging to the undertakers or to a communication or service pipe belonging to or used by such owner, occupier, consumer or other person, or who makes any alteration in any such communication or service pipe, or in any apparatus connected therewith, without the consent of the undertakers (*i*);

SECT. 10.  
Waste and  
Misuse of  
Water  
Supplied.

wrongful  
user ;

alteration of  
apparatus ;

(*f*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 20. The person is liable to a penalty not exceeding £5 for every such offence (*ibid.*). If the Act of 1863 is not incorporated in the special Act, and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is incorporated, then the following provision in *ibid.*, s. 59, has effect :—Every person who, not having agreed to be supplied with water by the undertakers, takes any water from any reservoir, watercourse or conduit belonging to the undertakers or any pipe leading to any such reservoir, watercourse, or conduit, or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, is liable to forfeit to the undertakers for every such offence a sum not exceeding £10. As to the limited nature of this provision, see *Piercy v. Pope* (1881), 30 W. R. 60, where it was held that it did not provide any penalty for improperly taking water from a tap in an unoccupied house.

(*g*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 18. The penalty is a fine not exceeding 40s. for each offence, without prejudice to the right of the undertakers to recover from the offender the value of the water misused (*ibid.*). If a dairyman uses water supplied for domestic purposes in order to wash his yard and a milk float, he commits an offence (*Cambridge Waterworks Co. v. Hancock* (1910), 74 J. P. 477); see pp. 301, 302, *ante*. As to the use of water, already used for ordinary domestic purposes, for flushing purposes, see *Evans v. Gornall* (1892), 8 T. L. R. 602; *Andrews v. Witts* (1901), 65 J. P. 231.

(*h*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 18. As to the penalty and right to recover value of water, see note (*g*), *supra*; as to the liability of an occupier for wrongful acts of his workmen, see *West Middlesex Water-works Co. v. Suwerkrop* (1829), 4 C. & P. 87. If rate-payers are entitled to use water from standpipes for domestic purposes, washing carts, and extinguishing fires, they commit an offence if they use the water for purposes of their trade (*Andrews v. Witts*, *supra*). Water supplied by measure is also the subject of larceny (*Ferens v. O'Brien* (1883), 11 Q. B. D. 21).

(*i*) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 19. The penalty is a sum not exceeding £5 for each offence, without prejudice to the right of the undertakers to recover damages from the offender for any injury done to their property and to their right to recover the value of any water wasted, misused, or unduly consumed (*ibid.*). An offence is committed if a person temporarily affixes a hose-pipe to a tap to draw off water (*Cambridge Waterworks Co. v. Hancock*, *supra*), or affixes a tap to shut off the water while the house is closed (*Williams v.*

SECT. 10.  
Waste and  
Misuse of  
Water  
Supplied.

damage to  
apparatus  
causing  
waste.

Provision of  
cistern.

(7) any person who wilfully or carelessly breaks, injures or opens any lock, cock, valve, pipe, work or engine belonging to the undertakers, or who flushes or draws off the water from the reservoirs or other works of the undertakers, or who does any other wilful act whereby such water is wasted (*k*).

**593.** Where the special Act provides that the water need not be constantly laid on under pressure, any person supplied with water must, when required by the undertakers, provide a proper cistern to hold the water supplied, with a ball and stopcock in the pipe bringing the water from the works of the undertakers to such cistern, and must keep such cistern, ball and stopcock in good repair, so as effectually to prevent the water from running to waste. If any person, when so required, neglects to provide these and keep them in repair, the undertakers may cut off the pipe, and turn off the water from the premises of such person until such cistern, ball and stopcock is provided and repaired, as the case may require (*l*). The undertakers may also repair any such cistern, pipe, ball or stopcock so as to prevent waste, and recover the expenses thereof from the person allowing it to be out of repair (*m*).

SECT. 11.—*Recovery of Damages and Penalties.*

Recoverable  
before court  
of summary  
jurisdiction.

**594.** Damages for the recovery of which no special provision exists, penalties, and the determination of any other matter referred to justices, are recovered and determined before a court of summary jurisdiction (*n*), and the Summary Jurisdiction

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*Llandudno District Council* (1897), 14 T. L. R. 18), or connects up a house belonging to him with the pipes of another house owned by him (*Kyffin v. Metropolitan Water Board* (1908), 72 J. P. 517; see also *Philp v. Dunfermline Magistrates* (1902), 4 Fraser (Justiciary Cases), 34). As to repair of communication pipes, see pp. 308, note (*b*), 311, *ante*.

(*k*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 60. The penalty is a sum not exceeding £5 (*ibid.*).

(*l*) *Ibid.*, s. 54. The expression "ball and stop cock" does not include a screw-down valve in the communication pipe (*Ward v. Folkestone Waterworks Co.* (1890), 24 Q. B. D. 334 (decided on the terms of a special Act)). If the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), is incorporated with the special Act, the penalty provided by *ibid.*, s. 17, applies to breaches of the above requirement; but if it is not incorporated, then the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 55, applies, whereby every person supplied with water by the undertakers who suffers any such cistern, pipe, ball or stopcock to be out of repair, so that the water supplied is wasted, is liable to forfeit to the undertakers for every such offence a sum not exceeding £5. For forms of notices by a local authority to a person supplied with water to provide or repair a cistern, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 180.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 56.

(*n*) *Ibid.*, s. 85, incorporating the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—160, and providing that such provisions apply to the waterworks and to the undertakers respectively, construed as if the word "undertakers" had been inserted therein instead of the word "company." Of these provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 146, 147, 151, 153, 155, and in part ss. 157, 160, have been repealed. *Ibid.*, s. 160, which related to perjury, and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 89, which



Acts (*o*) apply so far as they are applicable (*p*). Some special Acts allow several names and sums to be included in the same summons. In the metropolitan police area (*q*), penalties and forfeitures not specially provided for are payable to the Receiver of the Metropolitan Police District, and provision is made for their application by him (*r*).

SECT. 11.  
Recovery  
of Damages  
and  
Penalties.

#### SECT. 12.—*Offences by Employees.*

**595.** For the purpose of preventing the inhabitants of any district from being deprived of their water supply by reason of strikes or other breaches of contract of service, the malicious breach of a contract of service on the part of any person employed by a municipal authority, or by any company or contractor supplying water to a town, district, or other place, is a misdemeanour, if the person knows or has reasonable cause to believe that the probable consequence of his doing so will be to deprive the inhabitants to a great extent of their supply of water (*s*).

Breach of  
contract by  
employee.

## Part V.—Finance.

#### SECT. 1.—*Local Authorities.*

**596.** When local authorities supply water under their general powers (*t*), their borrowing and expenditure are governed by the general provisions of the Public Health Acts (*u*). When they supply water under a special Act or provisional order, provision is generally made therein for borrowing and repaying the capital moneys required, and for the application of the profits (*x*). Such

Statutory  
provisions.

related to the same matter, were repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), which consolidated the law on this matter; see title RAILWAYS AND CANALS, Vol. XXIII., pp. 734 *et seq.*; and as to perjury, generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 490 *et seq.* Anything in the special or incorporated Acts authorised or required to be done by two justices may be done by any one magistrate having by law authority to act alone for any purpose with the powers of two or more justices (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 87).

(*o*) As to the Summary Jurisdiction Acts, see title MAGISTRATES, Vol. XIX., pp. 531, 589; as to summary procedure, see *ibid.*, pp. 589 *et seq.*

(*p*) See, for example, *East London Waterworks Co. v. Charles*, [1894] 2 Q. B. 730; and compare title GAS, Vol. XV., p. 373.

(*q*) See title POLICE, Vol. XXII., pp. 466, 467.

(*r*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 88. As to the Receiver, see title POLICE, Vol. XXII., pp. 468, 469.

(*s*) Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 4; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 564, 565. The same provisions are applicable alike to water as to gas; compare title GAS, Vol. XV., p. 357.

(*t*) See pp. 254, 260, *ante*.

(*u*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 380 *et seq.* As to the Public Health Acts, see *ibid.* p. 361, note (*a*). As to income tax on municipal undertakings, see title INCOME TAX, Vol. XVI., pp. 624 *et seq.*

(*x*) The provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), with respect to profits, are not applicable; see p. 327, *post*.

SECT. 1.  
Local  
Authorities.

Act usually authorises the borrowing of sums for certain specific purposes, and such additional sums for the capital purposes of the undertaking, as the Local Government Board may sanction (y). The repayment is charged on the undertaking, or if necessary on the district fund or general district rate (a). The money is allowed to be repaid either by equal yearly or half-yearly instalments of principal or of principal and interest combined, or by means of a sinking fund, or partly by one of these methods and partly by another (b). Returns must be made to the Board with respect to the repayment of the debt (c). Power is also given to borrow for the purpose of paying off moneys previously borrowed which are intended to be repaid forthwith, and also to replace moneys temporarily applied from other funds of the authority in repaying moneys previously borrowed and intended to be replaced by borrowed moneys (d).

Application  
of receipts.

**597.** The local authority is commonly required to apply all money received by it in respect of its water undertaking, except moneys borrowed or received on capital account, for the purposes and in the order following:—

(1) in payment of the working and establishment expenses and cost of maintenance of the undertaking;

(2) in payment of interest on moneys borrowed for the purposes of the undertaking;

(3) in providing the requisite appropriations, instalments, or sinking fund payments, in respect of moneys borrowed for the purposes of the undertaking;

(4) in extending and improving, if the authority thinks fit, any works for the purposes of the undertaking;

(5) in providing a reserve fund, if the authority thinks fit, to meet deficiency in the income from the undertaking and any extraordinary claim or for renewing part of the undertaking (e). The balance, less a sum for current expenses, is in some cases to be carried to the district fund or rate, which is also made liable to make

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(y) It is not usual to allow borrowed moneys to be used for purposes which should properly be charged to income.

(a) As to the funds of local authorities, see title LOCAL GOVERNMENT, Vol. XIX., pp. 280 *et seq.* (urban districts), 335 *et seq.* (rural districts).

(b) See Hastings Corporation (Water and Finance) Act, 1911 (1 & 2 Geo. 5, c. xxxix.). The sinking fund may be either a non-cumulating sinking fund, formed by the payment of equal annual sums throughout the whole period as will together amount to the moneys for the repayment of which the fund is formed, or an accumulating sinking fund, formed by the payment of an annual sum which, with interest thereon at a prescribed rate per cent., will make up the amount.

(c) Model Bills and Clauses, 1913, Miscellaneous, clause 18. This is a general clause inserted in all Bills authorising local authorities to borrow money where provision is made for the repayment of the debt.

(d) Model Bills and Clauses, 1913, Miscellaneous, clause 17. The authority is, however, prohibited from borrowing to replace borrowed money which has been repaid by instalments, or by means of a sinking fund or out of other capital moneys (*ibid.*).

(e) The maximum amount of the reserve fund is usually prescribed, but if any part of it is used for authorised purposes, it may be made good out of the income.

good deficiencies in the revenue received from the undertaking (*f*), while in other cases it is to be applied in reduction of the charges for water (*g*).

SECT. 1.  
Local  
Authorities.

**598.** The local authority must keep separate accounts in respect of its water undertaking, distinguishing capital and revenue, and must have these made up and balanced annually and audited in like manner, and with the like consequences, as its other accounts (*h*).

Accounts.

## SECT. 2.—Statutory Companies.

### SUB-SECT. 1.—Capital.

**599.** The special Act authorising a statutory company to carry on a water undertaking usually prescribes the amount of the company's capital, and authorises the issue of shares. Borrowing powers are also conferred up to a certain proportion of the paid-up capital (*i*). Existing companies frequently apply for and are granted powers to raise additional capital, with correspondingly increased borrowing powers (*j*). The issue of shares and stock of existing companies is now made subject to the "auction clause," which requires such shares or stock to be offered for sale by public auction or tender (*k*), and this is sometimes extended to the loan stock. Holders of new shares and stock are given the same privileges, liabilities, and rights as holders of the same class of the other shares and stocks (*l*).

Powers  
conferred.

"Auction  
clause."

### SUB-SECT. 2.—Profits.

**600.** The special Act provides for a limit of dividend, usually 10 per cent. on the original capital, and as regards any new capital

Limit of  
dividend.

(*f*) See Slough Urban District Water Act, 1911 (1 & 2 Geo. 5, c. xx.); and compare title GAS, Vol. XV., pp. 365, 366.

(*g*) See Fylde Waterworks (Transfer) Act, 1897 (60 & 61 Vict. c. cccxxxi.).

(*h*) See Model Bills and Clauses, 1913, Miscellaneous, clause 19; see also title LOCAL GOVERNMENT, Vol. XIX., pp. 283 *et seq.* (urban districts), 337, 338 (rural districts). In the case of joint water boards, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 58, is made to apply to the accounts of the board and of their committees and officers, and to the audit thereof.

(*i*) The issue of capital and other like matters are usually governed by the provisions of the Companies Clauses Acts, 1845 (8 & 9 Vict. c. 16) and 1863 (26 & 27 Vict. c. 118), and Acts amending the same, so far as these are incorporated in the special Act. The special Act sometimes contains a clause against the conversion of borrowed money into capital. As to statutory companies generally, see title COMPANIES, Vol. V., pp. 674 *et seq.* For the clauses commonly inserted in the special Acts of such companies, see Model Railway Bill, 1913, clauses 9—16.

(*j*) See Model Gas Bill, 1913, clauses 6—9. The moneys, including premiums received, are generally required to be applied to purposes to which the capital is properly applicable. Any sum of money received as premium is not considered as part of the capital of the undertakers entitled to dividend (*ibid.*, clause 9).

(*k*) *Ibid.*, clause 15; for particulars of this clause, see title GAS, Vol. XV., p. 370; as to the Standing Order relating to the insertion thereof in Bills, see p. 271, *ante*.

(*l*) As to their rights in regard to arrears of dividend, see *Weymouth Waterworks Co. v. Coode and Hasell*, [1911] 2 Ch. 520.



SECT. 2.  
Statutory  
Companies.

issued 7 per cent. on ordinary capital, and 5 per cent. on preference capital. The provisions of the Waterworks Clauses Act, 1847 (*m*), with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their benefit are made applicable to such companies.

The profits of the undertaking to be divided among the undertakers in any year must not exceed the prescribed rate; if there is no prescribed rate, then they must not exceed the rate of 10 per cent. per annum on the paid-up capital of the undertaking, and this is deemed the prescribed rate unless a larger dividend is at any time necessary to make up the deficiency of any previous dividend which has fallen short of the said yearly rate (*n*).

Reserve fund.

**601.** If the clear profits in any year amount to a larger sum than is sufficient, after making up the deficiencies in previous dividends, to make a dividend at the prescribed rate, the excess must from time to time be invested in Government or other securities, and the dividends and interest arising from such securities must also be invested in the same or like securities, in order that the sum may accumulate at compound interest until the sum so formed amounts to the prescribed sum, or if no sum is prescribed, to a sum equal to one-tenth part of the nominal capital of the undertakers. This sum is to form a reserve fund to answer any deficiency which may at any time happen in the amount of divisible profits, or to meet any extraordinary claim or demand which may at any time arise against the undertakers; and if such fund is at any time reduced, it may thereafter be again restored to the said sum, and so from time to time as often as such reduction shall happen (*o*). No sum may, however, be taken from the said fund for the purpose of meeting any extraordinary claim unless it is first certified by two justices that the sum is required for the purpose of an extraordinary claim within the meaning of the special and incorporated Acts (*p*).

When the reserve fund, by accumulation or otherwise, amounts

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(*m*) 10 & 11 Vict. c. 17, ss. 75—82; compare title GAS, Vol. XV., p. 366. If incorporated in a special Act of an existing company, the provisions extend to the whole undertaking (*Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687, H. L.).

(*n*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 75. Where preference stock has been issued by a company at less than 10 per cent., but no rate has been prescribed in the special Act in respect of such stock, the rate at which such stock was in fact issued is the prescribed rate, and if dividends are paid at that rate there is no deficiency to be made good (*Chelsea Waterworks Co. v. Metropolitan Water Board*, [1904] 2 K. B. 77, C. A.). A company which has had the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), incorporated by a later special Act cannot make up to 10 per cent. the dividends paid previously to such special Act, if the earlier Acts of such company contained no prescribed rate (*Kent Waterworks (Company of Proprietors) v. Lamplough*, [1904] A. C. 27). The dividend of 10 per cent. may not be paid free of income tax (*Ashton Gas Co. v. A.-G.*, [1906] A. C. 10). In the case of arrears of dividends, where new shares have been issued at a lower prescribed rate than the original shares, the payments should be made in the same proportion as the prescribed rates (*Weymouth Waterworks Co. v. Coode and Hasell*, [1911] 2 Ch. 520).

(*o*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 76.

(*p*) *Ibid.*, s. 77.

to the prescribed sum or to one-tenth of the nominal capital, as the case may be, the interest and dividends thereon must no longer be invested, but are to be applied to any of the general purposes of the undertaking to which the profits are applicable (*q*).

If in any year the profits divisible do not amount to the prescribed rate, such a sum may be taken from the reserve fund as, with the actual profits of the year, will enable the undertakers to make a dividend of the amount aforesaid, and so from time to time as occasion requires (*r*).

**602.** On the petition of any two payers of water rate within the limits of the special Act the court of quarter sessions (*s*) may appoint some accountant or other competent person (*t*), not being a proprietor of any waterworks, to examine and ascertain (*a*), at the expense of the undertakers, the actual state and conditions of the concerns of the undertakers, and make report to the court at the same or some following sessions. The court may examine any witnesses upon oath touching the truth of the said accounts and the matters therein referred to. If it thereupon appears to the court that the profits for the preceding year have exceeded the prescribed rate, the undertakers must, in case the whole of the reserved fund has been and remains invested, and the dividends to the amount limited have been paid, make such a rateable reduction in the rates for water to be furnished by them as in the judgment of the court seems proper, but so as such rates when reduced shall ensure to the the undertakers, regard being had to the amount of profit before received, a profit as near as may be to the prescribed rate (*b*).

Reduction of  
water rate.

If it appears to the court that there was no sufficient ground for presenting the petition, the court may, if it thinks fit, order the petitioners to pay the whole or any part of the costs of or incident to such petition, the amount thereof to be determined by the court. Such costs are recoverable summarily or otherwise as provided in the special Act (*c*).

(*q*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 78.

(*r*) *Ibid.*, s. 79.

(*s*) "Quarter sessions" may be defined in the special Act; if not, it means the court of general or quarter sessions of the peace which shall be held at the place nearest to the waterworks, or the principal office thereof, for the county or place in which the waterworks, or the principal office thereof, is situate, or for some division of such county having a separate commission of the peace (*ibid.*, s. 3); see, generally, title MAGISTRATES, Vol. XIX., pp. 618 *et seq.*

(*t*) The court can appoint only one person; see *R. v. Brindley* (1885), 54 L. T. 435 (gas company).

(*a*) The undertakers are liable to penalties if they refuse or neglect to produce any books of account or other books, bills, vouchers, or papers relating to their pecuniary affairs, for seven days after being required to produce any of the same to the court, accountant or other person aforesaid (Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 82). The penalty is £100 for every such refusal or wilful neglect, and a further £10 for every day during which such refusal or wilful neglect continues after the expiration of the seven days. Such penalties may be recovered by any person who will sue for the same, with full costs of suit, in any of the superior courts (*ibid.*).

(*b*) *Ibid.*, s. 80.

(*c*) *Ibid.*, s. 81. The costs are recoverable in the same way as damages

## SECT. 2.

Statutory  
Companies.Abstract of  
accounts.

## SUB-SECT. 3.—Accounts.

**603.** In each year after the undertakers have begun to supply water under their special Act they must cause an account in abstract to be prepared of the whole receipt and expenditure of all rates or other moneys levied under the powers of their special and incorporated Acts for the year preceding, under the several distinct heads of receipt and expenditure, with a statement of the balance of such account, duly audited and certified by the chairman of the undertakers, and also by the auditors thereof, if any (*d*). A copy of such special account must be sent free of charge to the clerk of the county council for the county (*e*) in which the waterworks are situated on or before the 31st day of January in each year, under a penalty of £20 for each default. The copy of each account must be kept by the clerk, and be open to inspection by all persons, at all seasonable hours, on payment of 1s. for each inspection (*f*).

## Part VI.—Metropolitan Water Supply.

SECT. 1.—*The Metropolitan Water Board.*SUB-SECT. 1.—*Formation, Constitution, and Powers.*Limits of  
supply.

**604.** The Metropolis (*g*) and a large area round it is supplied with water by the Metropolitan Water Board, which was established in 1902 (*h*) for the purpose of acquiring by purchase, and of managing and carrying on, the undertakings of the nine metropolitan water companies then in existence (*i*), and generally for the purpose of supplying water within the parishes and places in which, at the date of transfer (*k*), any of those companies were authorised to supply water, subject to certain alterations made

are recoverable under that Act; see pp. 324, 325, *ante*. As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq*.

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 83. Recent special Acts contain a provision that the accounts must be certified by a properly qualified auditor.

(*e*) Or to the clerk of the peace in county boroughs (*ibid.*, ss. 3, 83).

(*f*) *Ibid.*, s. 83.

(*g*) See title METROPOLIS, Vol. XX., p. 392.

(*h*) By the Metropolis Water Act, 1902 (2 Edw. 7, c. 41).

(*i*) These companies were the New River Company, the East London Waterworks Company, the Southwark and Vauxhall Water Company, the West Middlesex Waterworks Company, the Lambeth Waterworks Company, the Chelsea Waterworks Company, the Grand Junction Waterworks Company, the Kent Waterworks Company, and the Staines Reservoirs Joint Committee (*ibid.*, Sched. I.). Certain of the property of the New River Company was excluded (*ibid.*, s. 9). As to the Staines Reservoirs Joint Committee, see *ibid.*, s. 10.

(*k*) The date of transfer was the 24th June, 1904, but in the case of the New River Company was the 25th July, 1904. This is referred to in the Act as "the appointed day" (*ibid.*, ss. 2, 37).



by the Act (*l*). This area constitutes the limits of supply (*m*). The Board must also supply water in bulk to the councils of certain other districts (*n*).

**605.** The Board consists of a chairman and vice-chairman and members appointed by the various county, city, borough and district councils within the limits of supply in certain proportions, and by the conservators of the rivers Thames and Lee (*o*). The chairman and vice-chairman are appointed by the Board, either from among the members or from outside, and may be paid salaries. The Board is a body corporate with a common seal,

SECT. 1.  
The Metro-  
politan  
Water  
Board.

Constitution  
of Board.

(*l*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 1, Sched. II. The alterations effected by the Act may be summarised thus. The parishes of Sunbury and Chessington, which were being supplied with water without authority, were included in the area (*ibid.*, Sched. II.). The undertakings of the councils of the urban districts of Tottenham and Enfield were transferred to the Board, and the Board was required to continue the supply (*ibid.*, s. 11). Such parts of the boroughs of Croydon and Richmond and of the urban districts of Cheshunt and Ware as were within the limits of supply were excluded, and the right of supply in such parts was conferred on the councils of these boroughs and districts (*ibid.*, s. 12). Provision was, however, made for the Board to supply these councils in bulk (*ibid.*, s. 13).

(*m*) *Ibid.*, s. 1. It comprises a population of over 7,000,000, and an area of nearly 350,000 acres. The rights of certain undertakers within the area are, however, protected (*ibid.*, ss. 32—36; and see Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 36), and variations in the limits may be made in certain cases by the Local Government Board by provisional order (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 26).

(*n*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), ss. 13, 14; see the saving of these in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.).

(*o*) The members are appointed thus:—County councils: London, 14; Essex, 1; Kent, 1; Middlesex, 1; Surrey, 1; Hertfordshire, 1. City councils: London, 2; Westminster, 2. Borough councils: Metropolitan boroughs (see title METROPOLIS, Vol. XX., pp. 402, 403), 1 each; West Ham, 2. Urban districts: East Ham, 1; Leyton, 1; Walthamstow, 1; Tottenham, 1; Willesden, 1. Certain groups of councils are allowed to elect one member each. These groups are:—(1) The urban district councils of Buckhurst Hill, Chingford, Loughton, Waltham Holy Cross, Wanstead and Woodford; (2) the urban district councils of Beckenham, Bromley, Chislehurst, Penge, Bexley, Dartford, Erith and Footscray; (3) the borough council of Ealing and the urban district councils of Acton and Chiswick; (4) the urban district councils of Brentford, Hampton, Hampton Wick, Hanwell, Heston and Isleworth, Sunbury, Teddington and Twickenham; (5) the urban district councils of Edmonton, Enfield and Southgate; (6) the borough council of Hornsey and the urban district council of Wood Green; (7) the borough council of Kingston and the urban district councils of East and West Molesey, Esher and the Dittons, Ham, Surbiton, Barnes, the Maldens and Combe and the borough council of Wimbledon. These groups appoint joint committees who appoint the member. The Conservators of the river Thames (see titles METROPOLIS, Vol. XX., pp. 413, 414; WATERS AND WATERCOURSES, pp. 408 *et seq.*, *post*) and the Lee Conservancy Board (see title WATERS AND WATERCOURSES, p. 405, *post*) appoint one each (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 1). For further provisions as to the election of these members, see *ibid.*, Sched. III. The total number of members so elected is sixty-six. The representation may be varied should circumstances require by an order of the Local Government Board (*ibid.*, s. 26).

SECT. 1.  
The Metro-  
politan  
Water  
Board.

Transfer of  
obligations.

Transfer of  
powers.

having power to acquire land for the purposes of its duties without licence in mortmain (*p*).

**606.** At the date of the transfer to the Board of the undertakings of the companies there were also transferred all other debts, liabilities and obligations of each company then existing (*q*), and existing contracts made with any of the water companies were made binding on the Board (*r*).

**607.** The companies whose undertakings were transferred to the Metropolitan Water Board had received their powers under charters, special Acts and orders (*s*), and they were also subject to certain Acts applicable to them generally (*t*). The Board, subject to the provisions of the Metropolis Water Act, 1902 (*a*), and amending Acts (*b*), holds the undertaking of each of the water companies, and may exercise all the rights, powers, authorities and privileges of the company, and is subject to all the duties, obligations and liabilities of the company under the Acts, whether local or general, and the charters, orders and other provisions relating to the company, in like manner, *mutatis mutandis*, as if the Board was the company (*c*).

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(*p*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 1, and Sched. III. The appointment of a member to either of the offices of chairman or vice-chairman does not create a vacancy on the board (*ibid.*).

(*q*) *Ibid.*, s. 2. The price to be paid for each undertaking was settled by arbitration under special provisions (*ibid.*, s. 23). For the cases arising on these arbitrations, see note (*s*), *infra*.

(*r*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 45; Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 35. As to such contracts, see *Edge v. Metropolitan Water Board* (1907), 97 L. T. 279; *Metropolitan Water Board v. Mulholland* (1909), 74 J. P. 27; *Chiswick Urban District Council v. Metropolitan Water Board* (1905), 69 J. P. 457.

(*s*) The New River Company was incorporated by Letters Patent, dated 21st June, 1619 (17 Jac. 1). The companies had their own special Acts dating back to the eighteenth century, the later of which incorporated some of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), the effect of which was to extend its provisions to the whole undertaking; see, for example, *Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687, H. L.; *Chelsea Waterworks Co. v. Metropolitan Water Board*, [1904] 2 K. B. 77, C. A.; *Kent Waterworks (Company of Proprietors) v. Lamplough*, [1904] A. C. 27.

(*t*) Namely, Metropolis Water Act, 1852 (15 & 16 Vict. c. 84); Metropolis Water Act, 1871 (34 & 35 Vict. c. 113); Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34); London Water Act, 1892 (55 & 56 Vict. c. cxxx.); Metropolis Water Act, 1897 (60 & 61 Vict. c. 56); Metropolis Water Act, 1899 (62 & 63 Vict. c. 7). The Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 3, extended the provisions of the Metropolis Water Acts, 1852 (15 & 16 Vict. c. 84) and 1871 (34 & 35 Vict. c. 113), to the whole area within which any of the companies was for the time being authorised to supply water. The companies were also subject to the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), as to which see pp. 320, 321, *ante*, which Act now applies to the Board. A doubt as to such application was removed by the Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), s. 84.

(*a*) 2 Edw. 7, c. 41.

(*b*) See, more particularly, the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.).

(*c*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 3. The King's Clogg of the New River Company was so transferred, and is a charge on the water fund (*Metropolitan Water Board v. Adair and New River Co.*



**608.** Debts, debenture stock, rentcharges or other annual payments secured on the undertaking or income of any company or part thereof are secured in like manner on the water fund established by the Act (*d*), and if any of the same were charged on specific property they remain so charged (*e*). The irredeemable debenture stock was subsequently extinguished and water stock was issued in substitution thereof, such water stock not being redeemable until after sixty years from the 31st March, 1903 (*f*). The Board must, within one hundred years from that date, purchase or redeem and pay off all redeemable debenture stock and all mortgage debts, and any stock so purchased or redeemed must be cancelled as from the date of the purchase or redemption (*g*).

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Board.

Transfer of  
charges.

**609.** Provision was also made for the transfer of the officers and servants of the companies to the Board, and for compensation being made to those whose office was abolished (*h*). The Superannuation (Metropolis) Act, 1866 (*i*), applies to the Board as if the Board was an authority mentioned in that Act (*j*).

Transfer of  
staff.

**610.** For the purposes of its duties with respect to water supply, the Board has power (1) to manage, alter, enlarge and, with the consent of the Local Government Board, to alienate any land or buildings transferred to, or otherwise vested in it; (2) to acquire, hire, erect and furnish such buildings and offices as it may require, whether within or without the limits of supply, and for that purpose to acquire, purchase or take or hire or exchange land; but these powers do not authorise the Water Board to acquire any waterworks or wells, or to use any lands or any easements or any rights in or over lands acquired under the powers of this provision for the purpose of obtaining water for public supply (*k*); and (3) to promote or oppose any Bill in Parliament

General  
powers.

(1911), 27 T. L. R. 253, H. L.). These Acts and all public general Acts applying to the metropolitan water companies have been extended to parishes where any company was supplying water otherwise than in bulk without authority and to the works of the company therein (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 3). There is also a proviso providing that these Acts are not to apply to the Water Board as regards places which have ceased to be within the limits of supply (*ibid.*).

(*d*) See p. 334, *post*. As to the definition of "debenture stock" and "mortgage debt," see Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 37.

(*e*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 4.

(*f*) *Ibid.*, s. 7; as to the saving of all provisions in deeds, wills, and instruments in regard to such substituted stock, see *ibid.*, s. 7 (7).

(*g*) *Ibid.*, ss. 8, 18; see p. 335, *post*.

(*h*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 47; *Webster v. Metropolitan Water Board* (1912), 76 J. P. 474. Compensation was also made payable to the directors and auditors of the water companies (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), ss. 48, 49).

(*i*) 29 & 30 Vict. c. 31.

(*j*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 24 (4). As to the formation of a superannuation and provident fund, see Metropolis Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.).

(*k*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 24. For the purposes of the purchase and alienation of land, the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176—178, except so far as they relate to the acquisition of land otherwise than by agreement, apply to the Board (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 24 (2)); as to these provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163.



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Report to  
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ment Board.

and prosecute or defend legal proceedings (*l*). Councils and other authorities represented on the Board are not thereby debarred from being heard against any Bill or provisional order promoted or applied for by the Board (*n*).

**611.** The Water Board must make to the Local Government Board an annual report of its proceedings, and must also give the Local Government Board such returns, statistics and information as to the exercise of these powers as the Local Government Board requires (*n*).

SUB-SECT. 2.—*Finance.*

Water fund.

**612.** All receipts of the Water Board are carried to what is termed the water fund, and all payments by the Board must be made out of that fund. Any deficiency in the water fund, whether for satisfying past or future liabilities, in any financial year must be apportioned amongst the various cities, boroughs, municipal or metropolitan, and urban districts, the councils of which are for the time being entitled to be represented on the Board, in proportion to the rateable value appearing in the valuation lists in force on the preceding 6th April of the hereditaments at that date supplied with water by the Board in each such city, borough or district (*o*).

Borrowing  
powers.

**613.** The Board was given borrowing powers for the purpose of carrying out the transfer of the undertakings to be acquired by it, and of executing works authorised by the Acts of the various water companies, and, with the consent of the Local Government Board, for the purpose of any payment by the Board, or of any permanent work or other thing which the Board is authorised to execute or do, and which, or the cost of which, ought, in the opinion of the Local Government Board, to be spread over a term of years (*p*). Such money is raised by means of the issue of water stock (*q*), unless

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The Board may obtain, and has obtained, statutory powers to acquire land for purposes of obtaining water and erecting waterworks; see Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxiv.); Metropolitan Water Board (New Works) Act, 1911 (1 & 2 Geo. 5, c. cxviii.).

(*l*) Metropolitan Water Act, 1902 (2 Edw. 7, c. 41), s. 24. The clerk of the Board, or any officer or member thereof acting under a general or special resolution of the board, may authorise the institution and carrying on, or the defence, of any proceeding which the Board are authorised to institute, carry on, or defend. Informations and complaints under the various Acts applicable to the Board, or under any bye-laws or regulations made thereunder, may be laid or made by an officer or member of the Board, or by the clerk (*ibid.*, s. 24 (3)).

(*m*) *Ibid.*, s. 31.

(*n*) *Ibid.*, s. 28. The Local Government Board must lay the report annually before Parliament (*ibid.*).

(*o*) *Ibid.*, s. 15 (1), (2). The Board must issue precepts for the apportioned sums to the councils of these various areas, and provision is made as to the rate out of which these sums are to be paid (*ibid.*, s. 15 (3)—(5)). The Board has been authorised to issue precepts to the various authorities for a sum sufficient to meet the deficiency accumulated during the four years ending the 6th April, 1912 (Metropolitan Water Board Act, 1913 (3 & 4 Geo. 5, c. xcvi.), s. 81). For provisions as to payments out of the water fund, and for the appointment of a finance committee to regulate and control the expenditure, see Metropolitan Water Act, 1902 (2 Edw. 7, c. 41), s. 20.

(*p*) Metropolitan Water Act, 1902 (2 Edw. 7, c. 41), s. 16 (1).

(*q*) Such stock is called the Metropolitan Water Stock, and bears interest at a rate not exceeding 3 per cent. per annum. The stock and the interest

the Local Government Board consents to some other mode of raising the money, in which case the money raised and the interest thereon are charged on the water fund, or on such property or revenues of the Board, in such manner as the Local Government Board sanctions (*r*).

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Board.

Money borrowed for the purpose of paying for the undertakings transferred, and of redeeming, purchasing, or paying off any debenture stock or mortgage debt, must be repaid within one hundred years from the 31st March, 1903, and if borrowed for any other purpose must be repaid within such period, not exceeding sixty years from the date of borrowing, as the Board, with the consent of the Local Government Board, determines (*s*).

Repayment  
of loans.

Borrowing powers for specific purposes have been conferred by subsequent special Acts (*t*), including power to raise money by the issue of bills (*u*) and power to borrow for current expenses by overdraft or temporary loan (*w*).

Specific  
purposes.

For the discharge of the various sums borrowed and of debenture stock mortgage debts, the Board must make provision by the creation of one or more sinking or redemption funds, in accordance with regulations which have been made by the Local Government Board (*x*).

Sinking  
funds.

**614.** The accounts of the Board, and of any committee appointed by it, and of its officers, must be made up and audited in like manner, and subject to the same provisions, as the accounts of county councils; a water consumer (*a*) has the same right as a ratepayer of being present at the audit, and of making objections and

Accounts.

thereon is charged on the water fund and on all the revenues of the Board. It is included amongst the securities in which a trustee may invest under the powers of the Trustee Act, 1893 (56 & 57 Vict. c. 53); see title TRUSTS AND TRUSTEES, p. 132, note (*h*), *ante*. The provisions of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 52, apply to the issue of such stock (Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 17); see title LOCAL GOVERNMENT, Vol. XIX., p. 385.

(*r*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 16 (2).

(*s*) *Ibid.*, s. 16 (3). For the purpose of paying off a loan the Board has the like powers of reborrowing as a county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 69 (Metropolis Water Act, 1902 (2 Edw. 7 c. 41), s. 16 (4)); see title LOCAL GOVERNMENT, Vol. XIX., p. 361.

(*t*) Metropolitan Water Board Act, 1906 (6 Edw. 7, c. lxxxvii.); Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.); Metropolitan Water Board (New Works) Act, 1911 (1 & 2 Geo. 5, c. cxviii.); Metropolitan Water Board Act, 1913 (3 & 4 Geo. 5, c. xcviii.).

(*u*) Metropolitan Water Board Act, 1906 (6 Edw. 7, c. lxxxvii.).

(*w*) Metropolitan Water Board Act, 1913 (3 & 4 Geo. 5, c. xcviii.).

(*x*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 18; and see the provisions in the Acts cited in note (*t*), *supra*. Payments, other than surplus revenue, into the sinking fund for redemption of loans etc. to be discharged within 100 years, were postponed for the first twenty years of the period (*ibid.*). The regulations were made by the Local Government Board by Order dated the 11th August, 1903. As to the sinking fund etc., see *Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687, H. L.

(*a*) The expression "water consumer" means any person who is supplied with water by the Board, or who pays, or is liable to pay, any money charged by the Board for or in respect of the supply of water, whether under the name of rent, rate or otherwise (Metropolis Water Act, 1902, (2 Edw. 7, c. 41), s. 37).

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appealing, and the enactments relating to the accounts of county councils and the audit thereof and to all matters incidental thereto or consequential thereon, including the penal provisions, apply accordingly (*b*).

Thames and  
Lee.

SECT. 2.—*Sources of Water Supply.*

**615.** The Water Board obtains its supply of water from the rivers Thames and Lee and from their tributaries, and also from springs and wells in the land belonging to the Board (*c*). The rights to abstract water from the Thames and its tributaries were obtained from time to time by the various metropolitan water companies under agreements confirmed by local Acts, or directly under the provisions of local Acts. These agreements and provisions have since been consolidated and amended by a single Act (*d*). No water may be taken by the Board from the river Thames or its tributaries below the highest point where the tide flows (*e*).

New sources  
of supply.

**616.** Before the Water Board resorts to any new source of supply it must give notice in writing thereof to the Local Government Board, and within one month of the receipt of such notice the Local Government Board may, if it thinks fit, appoint a competent person as an inspector to report, with respect to any sources then specially authorised by Parliament, whether the directions of the special Act have been complied with in reference thereto, and, with respect to any new sources not specially authorised by Parliament, whether the same are capable of supplying good and wholesome water for domestic purposes (*f*).

(*b*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 19. For the provisions as to the audit of the accounts of county councils, see title LOCAL GOVERNMENT, Vol. XIX., pp. 362, 363. The stamp duty for the purposes of the District Auditors Act, 1879 (42 & 43 Vict. c. 6), is settled by the Treasury, after consultation with the Local Government Board, and having regard to the cost of the audit (*ibid.*, s. 19). The provisions of the Local Authorities (Expenses) Act, 1887 (50 & 51 Vict. c. 72), were extended to the Board by the Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), s. 83.

(*c*) As to the effect on a stream of pumping from such a well, see *English v. Metropolitan Water Board*, [1907] 1 K. B. 588.

(*d*) Thames Conservancy Act, 1911 (1 & 2 Geo. 5, c. lvii.). This Act cancelled the agreements and repealed the enactments relating to the abstraction of the water from the Thames, and provided that the water so taken may be used for the supply of water to any part of the area. This Act also provided for the payment of an annual sum to the Thames Conservancy by the Water Board. Under the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), it is the duty of the Conservancy to maintain the flow and the purity of the river; see title WATERS AND WATERCOURSES, p. 448, *post*. As to the abstraction of water from the river Lee, see the River Lee Water Act, 1855 (18 & 19 Vict. c. cxvii.); as to the powers of the Lee Conservancy Board, see Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75); Lee Conservancy Act, 1900 (63 & 64 Vict. c. cxvii.). As to works to enable the water companies to supply each other with water in case of emergency, which powers and duties as to constructing works were transferred to the Board, see Metropolis Water Act, 1899 (62 & 63 Vict. c. 7).

(*e*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 1. On the Thames itself such point is Teddington Lock; see titles METROPOLIS, Vol. XX., pp. 413, 414; WATERS AND WATERCOURSES, pp. 405, 408, *post*.

(*f*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 5. The Local



The Local Government Board must within twenty-one days after the receipt from the inspector of his report send to the Water Board, with respect to any such new sources of supply not specially authorised by Parliament, a certificate of approval or disapproval, and with respect to the sources specially authorised a notice in writing stating whether in the judgment of the Local Government Board the directions of the special Act in reference thereto have been complied with (*g*).

SECT. 2.  
Sources of  
Water  
Supply.

Approval of  
Local Govern-  
ment Board.

After receipt of a certificate of disapproval of a new source not specially authorised, the Board must not use such new source; and after receipt of a notice in writing that in respect of a specially authorised source the directions of the special Act have not been complied with, the Board must not use such source until it complies with such directions (*h*).

**617.** The London County Council has power from time to time to promote Bills in Parliament relating to the supply of water within the administrative county of London and to inquire as to possible sources of supply (*i*).

Powers of  
London  
County  
Council.

### SECT. 3.—*Water for Domestic Purposes.*

#### SUB-SECT. 1.—*Duty to Provide and Supply.*

**618.** The Water Board may, and if required to do so must, provide and keep throughout its water limits, or throughout such parts thereof as the Board may be required, a constant supply of pure and wholesome water sufficient for the domestic purposes of the inhabitants within such limits, constantly laid on at such pressure as will make the water reach the top story of the highest houses within such water limits, but subject to any level prescribed by the special Act applicable, and must give and continue to give to such inhabitants such a constant supply (*k*). The Board is liable

Constant  
supply of  
pure water.

Government Board was substituted for the Board of Trade by the Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 35; and see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, Sched. V.; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142 (5). The inspector must give ten days' notice in writing of his intention to inspect the sources, and he has power of entry on the lands wherein such sources are situated (Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 6).

(*g*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 7.

(*h*) *Ibid.*, s. 8.

(*i*) London Water Act, 1892 (55 & 56 Vict. c. cxxx.). This Act limited the expenditure on such inquiries, and of costs incurred by them in inquiries before Royal Commissioners, to £10,000. As to the London County Council generally, see title METROPOLIS, Vol. XX., pp. 418 *et seq.*

(*k*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 7; compare Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35; and pp. 299, 302, *ante*. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 35, 36, are expressly excluded from incorporation in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3; but the other provisions of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), namely, ss. 37—43, are included; see pp. 304 *et seq.*, *ante*. A constant supply is now afforded throughout almost the whole of the Board's limits of supply. On the 31st December, 1912, the percentage of supplies on the constant system was about 99·2; see Annual Report of the Local Govern-

SECT. 3.  
Water for  
Domestic  
Purposes.

Provision of  
mains.

to penalties for non-compliance, but is not subject to any liability for not giving a constant supply if the want of such supply arises from frost, unusual drought, or other unavoidable cause or accident (*l*).

**619.** The Board must cause service mains or pipes (not being communication pipes) to be laid down, and a supply of pure and wholesome water for domestic purposes to be brought to every part within the limits of supply whereunto the Board is required by so many owners or occupiers of houses or buildings or parts of houses or buildings occupied as separate tenements in that part of the limits, that the aggregate amount of water rate payable by them annually in respect of the supply so required is not less than one-tenth part of the expense of providing and laying down such mains or pipes. No such requisition is, however, binding on the Board unless such owners or occupiers severally execute an agreement binding themselves to take such supply of water for three successive years at least (*m*).

Supply for  
domestic  
purposes.

**620.** The Board must, at the request of the owner or occupier of any house or building, or part of a house or building occupied as a separate tenement, in any street within the limits of supply, in

ment Board, 1913. Provisions under which the Board can be required to furnish a constant supply exist in the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 8—13. The Board must on Sundays, as on other days, supply sufficient pure and wholesome water for the domestic use of the inhabitants within their water limits (*ibid.*, s. 6). As to the prescribed level, see the saving in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 22.

(*l*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 15; see the cases cited in note (*e*), p. 303, *ante*. If the Board violates, refuses, or neglects to comply with any of the above provisions, it is liable to a penalty not exceeding £200, and to a further penalty not exceeding £100 for every month during which such violation, refusal, or neglect to comply with the said provision continues after the Board has received notice in writing from the Local Government Board to discontinue the same (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 16). As to the recovery and application of penalties, see *ibid.*, ss. 44, 45. A private person cannot enforce the penalties under *ibid.*, s. 16 (*Kyffin v. East London Water Co.*, [1896] 1 Q. B. 446). As to neglect to supply by reason of drought, see *Jackson v. Farnham Water Co.* (1887), 3 T. L. R. 632.

(*m*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 7. As to the penalties for neglect, see *ibid.*, s. 12. The Board is not bound to furnish any supply of water or lay down any pipe for such purpose in any part of the limits of supply which is for the time being supplied with water by any company or by any body or authority other than the Board (*ibid.*, s. 23). The provision in the text is substituted for and is similar in terms to the latter part of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35; see p. 303, *ante*. The Board, on the application of any person supplied with water, must furnish him with the particulars of any pipe from which he is supplied, together with the names of the streets through which such pipe passes, and the commencement and termination thereof (Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 18). As to plans of the Board's pipes, see *ibid.*, s. 17, as amended by the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 49. As to the general regulations as to laying and repairing pipes in the Metropolis, see title GAS, Vol. XV., p. 378; *Metropolitan Water Board v. Bradley* (1910), 74 J. P. 331.

which any service main or service pipe of the Board has been laid, or at the request of any person entitled to require a supply of water for domestic purposes, furnish to such owner or occupier, or other person, by means of a communication pipe or pipes and other necessary or other proper apparatus, to be provided and laid down and maintained by him and at his cost, a sufficient supply of water for domestic purposes at the specified rate (*n*).

SECT. 3.  
Water for  
Domestic  
Purposes.

**621.** If for twenty-eight days after demand in writing made to the Board, and tender made of an agreement signed by the owners or occupiers to take and pay for a supply of water for domestic purposes for three years or more, the Board neglects to lay down service mains or pipes in the manner above mentioned, and to provide, by means of a communication pipe or pipes and other necessary and proper apparatus, to be provided and laid down and maintained by and at the cost of such owners and occupiers, such supply of water, the Board is liable, on summary conviction of any such neglect, to forfeit to each such owner and occupier by way of penalty the amount of rate which he would be liable to pay under such agreement, and also the further sum of 40s. for every day during which the Board neglects to lay down such mains or pipes, or to provide such supply of water (*o*).

Neglect to  
supply.

**622.** Communication pipes and other necessary apparatus must be laid by the owners and occupiers of the dwelling-houses to be supplied with water, and for this purpose the provisions in the Waterworks Clauses Act, 1847 (*p*), in relation thereto apply (*a*). The owners or occupiers must also keep such pipes in repair (*b*), and for the purpose of repairing these pipes the provisions of the Waterworks Clauses Act, 1847 (*c*), as to opening the

Duties of  
owners and  
occupiers.

(*n*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 8; as to the like provision in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 53, which is incorporated in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3, see pp. 300, 306, *ante*. The rate is 5 per cent. of the rateable value; see p. 346, *post*.

(*o*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 12. This is subject to a proviso that the Board is not to be liable to any penalty for not laying down any such main or pipe, if it is prevented from doing so by any unavoidable cause or accident, or for not supplying water, if the failure to furnish such supply arises from frost, unusual drought, or other unavoidable cause or accident (*ibid.*). As to a requisition for constant supply, see *West Middlesex Waterworks Co. v. Tappenden* (1889), 5 T. L. R. 477 (decided on a section which had then been repealed).

(*p*) 10 & 11 Vict. c. 17.

(*a*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3, which incorporates the provisions "with respect to the communication pipes to be laid by the inhabitants," namely, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 48—53, as to which see pp. 307, 309, *ante*. There is also a provision in the Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 24, providing that no communication pipes or other means or contrivance are to be made, or laid down, without giving the notices and except under the superintendence mentioned in those provisions. As to the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 19, which is incorporated in some of the special Acts, see note (*i*), p. 323, *ante*; and compare *Kyffin v. Metropolitan Water Board* (1908), 99 L. T. 809.

(*b*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 8.

(*c*) 10 & 11 Vict. c. 17.



SECT. 3.  
Water for  
Domestic  
Purposes.

Meaning of  
"domestic  
purposes."

Supply by  
measure.

ground (*d*) are made applicable (*e*). This duty on the part of the owner and occupier to repair such pipes and apparatus extends to pipes and apparatus laid down before and existing when the Metropolitan Water Board (Charges) Act, 1907 (*f*), came into operation, as well as to those laid down subsequently (*g*).

**623.** The expression "domestic purposes" includes water-closets and baths constructed or fitted so as not to be capable of containing when filled, or filled up to the overflow or waste pipe, if any, more than eighty gallons, but not baths capable of containing more than that amount. It does not include a supply of water for consumption by or washing of horses or cattle, for washing carriages or vehicles, for watering gardens by means of any outside tap or any hose, tube, pipe, sprinkler, or other like apparatus, or for fountains, or any ornamental purpose; nor does it include a supply of water for steam, gas, motor, and other like engines for railway purposes, ventilating purposes, for washing any machine or apparatus, for cleansing sewers and drains, for cleansing and watering streets or roads, for fire extinction, for flushing drains by means of any apparatus discharging automatically, for public baths or wash-houses, or for any trade, manufacture, or business (*h*). Water supplied to a factory for the use therein of the employees, and not for the purpose of manufacture or business (*i*), or water used by a refreshment caterer (*k*), is water supplied for domestic purposes.

**624.** The Board is not bound to afford a supply of water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used, or to any common lodging-house, barracks, workhouse, or

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 48—52; see pp. 309, 310, *ante*.

(*e*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 19. This provision removes the difficulty as to the repair of such pipes experienced under the general provisions; see p. 309, *ante*.

(*f*) 7 Edw. 7, c. clxxi., which came into operation on the 1st April, 1908 (*ibid.*, s. 2).

(*g*) *Batt v. Metropolitan Water Board*, [1911] 2 K. B. 965, C. A.; *Stacey v. Gas Light and Coke Co., Metropolitan Water Board, and West End Tailoring Co.* (1910), 9 L. G. R. 174. In case of stopcocks in such pipes being out of repair, and persons tripping over them, the Board is therefore not liable for damages for negligence (*ibid.*). As to the Board's liability in respect of its own stopcock boxes, see *Osborn v. Metropolitan Water Board* (1910), 102 L. T. 217; *Rosenbaum v. Metropolitan Water Board* (1910), 103 L. T. 284; 103 L. T. 739, C. A. As to such liability generally, see pp. 311, 312, *ante*.

(*h*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 25. As to the extinction of fires and other public purposes, see pp. 345, 346, *post*.

(*i*) *Colley's Patents, Ltd. v. Metropolitan Water Board*, [1912] A. C. 24; *South Suburban Gas Co. v. Metropolitan Water Board*, [1909] 2 Ch. 666. In *Metropolitan Water Board v. London, Brighton and South Coast Railway*, [1910] 2 K. B. 890, C. A., water supplied for the use of passengers and the staff for drinking, and for urinals and water-closets, was held not to be for domestic purposes, but to come within the expression "railway purposes"; but see *Colley's Patents, Ltd. v. Metropolitan Water Board*, *supra*, per Lord LOREBURN, L.C., at p. 29. As to domestic purposes generally, see p. 301, *ante*.

(*k*) *Metropolitan Water Board v. Avery*, [1914] A. C. 118.

other public institution or building, except any hospital or sanatorium wholly or partly supported by endowments or voluntary contributions, and not carried on for purposes of private gain or loss. Where the Board declines to afford a supply otherwise than by measure it must, if required by the person who would otherwise have been entitled to demand such supply, furnish to the building in respect of which the supply is required a sufficient supply of water by measure (*l*).

SECT. 3.  
Water for  
Domestic  
Purposes.

SUB-SECT. 2.—*Purity and Sufficiency of Water.*

**625.** There are many provisions in the Acts applicable to the Metropolitan Water Board (*a*) for the purpose of securing to the consumers a pure and sufficient supply of water for domestic purposes, and for affording to the inhabitants within the limits of supply remedies for default. There are provisions as to the filtration and conveyance of the water (*b*), and for its examination bacteriologically and otherwise. Complaints may also be entertained and inquired into by the Local Government Board and by the Railway and Canal Commission (*c*). There are also provisions in regard to the metropolitan gas supply for the protection of the water from contamination by gas (*d*).

Provisions for  
securing pure  
and sufficient  
supply.

**626.** The Local Government Board must from time to time

Water  
examiners.

(*l*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 20. The Board may also require (*ibid.*) that the sum to be paid for any such supply by measure shall not be less than the sum which would have been chargeable in respect of such supply had the supply been given under the provisions of the Act relating to domestic supply otherwise than by measure, and the charges therefor (see p. 346, *post*), except in the case of barracks or other buildings for the time being in the occupation of His Majesty, or of any department of His Majesty's Government for public purposes. As to the supply to workhouses and such like institutions generally, see p. 300, *ante*.

(*a*) As to these Acts, see p. 332, *ante*.

(*b*) Thus, all water supplied by the Board for domestic use must be effectually filtered before it is passed into the pipes for distribution, except water pumped from wells into a covered reservoir or aqueduct, without exposure to the atmosphere, and which must not be afterwards mixed with unfiltered water (Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 4). Water may only be brought or conducted within the metropolis in pipes or covered aqueducts, unless the water be afterwards filtered before distribution (*ibid.*, s. 3). Reservoirs within five miles of St. Paul's Cathedral must be roofed in or covered over, except reservoirs from which the water is to be efficiently filtered before it is passed into the pipes for distribution, or reservoirs the water from which is to be used for other than domestic purposes (*ibid.*, s. 2). As to the penalties for non-compliance, see *ibid.*, s. 16. Every steam-engine, furnace, or other work in which coals which produce smoke during combustion are consumed by the Board for the purpose of the waterworks must be constructed on the most effectual principle for consuming its own smoke (*ibid.*, s. 14).

(*c*) As to the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII., pp. 103, 104; as to the Railway and Canal Commission, see titles COURTS, Vol. IX., pp. 217 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 753 *et seq.*

(*d*) See title GAS, Vol. XV., pp. 380 *et seq.* As to the protection of the Board as regards electricity, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 623, 624.

SECT. 3.  
Water for  
Domestic  
Purposes.

appoint a water examiner, being a competent and impartial person, who must from time to time, in the manner directed by the Local Government Board, examine the water supplied, in order to ascertain whether it has been effectually filtered as required (*e*), and he must report the result to the Local Government Board, who must send a copy of every such report to the Water Board. The Water Board may be represented at any examination by some officer, who must not, however, interfere with the examination (*f*); the examiner must at all reasonable times have free access to the works of the Water Board for the purpose of inspecting them, and must have all proper facilities for making an inspection (*g*).

Bacterio-  
logical  
examination.

**627.** The Water Board must cause chemical and bacteriological examinations of and experiments as to the condition of the water to be supplied by the Board to be made, and must supply such buildings, apparatus and plant, and such staff, and construct such works, as may be required for enabling such examinations and experiments to be conducted efficiently. The persons employed by the Board to make these examinations and experiments must periodically report to the Board the result thereof, and a copy of the report must at the same time be sent to the water examiner. The Board must also take and record such observations as may be required by the Local Government Board (*h*).

Complaint  
to Local  
Government  
Board.

**628.** If at any time complaint as to the quantity or quality of the water supplied for domestic use is made to the Local Government Board, by memorial in writing signed by not less than twenty inhabitant householders paying rates for and supplied with water by the Water Board, the Local Government Board may, at any time within one month after the receipt of such complaint, appoint a competent person to inquire into and concerning the grounds thereof and report to the Local Government Board thereon (*i*). Even without such a complaint, the Local Government Board may at any time, if and when it thinks fit, appoint a competent person to inquire into and report on the quality of the water furnished by the Water Board (*k*). The person so appointed, in either case, must, within three days after such appointment, give notice thereof in writing to the Water Board, and after such notice, he has power to inspect and examine the waterworks and to inquire into the grounds of any complaint, and the Water Board must afford him all reasonable facilities for such inspection, examination, and inquiry (*l*). If after receipt of such report it appears to the Local Government Board

(*e*) That is, by the Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 4; see note (*b*), p. 341, *ante*.

(*f*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 36. The examiner is removable by the Local Government Board (*ibid.*).

(*g*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 25 (5).

(*h*) *Ibid.*, s. 25 (1)—(4).

(*i*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 9.

(*k*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 35.

(*l*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 10; Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 35. Any person obstructing an inspector is liable to a penalty not exceeding £10 (Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 11).



that the complaint is well founded, or that some matter requires alteration, the Local Government Board must give notice thereof in writing to the Water Board (*m*), and the Water Board must within a reasonable time remove the grounds of complaint (*n*).

SECT. 3.  
Water for  
Domestic  
Purposes.

**629.** Any water consumer (*o*), and any local authority (*p*), may complain to the Railway and Canal Commissioners (*q*) that the Water Board has failed to perform some statutory duty, and the Commissioners may hear and determine the complaint, and, if satisfied of such failure, order the Board to fulfil the duty within the time limited by the order and may, if they think fit, by any such order impose any penalty for such failure which can be imposed under any Act, and enforce any such order in like manner as any other order of the Commission (*r*). Similarly, a complaint may be made as to the quantity or quality of the water supplied, in which case the Commissioners may, if satisfied that the complaint is well founded, order the Board to remove the ground of complaint, and may award damages to the complainant (*s*).

Complaint  
to Railway  
and Canal  
Commis-  
sioners.

**630.** A local authority may aid any water consumer in obtaining the determination of any question which appears to the local authority to be of interest to water consumers within its district with respect to the rights, duties, and liabilities of the Board in reference to the quantity or quality of the water supplied or the charges made. A local authority so aiding any legal proceedings may, if the court thinks fit, be made a party to the proceedings, and be liable for costs accordingly (*t*).

Aid from  
local  
authority.

(*m*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 12.

(*n*) *Ibid.*, s. 13. The penalty for non-compliance by the Water Board is not exceeding £200, and a monthly penalty not exceeding £100 after receipt of notice from the Local Government Board (*ibid.*, s. 16).

(*o*) A "water consumer" is any person supplied with water by the board, or who pays or is liable to pay any money charged by the Board for or in respect of the supply of water, whether under the name of rent, rate or otherwise, and includes any householder or owner or occupier of a house entitled to make a communication with the mains or pipes of the Board (Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 5); but the terms of agreements existing on the 6th August, 1897, between a water company and a water consumer as to the supply of water are not affected by this definition (*ibid.*).

(*p*) "Local authority" means the council of any county borough or district, the corporation of the City of London, and any metropolitan borough council (*ibid.*).

(*q*) As to the Railway and Canal Commissioners, see titles COURTS, Vol. IX., pp. 217 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 753 *et seq.*

(*r*) Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 1 (1); as to the enforcement of orders, see title RAILWAYS AND CANALS, Vol. XXIII., pp. 761, 762.

(*s*) Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 1 (2). The enactments relating to the Railway and Canal Commission, except the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 2, with the necessary modifications, apply to the commission for its jurisdiction in respect to the metropolitan water supply (Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 1 (3)). The remedies above mentioned are in addition to, and not in substitution for, any existing proceedings or remedy (*ibid.*, s. 1 (4)).

(*t*) Metropolis Water Act, 1897 (60 & 61 Vict. c. 56), s. 2. This

## SECT. 4.

Water for  
Non-  
domestic  
Purposes.Supply for  
trade  
purposes.SECT. 4.—*Water for Non-domestic Purposes.*

**631.** The Water Board must, at the request of any owner or occupier of any premises situated in or adjoining any street in which any main or service pipe of the Board is laid, who requires for use on such premises a supply of water by measure for purposes other than domestic (*u*), and by means of communication pipes and other necessary and proper apparatus to be provided, laid, and maintained by and at the cost of the person requiring such supply, afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person as aforesaid) or approved by the Board (*a*) for measuring and ascertaining the quantity of water so supplied (*b*). The Board is not liable to any penalty or damages for not supplying water under this provision if the failure to furnish such supply arises from frost, unusual drought, or other unavoidable cause or accident (*c*). Any builder about to erect any building or part of a building who requires a supply of water for that purpose is deemed the occupier of premises within the meaning of the above provision (*d*).

Hydraulic  
pressure.

**632.** The Board may also from time to time supply water under pressure for the purpose of supplying motive power by hydraulic pressure by agreement with the person requiring such supply (*e*).

Supply by  
agreement.

**633.** The Board has a general power of supplying water by agreement with any person or body desiring a supply for any purpose within the limits of supply, and may do so upon such terms and conditions as to payment and otherwise as may be agreed upon. The terms and conditions upon which such supply

provision changes the law as laid down in *A.-G. v. Camberwell Vestry* (1894), 8 R. 627.

(*u*) As to what purposes are not domestic purposes, see pp. 301, 302, 340, *ante*.

(*a*) A scale of maximum charges for the hire of meters supplied by the Board is provided in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 18. The scale varies from 1s. 6d. to 25s. per quarter, according to the diameter of the inlet and outlet to such meter (*ibid.*).

(*b*) *Ibid.*, s. 16 (1). As to the charges for such supply, see *ibid.*, s. 16 (2), (3); pp. 347, 348, *post*. As to the rights of builders previously to this Act, see *Metropolitan Water Board v. Paine*, [1907] 1 K. B. 285.

(*c*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 16 (4). As to such accidents, see p. 303, *ante*.

(*d*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 17. The Board may, however, if it so determines, instead of affording the required supply by measure, afford the same at a rate not exceeding 7s. per £100 of the probable total cost after making such allowance as the Board may think reasonable for decorative or iron or steel work not requiring the use of water (*ibid.*). A builder may, however, obtain the water from a building owner who is paying for it by measure, and in this case he is not liable to pay the Board as a person who has required a supply of water from the Board (*Metropolitan Water Board v. Johnson & Co.*, [1913] 3 K. B. 900, C. A.). The determination as to charging by rate must be a determination in the particular case; a general resolution by the Board to charge by rate is not sufficient (*ibid.*).

(*e*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 21. The rates and charges and terms and conditions of such supply must from time to time be agreed upon (*ibid.*).

is given must be the same, in like circumstances, to all consumers (*f*). Notwithstanding any of these provisions or any agreement, the Board is not required to afford a supply of water for other than domestic purposes, if and so long as any such supply would interfere with the sufficiency of the water required to be supplied for domestic purposes (*g*).

SECT. 4.  
Water for  
Non-  
domestic  
Purposes.

SECT. 5.—*Water for Public Purposes.*

**634.** The Water Board is subject to the same duties in regard to supplying water for cleansing of drains, watering streets, and for public baths and washhouses as are other undertakers under the provisions of the Waterworks Clauses Act, 1847 (*h*), with certain modifications (*i*). The rate for such supply is 6*d.* per 1,000 gallons (*k*).

Cleansing of  
streets etc.

**635.** As regards fire extinction the Board is subject, with certain modifications, to the same duties as other undertakers (*l*), the London County Council being the local authority in respect of the enforcement of these duties (*m*). The Board, at the expense of the London County Council, must provide in any mains or pipes within the Metropolis, plugs, hydrants, and all other apparatus necessary or proper in connexion with the Board's pipes, for a supply of water in case of fire, and the London Fire Brigade may make such use thereof as may be deemed necessary for the purpose of extinguishing any fire (*n*). These plugs, hydrants, and other

Fire  
extinction.

(*f*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 24. Nothing in this provision prejudices or affects the terms upon which any person or body is entitled to require a supply for any purpose (*ibid.*).

(*g*) *Ibid.*, s. 32; the water supply must not be cut off from any market gardener's premises without giving seven days' previous notice (*ibid.*).

(*h*) 10 & 11 Vict. c. 17, s. 37, incorporated in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3; see pp. 303, 304, *ante*.

(*i*) Thus, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 37, is to be construed as extending to all such purposes as are therein mentioned, whether the expenses in connexion with such purposes are defrayed out of the poor rates, borough rates, or out of any other public rates (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 31). As to the power of metropolitan local authorities to obtain a water supply for cleansing sewers and other purposes, see pp. 266, 267, *ante*.

(*k*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 31. Water for watering public parks and gardens, and the roads therein, is also to be charged at the same rate (*ibid.*, s. 29).

(*l*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 38—43, incorporated in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3; as to fire-plugs, see also Metropolitan Water Board (Various Powers) Act, 1907 (7 Edw. 7, c. clxxiv.), s. 73; Metropolitan Water Board Act, 1913 (3 & 4 Geo. 5, c. xeviii.), s. 85; pp. 304 *et seq.*, *ante*.

(*m*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 32; the council is entitled (*ibid.*) to copies of plans showing the position of mains and pipes and alterations therein, made pursuant to the provision in the Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 17. As to the London Fire Brigade, see title METROPOLIS, Vol. XX., pp. 417, 418.

(*n*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 32; Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 34. Where the Board gives a constant supply in any part of its water limits, it may give



SECT. 5.  
Water for  
Public  
Purposes.

apparatus may be used by the Board for other than public purposes, without the consent of the London County Council, and may, by permission of the Board, be used by other persons (o).

SECT. 6.—*Charges for Supply.*

SUB-SECT. 1.—*Water Rates.*

Basis of rate.

**636.** The rate per annum for a domestic supply must not exceed 5 per cent. of the rateable value of the house or building or part of a house or building in respect of which the supply is required, and such rate, subject to the provisions herein stated, must be charged uniformly in like circumstances to all consumers entitled to such supply (p).

Rebates.

Where the Water Board furnishes a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit, and occupied as a separate tenement, which is assessed to the poor rate, or other rate in which such last-mentioned rate is included, in a sum exceeding £300 per annum, and is not charged with the payment of inhabited house duty, the Board must make and allow from the water rate payable in respect of such supply a rebate or discount of such amount, not less than 20 per cent. nor more than 30 per cent. of such water rate, as the Board from time to time determines, and such rebate or discount must from time to time be made or allowed from the water rate payable in respect of every such supply, and at a uniform rate per cent. (q).

notice thereof to the London County Council, and if the Council does not within two months specify the size and position of the plugs which it requires to be fixed, the Board may provide such plugs as to the Board seem necessary and proper, and these plugs are deemed to be a compliance with the requirements as to supplying such plugs, and the costs of providing such plugs are at the expense of the Council (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 34).

(o) *London County Council v. East London Waterworks Co.*, [1900] 1 Q. B. 330. As to the use of these fire hydrants for other public purposes by the county or borough councils, see *London County Council (General Powers) Act*, 1894 (57 & 58 Vict. c. cexii.), s. 4.

(p) *Metropolitan Water Board (Charges) Act*, 1907 (7 Edw. 7, c. clxxi.), s. 8; as to an exception from this uniform rate in respect of an estate in Paddington, see *ibid.*, s. 11. The Board cannot charge any additional rate for a supply constituting a high service (*ibid.*, s. 22). A house may be occupied as a separate tenement and the rate chargeable on it only, although it communicates with adjoining buildings (*Metropolitan Water Board v. Baker (G. P. & J.), Ltd.* (1910), 74 J. P. 337).

(q) *Metropolitan Water Board (Charges) Act*, 1907 (7 Edw. 7, c. clxxi.), s. 9. In making and allowing such rebate or discount the water rate must not in any case be less than would have been payable in respect of any house or building or part of a house or building occupied as a separate tenement assessed to the poor rate or other such rates in a sum of £300 per annum (*ibid.*). In order to ascertain whether any such house or building or part thereof is charged with the payment of inhabited house duty, any person having charge of any list of assessments to or exemptions from such duty, or any official document relating thereto, must on a request in writing by the clerk of the Board make and transmit to the Board copies or extracts from the same certified as correct by the officer preparing the same, or permit the Board to make copies or extracts. Any such certified copy or extract is in all proceedings and for all purposes

**637.** The rateable value of any house or building or part of a house or building for the purposes of water rate must be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues (*r*), or, if there is no such list in force, by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included (*s*). If no rateable value has been assigned in any such valuation list to any house or building or part of a house or building, and such house or building or part is not rated to any rate made for the relief of the poor or to any such rate as aforesaid, the rateable value must for the purposes of the water rate be determined by two justices (*t*).

SECT. 6.  
Charges for  
Supply.

Rateable  
value.

SUB-SECT. 2.—*Supply by Meter.*

**638.** A maximum scale of charges for supply by meter is provided, and the charge per 1,000 gallons varies with the amount consumed, but there is also a minimum quarterly charge (*a*). The whole of the water furnished to any person within any premises which form one area for trading or manufacturing purposes must be reckoned as one supply, and is chargeable accordingly, notwithstanding that the water may be in fact delivered thereat through two or more meters, pipes or other necessary and proper

Charges.

admissible as sufficient evidence of the matters thereon stated (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 10).

(*r*) It is immaterial that a provisional list altering the value may come into force a few days later (*Metropolitan Water Board v. Phillips*, [1913] A. C. 86). As to the valuation lists in the Metropolis, see title RATES AND RATING, Vol. XXIV., pp. 115 *et seq.*

(*s*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 13 (1). As to the rateable value of buildings in occupation of His Majesty or of the Government, see *ibid.*, s. 14.

(*t*) *Ibid.*, s. 13, which provides that the annual value of such house, building, or part is to be determined in the manner provided by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68 (as to which see p. 314, *ante*), and that such annual value shall be the rateable value (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 13 (1)). By the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34), s. 1, it was provided that in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, the words "the annual value of the tenement supplied with water" are, within the unions and parishes to which the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), applies, to mean the rateable value as settled from time to time by the local authority as duly constituted, provided that where the water rate is chargeable on the annual value of a part only of any hereditament entered in the valuation list such annual value is to be a fairly apportioned part of the rateable value of the whole tenement ascertained as aforesaid, the apportionment in case of dispute to be determined by two justices as provided by the said provision. By the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 13 (2), the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34), is extended and made applicable throughout the whole limits of supply, and in construing the above proviso to *ibid.*, s. 1, the words "rateable value" are to be substituted for "annual value."

(*a*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 16 (2). Thus, the charge per 1,000 gallons is 11*d.* where the quarterly consumption does not exceed 50,000 gallons, and is 6½*d.* when such consumption exceeds 5,000,000 gallons. The minimum charge is 22*s.* 11*d.* per quarter. As to supply for hydraulic purposes, see p. 344, *ante*.

SECT. 6. instruments (*b*). The rates are to be charged uniformly under  
 Charges for like circumstances to all consumers entitled to and receiving a  
 Supply. supply (*c*).

SUB-SECT. 3.—*Payment and Recovery of Rates.*

Application of  
 Waterworks  
 Clauses Act,  
 1847.

**639.** The provisions in the Waterworks Clauses Act, 1847 (*d*), with respect to the payment and recovery of water rates (*e*) apply to the Water Board with some modifications (*f*), and the several words and expressions defined in that Act have the same meanings, unless there is something in the subject or context repugnant to such construction (*g*). Further, where a house or building or part of a house or building supplied with water is let to monthly or weekly tenants, or tenants holding for any other period less than a quarter of a year, the owner instead of the occupier must, if the Board so determines, pay the rate for the supply (*h*).

Rebate where  
 owner agrees  
 to pay.

**640.** Where the water rate in respect of the supply of water to any house or building or part of a house or building is payable by

(*b*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.). There is also a similar proviso as to water taken for railway purposes (*ibid.*).

(*c*) *Ibid.*, s. 16 (3). The Board must not in the case of any supply exceeding 25,000 gallons charge for any such supply a greater sum than it would be entitled to charge if the quantity of water supplied were just sufficient to bring such supply within the next division of the scale of rates relating to a supply of a greater quantity whereon a lower rate for every 1,000 gallons is chargeable (*ibid.*); as to supply by agreement, see *ibid.*, s. 24; p. 344, *ante*.

(*d*) 10 & 11 Vict. c. 17.

(*e*) *Ibid.*, ss. 68—74; see pp. 314 *et seq.*, *ante*.

(*f*) As to a modification of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, see note (*a*), p. 315, *ante*. The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 70 (see p. 316, *ante*), which provides for the rates being paid quarterly on the usual quarter days, is varied by making the quarterly days for payment the 1st day of April, July, October, and January respectively (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 15). The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 71 (see p. 317, *ante*), which relates to notice of discontinuance of supply, is varied by a provision that the notice for a discontinuance of a supply of water is of no effect unless it is in writing, signed by and on behalf of the consumer, and is left at or sent by post to the office of the Board (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 30). The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72 (see note (*e*), p. 316, *ante*), which makes the owners of tenements of the annual value of £10 and less liable for the water rates, is varied by the alteration of the words "annual value" to "rateable value" and inserting £20 for £10 (Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 4). The effect of this amendment is to make the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34), apply also to the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72 (*Metropolitan Water Board v. Streeton* (1910), 102 L. T. 220). The definition of "owner" in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72, is the definition adopted throughout the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.); see *ibid.*, s. 5; *Metropolitan Water Board v. Brooks*, [1911] 1 K. B. 289, C. A.

(*g*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 3.

(*h*) *Ibid.*, s. 26. The provisions in the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), prohibiting the cutting off of the water supply for non-payment of such rates (see p. 320, *ante*) apply to the Water Board; see note (*t*), p. 332, *ante*.



the owner and not by the occupier or occupiers, and such owner agrees with the Board in writing to pay such rate whether the house, building, or part be occupied or not, the Board may make or allow to such owner a deduction or abatement from the amount payable by way of water rate in respect of such house, building, or part to an amount not exceeding one-fifth thereof, and in agreeing to make or allow any such deduction or abatement the Board may impose such terms and conditions as to the time and mode of payment of the water rate as it may think fit (*i*).

SECT. 6.  
Charges for  
Supply.

Disputes in regard to the charges for supply to Government buildings may be settled by arbitration (*k*).

**641.** If any person refuses or neglects to pay to the Board any rate or sum due in respect of the charges for water supply, the Board may recover the same with costs in any court of competent jurisdiction; this remedy is in addition to the other remedies of the Board for the recovery thereof (*l*).

Recovery by  
action.

**642.** If a consumer leaves the premises where water is supplied to him without paying the rate, the Board cannot require the next tenant of the premises to pay the arrears, unless the incoming tenant has agreed with the defaulting consumer to do so. The Board, notwithstanding such arrears, must supply water to the incoming tenant when required by him (*m*).

Arrears on  
change of  
tenancy.

#### SECT. 7.—*Waste, Misuse, and Contamination.*

**643.** Every cistern or other receptacle for water, and every closet, soil pan, and private bath, supplied with water by the Water Board, must be so constructed and used as effectually to prevent the waste, misuse, or undue consumption of water, and the flow or return of foul air or other noisome or impure matter into the mains of the Board, or into any pipes connected or communicating therewith. The Board is not bound to supply water into any cistern, receptacle, closet, soil pan or private bath not so constructed and used (*n*).

Provisions  
against  
waste.

**644.** The metropolitan water companies were required within a certain time, and the Board has power from time to time, to make

Regulations  
of the Board.

(*i*) Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 27.

(*k*) *Ibid.*, s. 28.

(*l*) *Ibid.*, s. 33; compare Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21; p. 318, *ante*. Proceedings under this provision when brought in the county court are not limited by the six months' limitation in respect of the recovery of rates before a court of summary jurisdiction (*Metropolitan Water Board v. Bunn*, [1913] 3 K. B. 181, C. A., following *Blackburn Corporation v. Sanderson*, [1902] 1 K. B. 794, and distinguishing *Tottenham Local Board v. Rowell* (1876), 1 Ex. D. 514, C. A., and *West Ham Local Board v. Maddams* (1876), 1 Ex. D. 516, n.; compare *Bolton Corporation v. Scott* (1913), 77 J. P. 193, C. A.; and pp. 318, 320, *ante*).

(*m*) Metropolitan Water Act, 1871 (34 & 35 Vict. c. 113), s. 48. A trustee in bankruptcy who takes over the bankrupt's premises is an "incoming tenant" within this provision (*Re Flack, Ex parte Berry*, [1900] 2 Q. B. 32).

(*n*) Metropolitan Water Act, 1852 (15 & 16 Vict. c. 84), s. 23. As to cutting off the water for neglect to prevent waste etc., see p. 352, *post*.

SECT. 7.  
Waste,  
Misuse, and  
Contamina-  
tion.

such regulations as are necessary or expedient for the purpose of preventing the waste or misuse, undue consumption or contamination of water, and therein, amongst other things, to prescribe the size, nature and strength of the pipes, cocks, cisterns, and other apparatus to be used, and to interdict any arrangements and the use of any pipes, cocks, cisterns, or other apparatus, which may tend to such waste, misuse, undue consumption, or contamination (*o*). The Water Board, if it thinks fit, or, if requested by the Local Government Board, may repeal or alter any of these regulations, or make new regulations instead of any of them (*p*). Penalties may be imposed by such regulations for offences against the same, not exceeding in respect of any offence the sum of £5, and such penalties are recoverable before a court of summary jurisdiction; every such regulation must, however, be so framed as to allow part only of the maximum penalty being inflicted (*q*). The regulations, or any repeal or alteration thereof, are of no force or effect until submitted to and confirmed by the Local Government Board, which may institute an inquiry in relation thereto (*r*). Printed copies of the regulations in force for the time being are to be kept at the office of the Water Board, and of the London County Council, and of the different city, borough, and district councils within the limits of supply, and must be open to inspection without payment; and printed copies must be supplied by the Water Board on payment to persons applying for the same (*s*). All regulations, and every repeal or alteration, when so published, is binding upon and must be observed by all parties, and the Board is not bound under any agreement to supply water to premises unless such regulations as are for the time being in force are duly observed in respect of such premises (*t*).

(*o*) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 26; Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 17. Regulations pursuant to these enactments were made and approved by the Board of Trade by Order dated the 16th August, 1872. These regulations are not affected by the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), s. 35.

(*p*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 18. The Local Government Board was substituted for the Board of Trade by the Public Health Act, 1872 (35 & 36 Vict. c. 79); see pp. 336, 337, *ante*. A "metropolitan authority," or any ten consumers of the water supplied, may request the Water Board in writing to repeal and alter the regulations, or to make new regulations, and if the Water Board refuses, the Local Government Board after inquiry may make such repeal or alterations or new regulations as it thinks fit (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 19). The expression "metropolitan authority" is defined (*ibid.*, s. 3, Sched. A; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II., Part II.) as including the London County Council, the City Council, the various metropolitan borough councils, and borough and district councils within the limits of supply. As to serving notice of alteration of the regulations on the metropolitan authority, see Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 21.

(*q*) *Ibid.*, s. 20. As to recovery, see *ibid.*, s. 45; as to courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*r*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 22, which provides for the notices and conduct of such inquiry.

(*s*) *Ibid.*, s. 23. A copy dated and authenticated by seal is evidence of such regulations (*ibid.*, s. 25).

(*t*) *Ibid.*, s. 24.

**645.** When the Board affords, or is about to afford, a constant supply of water (*a*) in any district, the owners and occupiers of premises supplied with water in the district must provide the fittings prescribed by the regulations, and from time to time keep them in proper repair (*b*). If the owner or occupier makes default in so providing the fittings, the Board may, if it thinks fit, provide them, and where the fittings of any person are out of order and not as prescribed, the Board may, by notice in writing to such person, require him within twenty-four hours after the date of the service of such notice to cause the same to be repaired, so as to prevent any waste of water, and if any person fails to comply with the terms of such notice, the Board may, if it thinks fit, repair the fittings. The expenses incurred by the Board in providing such fittings and in making such repairs are payable to the Board by the person liable to pay the rate for the water supplied, or on whose credit the water is supplied, by means of such fittings, or by the owner of the premises (*c*).

SECT. 7.

Waste,  
Misuse, and  
Contamina-  
tion.Provision of  
fittings.

When the Board is required or has proposed to provide a constant supply in any district, the officers and agents of the Board, or of the party requiring such supply, or any person appointed by the Local Government Board for such purpose, may at all reasonable times enter any premises within such district in order to inspect the premises and examine the same with a view to ascertain whether there are in or about the same the prescribed fittings, or to provide or repair the fittings (*d*). Disputes as to

Right of  
entry.

(*a*) Provision is made for notices being served on owners and occupiers within any district, when it is proposed to give a constant supply therein, requiring them to supply their premises with the necessary fittings. Such fittings must be provided within two months of the service of the notice (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 26—28).

(*b*) *Ibid.*, ss. 3, 28. The term “fittings” includes communication pipes, and also pipes, cocks, cisterns, and other apparatus used or intended for supply of water by the Board to a consumer, and for that purpose placed in or about the premises of the consumer (*ibid.*, s. 3); as to communication pipes and their repair, see pp. 339, 340, *ante*.

(*c*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 29. Such expenses may be recovered with costs from the owner, and to the extent of any rent due by the occupier of the premises from such occupier, before a court of summary jurisdiction, or by action in any court having jurisdiction locally in the matter, as if the same were an ordinary simple contract debt. Any sum and costs recovered from the occupier may be deducted from the rent due. If the occupier fails to disclose the amount of rent due by him, or the name and address of the owner, he is liable to pay the whole of such expenses and costs, but the above provision does not, as between owner and occupier, affect any contract made between them respecting the payment of any such works (*ibid.*). The term “owner” means the person who for the time being receives the rack-rent of the premises with reference to which the term is used, whether on his own account or under or by virtue of any mortgage or charge, or as agent or trustee for any person, or who would so receive the same if the premises were let at a rack-rent, and includes every successive owner from time to time of the premises, being such for any part of the time during which the enactment wherein that term is used operates in relation to the premises (*ibid.*, s. 3; *Metropolitan Water Board v. Brooks*, [1911] 1 K. B. 289, C. A.).

(*d*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 30. Persons obstructing such inspection, examination, provision or repair of fittings



## SECT. 7.

Waste,  
Misuse, and  
Contamina-  
tion.

Neglect of  
fittings.

Cutting off  
supply.

Nuisances.

whether the fittings of any person are as prescribed are settled by a court of summary jurisdiction on the application of either party (e).

**646.** When a constant supply is afforded or about to be afforded, any person supplied with water by the Board who wilfully or negligently causes or suffers any fittings to be out of repair, or to be so used or contrived that the water supplied is or is likely to be wasted, misused, unduly consumed or contaminated, or so as to occasion or allow the return of foul air or other noisome or impure matter into any pipe belonging to or connected with the pipes of the Board, is liable for every such offence to a penalty not exceeding £5 (f).

**647.** If any person supplied with water by the Board wrongfully does or causes or permits to be done anything in contravention of any of the provisions of the special Acts applicable to the Board or of the Metropolis Water Acts, 1852 (g) or 1871 (h), or wrongfully fails to do anything which under any of those provisions ought to be done for the prevention of the waste, misuse, undue consumption or contamination of the water of such company, the Board may, without prejudice to any other remedy against him, cut off any of the pipes by or through which water is supplied by them to him or for his use, and may cease to supply him with water so long as the cause of injury remains or is not remedied (i). Within twenty-four hours of such cutting off from a dwelling-house the Board must give notice thereof in writing to the sanitary authority of the district in which the house is situated (k).

**648.** The absence, in respect of any premises, of the prescribed

are liable for each offence to a penalty not exceeding £5 (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 30). This provision gives the officers of the Board a right of entry to inspect the fittings at any reasonable time where a constant supply is afforded, and is independent of the other provisions as to notice requiring fittings when the supply is about to be afforded (*Metropolitan Water Board v. Northcott* (1907), 71 J. P. 338). Proof of the regulations is, however, necessary in order to obtain a conviction for obstruction (*ibid.*).

(e) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 31. The court may make such order as to the costs of the proceedings as seems just, and the decision of the court is final and binding on all parties (*ibid.*). As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(f) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 32.

(g) 15 & 16 Vict. c. 84.

(h) 34 & 35 Vict. c. 113.

(i) Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), s. 25; Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 32. The right to cut off the supply for failure to pay water rate is subject to the provisions of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), as to which see *Metropolitan Water Board v. Bibbey*, [1911] 2 K. B. 74; pp. 320, 321, *ante*. Failure to repair a communication pipe which is leaking is a good ground for cutting off the supply (*Grand Junction Waterworks Co. v. Rodocanachi*, [1904] 2 K. B. 230; see pp. 322, 339, 340, *ante*).

(k) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 32; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 49. The penalty for failure is £10, which the sanitary authority must enforce (*ibid.*). As to the sanitary authority, see title METROPOLIS, Vol. XX., pp. 408, 466.

fittings after the prescribed time is a nuisance liable to be dealt with summarily (*l*). In the Metropolis every sanitary authority must also make bye-laws for securing the cleanliness and freedom from pollution of tanks, cisterns, and other receptacles used for storing water used or likely to be used by man for drinking or domestic purposes, or for manufacturing drink for the use of man (*m*).

SECT. 7.  
Waste,  
Misuse, and  
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tion.  
—

(*l*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 33; see title NUISANCE, Vol. XXI., pp. 539, 566. Such absence of water fittings is deemed to render the premises unfit for human habitation, unless and until the contrary is shown to the satisfaction of the court (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 33; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (3) (d)). An occupied house within the Metropolis without a proper water supply is also a nuisance liable to be dealt with summarily, and if it is a dwelling-house is deemed unfit for human habitation (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 48; and see p. 267, *ante*).

(*m*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 50.

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## WATERCOURSES.

*See* EASEMENTS AND PROFITS À PRENDRE; SEWERS AND DRAINS;  
WATERS AND WATERCOURSES.

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## WATERMEN.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION ; ROYAL FORCES ;  
WATERS AND WATERCOURSES.

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## Part I.—Property in Water.

### SECT. 1.

#### Extent of Rights of Property in Water.

Flowing water.

### SECT. 1.—*Extent of Rights of Property in Water.*

**649.** Water flowing in a known channel or percolating through the soil is not, except in the cases mentioned below, the subject of property or capable of being granted to anybody. For flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant can acquire an exclusive use, but in the sense that it is public and common to all who have a right of access thereto (*a*).

The exceptions to this rule are as follows:—(1) Where Parliament has declared otherwise (*b*); (2) where the water flows to a person's property and there is no one to share with him the use of the water, or to call him to account for any use he may make of it (*c*); (3) where flowing water is appropriated or taken into possession, but the right of property exists during such possession only (*d*); and (4) where water is supplied by a water company, even though in the consumer's own pipes (*e*).

Water in receptacle.

**650.** Water which does not flow, but is in some receptacle, is the property of the person who has the possession of it so long as he continues such possession (*f*), and such water may be granted by him to another (*g*).

### SECT. 2.—*Grant of Property or Proprietary Rights in Water.*

Scope of grant.

**651.** Except in the instances mentioned above (*h*) where a person may have a proprietary right in water, no one can make a grant of any property or proprietary right in flowing water so as to affect the rights of persons who have a right of access to such water (*i*).

(*a*) *Embrey v. Owen* (1851), 6 Exch. 353; *Mason v. Hill* (1833), 5 B. & Ad. 1; *Ewart v. Belfast Poor-Law Guardians* (1881), 9 L. R. Ir. 172, C. A. A person can only acquire a right to so much water as he applies to a beneficial purpose, leaving the rest to others who, if they appropriate it, cannot lawfully be disturbed (*Williams v. Morland* (1824), 4 Dow. & Ry. (K. B.) 583).

(*b*) *Medway River Navigation Co. v. Romney (Earl)* (1861), 9 C. B. (N. S.) 575; *Rochdale Canal Co. v. King* (1849), 14 Q. B. 122.

(*c*) *Holker v. Porritt* (1875), L. R. 10 Exch. 59, Ex. Ch. As soon as a person has appropriated water to a beneficial use, he may sue for any injury done to him in respect of such use (*Mason v. Hill*, *supra*).

(*d*) *Holker v. Porritt*, *supra*; 1 Bl. Com. (1841 ed.) 149, 157. The same rule applies to percolating water when appropriated even by the artificial means of pumping (*Ballard v. Tomlinson* (1885), 29 Ch. D. 115, C. A.); see also title PERSONAL PROPERTY, Vol. XXII., p. 401.

(*e*) *Ferens v. O'Brien* (1883), 11 Q. B. D. 21, where it was held to be larceny at common law to take water from the pipes of another person.

(*f*) 2 Bl. Com. 2, 14; *Ferens v. O'Brien*, *supra*. If such water escapes the person who stored it is liable for the consequences (*Rylands v. Fletcher* (1868), L. R. 3 H. L. 330); and see p. 430, *post*.

(*g*) By the grant of a pool or pit of water, the water passes (Co. Litt. 5; *Throckmerton v. Tracy* (1555), Plowden, 145, 151), *stagnum* being a word compounded of land and water and containing both.

(*h*) See the text, *supra*.

(*i*) By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict.

A person may, however, grant to another the right to take or use running water so as to bind the grantor's estate, or such rights may be acquired by uninterrupted user, because they are easements (*j*).

SECT. 1.  
Extent of  
Rights of  
Property  
in Water.

## Part II.—Rights and Duties Relating to the Soil.

### SECT. 1.—*The High Seas.*

#### SUB-SECT. 1.—*In General.*

**652.** The term “high seas” includes the whole of the sea below low-water mark and outside the body of a county, for the realm of England only extends to the low-water mark, and all beyond is the high seas (*k*). Definition.

The soil under the part of the high seas which is more than three miles from the coast is, in the absence of any treaty between States or of actual possession by a State, the property of no person (*l*).

c. 41), s. 6, a conveyance of land is deemed to include waters and water-courses appertaining or reputed to appertain to the land, or demised or occupied or enjoyed with or reputed or known as part or parcel of, or appurtenant to, the land; see also *Canham v. Fisk* (1831), 2 Cr. & J. 126. Running water passes with the land on a sale, but a riparian owner cannot, except as against himself, grant to any other person any right to take water; see *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155, C. A.; and p. 427, *post*.

(*j*) *Mason v. Hill* (1833), 5 B. & Ad. 1; *Fitch v. Rawling* (1795), 2 Hy. Bl. 394; *Manning v. Wasdale* (1836), 5 Ad. & El. 758; *Race v. Ward* (1855), 4 E. & B. 702. The privilege of washing and watering cattle at a pond, and of taking and using the water for culinary and domestic purposes, is not a *profit à prendre*, but an easement; compare title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 238, 337; see also *Lord v. City of Sydney Commissioners* (1859), 12 Moo. P. C. C. 473 (reservation of right to water). Unless the user was by consent or agreement in writing, forty years' enjoyment confers an absolute and indefeasible right; see the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2. Before this Act it was said in *Bealey v. Shaw* (1805), 6 East, 208, *per* Lord ELLENBOROUGH, C.J., at p. 215, that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party enjoying it, derived from grant or Act of Parliament; but less enjoyment may suffice. A sale of water power derived from an artificial reservoir cannot be impeached by the vendor, though the sale might not be effectual as against riparian owners (*Hamelin v. Bannerman*, [1895] A. C. 237, P. C.).

(*k*) See Hale, *de Jure Maris*, c. 4 (Hargrave, *Law Tracts*, p. 10); Seldon, *Mare Clausum*, Book 2; *R. v. Keyn* (1876), 2 Ex. D. 63, C. C. R.; Coulson and Forbes, *Law of Waters*, 3rd ed., p. 1. It is doubtful whether the low-water mark is that of the ordinary tides or that of the spring tides. If the low-water mark of ordinary tides be the boundary, then on many parts of the coast there are considerable tracts of land left bare by the sea on three days in every lunar week which are not part of the realm of England and not subject to the common law. In the time of Elizabeth the land and the foreshore were considered to go to the low-water mark of spring tides; see Stuart Moore, *History and Law of Foreshore*, p. 236. As to land under territorial waters, see p. 359, *post*. For the definition of “ordinary tides,” see p. 361, *post*.

(*l*) See Coulson and Forbes, *Law of Waters*, 3rd ed., p. 1.

## SECT. 1.

## The High Seas.

Rights of the Crown.

## SUB-SECT. 2.—Territorial Waters.

**653.** The soil of the sea between the low-water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown (*m*) is claimed as the property of the Crown although outside the realm. The soil of the bed of all channels, creeks and navigable rivers, bays and estuaries, as far up the same as the tide flows, is *primâ facie* the property of the Crown (*n*). The Crown also claims to be entitled to the mines and minerals under the soil of the sea within these limits (*n*).

Grants to subjects.

**654.** The Crown can grant, and in many cases has granted, the soil below the ordinary low-water mark to subjects, but such a grant is subject to the public rights of navigation and fishing and rights ancillary thereto existing over the *locus* of the grant (*o*).

A subject may, by usage and prescription, acquire a title to so much of the soil below low-water mark as he may reasonably possess, namely, a *districtus maris*, a place in the sea between certain points, or a particular part contiguous to the shore, or a port or creek or arm of the sea (*p*).

(*m*) Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 7. Under this Act the Crown, though claiming jurisdiction to such a distance as is necessary for the defence and security of the kingdom, limits the jurisdiction of the Admiral to one marine league measured from low-water mark, commonly known as the three-mile limit. The area of water in which British subjects have the exclusive right of fishing is defined as to the English Channel by the Sea Fisheries Act, 1843 (6 & 7 Vict. c. 79), Schedule, art. 11, and as to the North Sea by the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), Sched. I., art. 11.

(*n*) According to the judgment of COCKBURN, C.J., in *R. v. Keyn* (1876), 2 Ex. D. 63, C. C. R., the soil of the sea outside the body of a county and within the three-mile limit was not *primâ facie* vested in the Crown, as was the case of the bed and foreshores within the county, and has never been so vested except in the case of the bed of the sea off the coast of Cornwall by the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109). On the other hand, there are *dicia* of judges to the contrary in *Gammell v. Woods and Forest Commissioners* (1859), 3 Macq. 419, H. L.; *Gann v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192; *A.-G. v. Chambers* (1854), 4 De G. M. & G. 206, 213; *Lord Advocate v. Wemyss*, [1900] A. C. 48, 66; *FitzHardinge (Lord) v. Purcell*, [1908] 2 Ch. 139, 166; *Denaby and Cadeby Main Collieries, Ltd. v. Anson*, [1911] 1 K. B. 171, C. A.; see also Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 7; title CONSTITUTIONAL LAW, Vol. VII., pp. 112 *et seq.*, 142 *et seq.*; p. 363, *post*. In *A.-G. for British Columbia v. A.-G. for Canada*, [1914] A. C. 153, P. C., the Privy Council refused to consider this question on the ground that it was not a question belonging to municipal law alone, and that it was not at present desirable that any municipal tribunal should pronounce upon it. For the history of the *primâ facie* title of the Crown to the bed of the sea and foreshores, see Stuart Moore, *History and Law of Foreshore*, pp. 1 *et seq.*

(*o*) *Gann v. Whitstable Free Fishers*, *supra*; *A.-G. v. Wright*, [1897] 2 Q. B. 318, C. A.; *Lord Advocate v. Wemyss*, *supra*, at p. 66. By grants made before Magna Charta the public right of fishing may have been annulled; see title FISHERIES, Vol. XIV., p. 574; *FitzHardinge (Lord) v. Purcell*, *supra*; *A.-G. for British Columbia v. A.-G. for Canada*, *supra*, at pp. 170, 171; and note (*t*), p. 361, *post*.

(*p*) Hale, *de Jure Maris*, c. 6 (Hargrave, *Law Tracts*, pp. 31—33); for instances, see *Gann v. Whitstable Free Fishers*, *supra* (the Whitstable oyster fishery); *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R.



SECT. 2.—*The Seashore.*

SECT. 2.

SUB-SECT. 1.—*Limits.***The Seashore.**

Definition.

**655.** The seashore or foreshore (for in legal parlance these expressions mean one and the same thing (*q*)) is that portion of the realm of England which lies between the high-water mark of the ordinary tides and low-water mark (*r*).

**656.** The high-water mark of the ordinary tides is the line of the medium tide between the spring and the neap tides throughout the year, that is, the point on the shore which is, about four days in every week, reached and covered with the tides. This line is, therefore, the landward limit of the foreshore (*s*). High-water mark.

**657.** The seaward limit is usually taken to be the low-water line of such tides (*t*). Foreshore is a movable freehold, varying as the water gradually and imperceptibly recedes or encroaches. Thus, a grant of foreshore conveys not that which at the time of the grant Low-water mark.

4 H. L. 266; and the cases cited in Hale, de Jure Maris, c. 5 (Hargrave, Law Tracts, pp. 20—22); see also note (*t*), *infra*.

(*q*) *Mellor v. Walmsley*, [1905] 2 Ch. 164, C. A.; but see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 82, in which the expression “the seashore” appears to be used as including the foreshore and seashore above high-water mark. There is no definition of seashore in this Act, but *ibid.*, s. 82, appears to be a public enactment of a clause which has constantly been inserted in local Acts for town improvements, in which Acts the seashore was defined according to the desire of the promoters; see, for example, Clacton Improvement Act, 1905 (5 Edw. 7, c. liv.); Whitby Urban District Council Act, 1905 (5 Edw. 7, c. exxxv.); Formby Urban District Council Act, 1905 (5 Edw. 7, c. cli.).

(*r*) *Scrutton v. Brown* (1825), 4 B. & C. 485, 496; *A.-G. v. Chambers* (1854), 4 De G. M. & G. 206, 216; *Blundell v. Catterall* (1821), 5 B. & Ald. 268.

(*s*) *A.-G. v. Chambers*, *supra*, per ALDERSON, B., on behalf of the judges who were called in to advise the court as to the landward limit of the Crown’s title to foreshore, at p. 215: “The medium tides of each quarter of the tidal period afford a criterion which we think may be best adopted. It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded and for about three days it is left short, and on one day it is reached. This point of the shore, therefore, is about four days in every week, *i.e.*, for the most part of the year, reached and covered by the tides . . . We therefore beg to advise your lordship that in our opinion the average of these medium tides in each quarter of a lunar revolution during the year gives the limits of the Crown right to the seashore.” This Lord CRANWORTH, L.C. (*ibid.*, at p. 218), interpreted as meaning that the limit of the foreshore was “the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord HALE, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line”; compare *Elliot v. Morley (Earl)* (1907), 51 Sol. Jo. 625.

(*t*) *Blundell v. Catterall*, *supra*. The delimitation of the low-water boundary of the foreshore has not been brought directly in issue by the Crown, as was the case with the landward boundary in *A.-G. v. Chambers*, *supra*. It is not improbable that in former times the foreshore was considered to extend to the low-water mark of spring tides, for in manors to which a several fishery by fixed engines was parcel the fishing engines were not infrequently placed below the low-water mark of ordinary tides; see Hale, de Jure Maris, c. 5 (Hargrave, Law Tracts, pp. 21—26), quoting Magna Charta and various statutes for the removal of weirs, as

SECT. 2.  
The  
Seashore.

Where tide  
recedes.

is between high and low water mark, but that which from time to time is between these termini (*a*).

SUB-SECT. 2.—*Accretion*.

**658.** Where tidal water recedes gradually and imperceptibly from the land, or land by alluvion or dereliction is added to the dry land or foreshore, so that it becomes situate above the high-water mark of ordinary tides, or above the low-water mark, it belongs, if above the high-water mark, to the owner of the dry land to which it is added, and if above the low-water mark to the owner of the foreshore (*b*).

Where tide  
encroaches.

**659.** Where the opposite process takes place, and the tidal water gradually and imperceptibly encroaches, the land which was situate above the high-water mark becomes the property of the owner of the foreshore, and where the land had been part of the foreshore its ownership passes to the owner of the bed of the tidal water (*c*). By “imperceptible” is meant imperceptible in its progress, not imperceptible after a length of time (*d*); for the whole doctrine of accretion is based upon the theory that from day to day, week to week, and month to month, a man cannot see where his old line of boundary was (*e*), and that which cannot be perceived in its progress is taken to be as if it never had existed at all (*f*).

Sudden  
changes.

**660.** Where, however, the change is not slow and imperceptible, but sudden (*g*), or where the boundaries of the land are well known and defined, the principles of law above stated do not apply, and no change occurs in the ownership of the land or foreshore (*h*).

showing that it was possible for a subject to own the soil below low-water mark even on the sea coast: see also note (*p*), p. 360, *ante*.

(*a*) *Scrutton v. Brown* (1825), 4 B. & C. 485. For sudden changes, see the text, *infra*.

(*b*) *R. v. Yarborough* (Lord) (1824), 3 B. & C. 91, affirmed, *sub nom. Gifford v. Yarborough* (Lord) (1828), 5 Bing. 163, H. L. In disputes between riparian owners and the Crown as to accretions, the burden of proving the former position of the high-water mark is on the Crown if the riparian owner admits the Crown's title to the foreshore (*A.-G. v. Chamberlaine* (1858), 4 K. & J. 292; *A.-G. v. M'Carthy*, [1911] 2 I. R. 260).

(*c*) *Re Hull and Selby Railway* (1839), 5 M. & W. 327.

(*d*) *R. v. Yarborough* (Lord), *supra*, at p. 107; *Ford v. Lacy* (1861), 7 H. & N. 151; *Foster v. Wright* (1878), 4 C. P. D. 438.

(*e*) *Hindson v. Ashby*, [1896] 2 Ch. 1, 28, C. A.

(*f*) *Re Hull and Selby Railway*, *supra*, at p. 333.

(*g*) *Carlisle Corporation v. Graham* (1868), L. R. 4 Exch. 361 (new channel of river formed suddenly); *Mussumat Imam Bandi v. Hurgovind Ghose* (1848), 4 Moo. Ind. App. 403. If land suddenly inundated again becomes dry land, it again belongs to its former owner (*A.-G. v. Reeve* (1885), 1 T. L. R. 675 (10—12 feet of shingle added in a tide)). Lands acquired *per relictionem maris* (a sudden retreat of the sea) are not precribable as part of a manor or as belonging to a subject (Hale, *de Jure Maris*, c. 6 (Hargrave, Law Tracts, p. 30), citing *R. v. Oldsworth* (1637), in Exch.). For the effect of sudden changes on the ownership of fisheries, see Stuart Moore, *History and Law of Fisheries*, pp. 124, 135.

(*h*) *Hindson v. Ashby*, *supra* (where the land to which the accretion was added was a natural bank of a river 6 feet high). It is impossible to say with any certainty what is a sufficient boundary to prevent the doctrine of accretion applying. In Hale, *de Jure Maris*, c. 4 (Hargrave, Law Tracts, p. 15), it is said: “If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by

The doctrine of accretion applies equally to the property of the Crown or a subject (*i*), and applies whether the change is caused by natural means or artificial means lawfully employed, because the rule applies to the result and not to the manner of its production (*k*).

**661.** Where land imperceptibly accretes to land it acquires the legal characteristics of the land to which it is added. Thus, if it accretes to freehold it becomes freehold, or if to copyhold it becomes copyhold, and if to land subject to customary rights, it is equally liable to them (*l*). The same doctrine applies to the question of jurisdiction; thus, where a town is declared to be bounded by the high-water mark, the town will extend to that mark wherever it may happen to be from time to time (*m*).

**662.** The rights of the public over the foreshore, of fishing and navigation, are affected by accretion or dereliction to this extent, that they follow the foreshore wherever it may be from time to time (*n*).

SUB-SECT. 3.—*Ownership of the Foreshore.*

(i.) *The Crown.*

**663.** *De jure communi* the Crown is *primâ facie* entitled to every part of the foreshore of this realm between the ordinary high-water mark and the low-water mark (*o*).

SECT. 2.  
**The  
Seashore.**

Extent of  
doctrine of  
accretion.

Effect of  
accretion.

Effect on  
public rights.

*Primâ facie*  
title.

situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or if it be by art or industry regained, the subject doth not lose his propriety though the inundation continue forty years. If the mark remain or continue or extent can reasonably be certain, the case is clear"; see *Anon.* (1573), Dyer, 326 b; *Anon.* (1348), 22 Lib. Ass., pl. 93; but see *Hindson v. Ashby*, [1896] 2 Ch. 1, C. A., where LINDLEY, L.J., at p. 13, said that the doctrine would not apply "if the boundary on the waterside is a wall or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other," and that he was not satisfied that the statements in Bracton, Selden Society ed., p. 105, Fleta 3, ch. ii., p. 176, 22 Ass., fol. 106, pl. 93, and Hale, de Jure Maris, cc. 1, 6, showing that the doctrine did not apply where the boundaries are well defined and known, were applicable to cases of land having no boundary on the side of the flowing water, except the water itself. In *A.-G. v. M'Carthy*, [1911] 2 I. R. 260, the doctrine was held to apply even though there was evidence by which the former line of high-water mark could be ascertained, namely, maps and plans. In *Foster v. Wright* (1878), 4 C. P. D. 438, changes in the course of a river marked from time to time on a map were held not sufficient to prevent the doctrine of accretion applying; see also *Lloyd v. Ingram* (1868), cited in *Hindson v. Ashby*, *supra*, at p. 20; *Hayes v. Hayes* (1897), 31 I. L. T. (Journal) 392.

(i) *Re Hull and Selby Railway* (1839), 5 M. & W. 327; *Gifford v. Yarborough (Lord)* (1828), 5 Bing. 163, H. L.; *A.-G. v. M'Carthy*, *supra*.

(k) *A.-G. v. Chambers*, *A.-G. v. Rees* (1859), 4 De G. & J. 55. The opinion expressed by Lord CHELMSFORD, L.C. (*ibid.*, at p. 68), that the rule did not apply to acts done on the parties' own land not only calculated but with intention of adding land by accretion seems to be overruled by *Bradford Corporation v. Pickles*, [1895] A. C. 587, if the acts were in themselves lawful; see also *Doe d. Rajah Seebkristo v. East India Co.* (1856), 10 Moo. P. C. C. 140; *A.-G. v. M'Carthy*, *supra*.

(l) *Mercer v. Denne*, [1904] 2 Ch. 534 (custom to dry fishing nets on waste land).

(m) *Smart & Co. v. Suva Town Board*, [1893] A. C. 301, P. C.

(n) *Mercer v. Denne*, *supra*; *Carlisle Corporation v. Graham* (1868), L. R. 4 Exch. 361.

(o) *A.-G. v. Emerson*, [1891] A. C. 649; *Malcomson v. O'Dea* (1863),



## SECT. 2.

The  
Seashore.Duchy of  
Lancaster.

**664.** Though the Crown may have granted out foreshore to a subject, it may have again become entitled to it by succession, escheat, or forfeiture, or purchase. In the case of the foreshores abutting on the lands of the Duchy of Lancaster the Crown's title to such foreshore either is the *primâ facie* title, or rests on the grants made to the Dukes of Lancaster before the possessions of that dukedom became part of the possessions of the Crown (*p*).

Duchy of  
Cornwall.

**665.** The *primâ facie* title no longer holds good in the case of foreshores on the coast of Cornwall, because, by a statute based on a charter of 11 Edw. 3, the rights of the Crown to the foreshores in this county have become vested in the Duke of Cornwall, except when they belong to a subject. The subject may prove his right to foreshore in this county in the same way as he can to foreshore which *primâ facie* belongs to the Crown (*q*).

10 H. L. Cas. 593; *Gann v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192; *Le Strange v. Rowe* (1866), 4 F. & F. 1048; *Kirby d. Killgrew v. Gibs* (1667), 2 Keb. 294; *Constable's (Sir Henry) Case* (1601), 5 Co. Rep. 106 a, 107 a. The *primâ facie* presumption of the Crown's ownership of the foreshore is based on the fundamental principle of the law of property in land, that all the lands in the realm belonged originally to the King (Hall on Seashore, p. 4). The presumption that the *terra firma* (i.e., land above the high-water mark) belongs to the King as never having been granted out can hardly arise, because there is overwhelming evidence that the greater part of such land has been granted out. Domesday Book itself is evidence of what lands belonged to the Crown, and what to its subjects; but, as the evidence that the Crown has granted the foreshore is not so comprehensive, the presumption still holds good, though of recent years it is of less weight than formerly. For fuller particulars of the origin and growth of this presumption, see Stuart Moore, *History and Law of Foreshore*. It is noteworthy that the Statute de Prerogativa Regis (17 Edw. 2, stat. 2, c. 13) is silent as to the Crown's ownership of the foreshore. In *Le Strange v. Rowe* (1866), 4 F. & F. 1048, ERLE, C.J., said, at p. 1052: "In a great number of cases the Crown has parted with the foreshore. There are some manors that remain in the Crown that are the property of the Crown, but I take it that in the great majority of cases the right to the foreshore between high and low water mark is in the Lord of the Manor"; see also Hale, *de Jure Maris*, c. 4 (Hargrave, *Law Tracts*, p. 13): "Although it is true that such shore may and commonly is parcel of the manor adjacent, and so may be belonging to a subject as shall be shown, yet *primâ facie* it is the King's." The *primâ facie* presumption can scarcely apply to the lands of the lords marchers in Wales, who obtained their lands by grants of all lands which they might acquire by conquest (*A.-G. v. Phillips* (1857), cited in Stuart Moore, *History and Law of Foreshore*, pp. 511, 512). The management of the foreshore belonging to the Crown is, with certain exceptions, vested in the Board of Trade (Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 7); the management of the mines and quarries in or under such foreshore is vested in the Commissioners of Woods and Forests (*ibid.*, s. 21); see title CONSTITUTIONAL LAW, Vol. VII., pp. 142 *et seq.* The Board of Trade's dealings with the foreshore are from time to time printed as a Parliamentary Paper. As to these dealings and the Board's dealings with the bed of the sea, see Stuart Moore, *History and Law of Foreshore*, p. 597.

(*p*) There is no distinction between the privilege of the King as Duke of Lancaster and his prerogative as King of England (*Alcock v. Cooke* (1829), 5 Bing. 340); for some of these charters, see Hardy, *Charters of the Duchy of Lancaster*.

(*q*) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), by s. 9 of which the rights of the subject are saved; see *R. v. Keyn* (1876), 2 Ex. D. 63, 121, 155, 158, 199, 202, C. C. R.; see title CONSTITUTIONAL LAW, Vol. VII., pp. 113, 114. A translation of the charter of 11 Edw. 3 to Edward, Earl of Chester, is printed in *The Prince's Case* (1606), 8 Co.

**666.** In the County Palatine of Chester the *primâ facie* title of the Crown is rebutted by Domesday Book, which states that in Cheshire the Bishop of Chester held of the King what pertained to his bishopric, and that all the rest of the land of the county Earl Hugh with his men held of the King (*r*). This palatinate is now vested in the Crown, and the title of the Crown to foreshore therefore rests upon the title of the Earls of Chester thereto.

SECT. 2.  
The  
Seashore.

County  
Palatine of  
Chester.

**667.** In the County Palatine of Durham the *primâ facie* title of the Crown is non-existent; for the foreshores there were granted to the Bishop of Durham as part of his palatinate (*s*). When such foreshores have not been granted by the bishops to their tenants they have been vested by Parliament in the Crown as part of the *jura regalia* of the bishopric, and are now under the control of the Commissioners of Woods and Forests (*t*).

County  
Palatine of  
Durham.

(ii.) *The Subject.*

**668.** A subject, not being Duke of Cornwall, may own foreshore either as a hereditament in gross, or as parcel of a seignory, honour, manor, or town (*u*), or lands (*a*), and he can establish a title against

How title  
established.

Rep. 1a, 8a, 16a. The charter assigned seventeen manors to the Duchy and "also the profit of all the ports within the same our County of Cornwall to us belonging together with wreck of the Sea as well as of Whales and Sturgeon and other fish which do belong to us by reason of our prerogative and whatsoever belongs to any wreck of the sea with any appurtenances in our said County of Cornwall." This charter, as interpreted by the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), was held in *Penryn Corporation v. Holm* (1877), 2 Ex. D. 328, to have passed the rights of the Crown in all the foreshores of the county of Cornwall to the Duchy, though in fact, at the time of this charter, the Crown had already parted with its right to wreck on parts of this coast (see *Quo Warranto* Rolls (Cornwall); Hale, de Jure Maris, cc. 6, 7 (Hargrave, Law Tracts, pp. 28, 41)), and probably all the foreshore (see note (*d*), p. 379, *post*). In *Dickens v. Shaw* (1822), cited in Hall on Seashore, Appendix, p. xlv., a grant of wreck was held not sufficient in itself to pass foreshore, though apparently in *Penryn Corporation v. Holm*, *supra*, such a grant was considered to be sufficient, for the charter of 11 Edw. 3 contains no direct grant of foreshore. Up to 1844 Duchy lands were inalienable; see Duchy of Cornwall Lands Act, 1844 (7 & 8 Vict. c. 65), s. 1; *Lopez v. Andrew* (1826), 3 Man. & Ry. (K. B.) 329, n.; *A.-G. v. Ceely* (1660), Wight. 208. Charles II. was held entitled to the soil of Sutton Pool at Plymouth in right of the Duchy of Cornwall and not in right of the *primâ facie* title (Hale, de Portibus, c. 4 (Hargrave, Law Tracts, pp. 56—58)).

(*r*) Domesday Book, fol. 262b.

(*s*) Compare *A.-G. v. Newcastle-upon-Tyne Corporation* (1903), 67 J. P. 155; *Tynemouth's (Prior) Case* (1292), cited in Stuart Moore, History and Law of Foreshore, p. 111.

(*t*) Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19), s. 1; see title CONSTITUTIONAL LAW, Vol. VII., p. 114. The county of Durham means the county of Durham and Sadberge, including the detached parts of Craikshire, Bedlingtonshire, Norhamshire, Allertonshire and Islandshire, and all other places heretofore within the jurisdiction of the Bishop of Durham in right of the said County Palatine (Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19), s. 7). By the Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 2, the rents and proceeds of Durham foreshores, except at Holy Island, are divided between the Crown and the Ecclesiastical Commissioners; see also *ibid.*, s. 4; Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 7, Sched. II.

(*u*) *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, 658, C. A.; see note (*f*), p. 367, *post*.

(*a*) Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, pp. 26, 27); and



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the Crown to any part of the foreshore (1) by producing an express grant thereof from the Crown (*b*); or (2) by evidence from which such a grant may be inferred (*c*); or (3) by construction of a grant in ambiguous or general terms (*d*); or (4) by possession for a period of over 60 years (*e*); or (5) by proof that the foreshore has come into existence by a sudden incursion of tidal water (*f*). As against another subject, title can be made under the Real Property Limitation Acts (*g*).

Grant of  
foreshore.

**669.** Foreshore passes from the Crown by a grant which expressly refers to it by that name or has words which aptly describe it. In ancient grants the words *Litus*, *Marina*, *Litus Maris*, sometimes called *Marettum*, *terra aqua maris cooperta* (*h*), land within the flux and reflux of the sea (*i*), *separalis piscaria*, suffice to pass the foreshore. Less apt words, however, suffice to pass the foreshore from the Crown, if the grantee can show user under his grant; for when a question arises as to what passed by an ancient deed it can be explained by modern usage (*j*). Thus, the Crown may alienate

see the cases cited in notes (*e*)—(*i*), pp. 367, 368, *post*; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.

(*b*) *Devonshire (Duke) v. Hodnett* (1827), 1 Hud. & B. 322. If the original grant is not forthcoming an exemplification or constat thereof may be used (Roscoe, *Nisi Prius Evidence*, 17th ed., p. 96); though at the present day a certified copy from the Public Record Office suffices; see title EVIDENCE, Vol. XIII., p. 524. Ancient grants of the Crown without evidence of possession are not enforced (*A.-G. v. Richards* (1795), 2 Anst. 603; *Blount v. Layard* (1888), [1891] 2 Ch. 681, n., C. A.; *Johnston v. O'Neill*, [1911] A. C. 552). Where there are several grants by the Crown of the same piece of foreshore the first grant prevails (*Vyner v. Mersey Docks and Harbour Board* (1863), 14 C. B. (N. S.) 753).

(*c*) *Kingston-upon-Hull Corporation v. Horner* (1774), 1 Cowp. 102; *Re Alston's Estate* (1857), 28 L. T. (O. S.) 337. Where a grant cannot be produced evidence of ancient documents and modern acts of ownership unquestioned by the Crown are sufficient to sustain a title against the Crown (*Re Alston's Estate, supra*). Proof of the enjoyment of a several fishery by fixed engines raises the presumption that the foreshore belongs to the owner of the several fishery (*A.-G. v. Emerson*, [1891] A. C. 649; see also *Foster v. Warblington Urban Council, supra*); compare title FISHERIES, Vol. XIV., p. 588.

(*d*) See the cases cited p. 367, *post*; *Hamilton v. A.-G.* (1880), 5 L. R. Ir. 555.

(*e*) Crown Suits Act, 1769 (9 Geo. 3, c. 16); Crown Suits Act, 1861 (24 & 25 Vict. c. 62); *Lord Advocate v. Young, North British Rail. Co. v. Young* (1887), 12 App. Cas. 544. Where the Crown has been out of possession for twenty years the burden of proving title in the first instance is on the Crown (*A.-G. v. Parsons* (1836), 2 M. & W. 23; stat. (1623) 21 Jac. 1, c. 14); see title LIMITATION OF ACTIONS, Vol. XIX., p. 161.

(*f*) See note (*g*), p. 362, *ante*.

(*g*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 104 *et seq.*

(*h*) Hale, *de Jure Maris*, cc. 5, 6 (Hargrave, *Law Tracts*, pp. 18, 19, 20, 26); see also grant to Abbey of Strata Florida *in litore et in mare* (Dugdale, *Monasticon Anglicanum*, v. 633); to Abbot of St. Augustine, *Totum Littus usque in medietatem aquæ* (Stuart Moore, *History and Law of Foreshore*, p. 16); for numerous other expressions sufficient to pass the foreshore, see *ibid.*; see also *Devonshire (Duke) v. Hodnett, supra*.

(*i*) *A.-G. v. Emerson, supra*, at p. 661; *Hindson v. Ashby*, [1896] 2 Ch. 1, 11, C. A. As to grants of several fisheries and foreshore, see, further, title FISHERIES, Vol. XIV., p. 576.

(*j*) *Beaufort (Duke) v. Swansea Corporation* (1849), 3 Exch. 413; *Devonshire (Duke) v. Pattinson* (1887), 20 Q. B. D. 263, C. A.; *Waterpark (Lord) v. Fennell* (1859), 7 H. L. Cas. 650; *Re Belfast Dock Act, Ex parte Ranfurly (Earl)* (1867), 11 L. R. Eq. 128.



foreshore by other words, if that is the apparent intention to be collected from the grant itself, or by the construction of an ancient grant by user. Where there is a doubt whether the grant includes the foreshore or not it is to be solved by reference to the user (*k*). Where the user has been long and notorious the proper course is to attribute such user to a legal origin and not to usurpation (*l*). In interpreting such grants, evidence of user before the time of the grant may also be given to explain what was granted (*m*).

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**670.** Foreshore has been held to pass by a grant containing the words anchorage (*n*), ooze or *wagessum* (*o*), sea ground or shore (*p*), *ripa* (*q*), waste (*r*), wreck (*s*), wreck by all their lands upon the sea (*t*), *terra de G. cum pertinentiis* (*a*), weirs or *gurgites* (*b*).

Words used.

**671.** Foreshore also passes by a grant of a manor *cum omnibus pertinentiis* (*c*), or with anchorage, groundage, and wreck of the sea (*d*), or with fisheries, wreck of the sea, and all other rights and jurisdictions (*e*), or as parcel or reputed parcel of an honour, seignory, or manor (*f*). It may also pass by a grant of lands with all and singular lands, tenements etc. to the premises or any part thereof incident or appurtenant, or accepted, reputed,

When  
included in  
grant of  
manor.

(*k*) *A.-G. for Ireland v. Vandeleur*, [1907] A. C. 369; and see the cases cited in notes (*n*)—(*b*), *infra*.

(*l*) *Donegall (Marquis) v. Templemore (Lord)* (1858), 9 I. C. L. R. 374.

(*m*) *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92, P. C.; but where the terms of the grant are plain and unambiguous it cannot be explained by previous or subsequent user (*Wyatt v. A.-G. of Quebec*, [1911] A. C. 489, P. C.).

(*n*) *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266; *Le Strange v. Rowe* (1866), 4 F. & F. 1048.

(*o*) *Foster v. Frost* (1887), cited in Stuart Moore, History and Law of Foreshore, pp. 41, 163; *Bridges v. Highton* (1865), 11 L. T. 653; *Re Alston's Estate* (1857), 28 L. T. (o. s.) 337; *Scrutton v. Brown* (1825), 4 B. & C. 485.

(*p*) *Scrutton v. Brown*, *supra*.

(*q*) *Re Belfast Dock Act, Ex parte Ranfurly (Earl)* (1867), 1 I. R. Eq. 128.

(*r*) *A.-G. v. Hammer* (1858), 31 L. T. (o. s.) 379; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, 658, C. A.

(*s*) *Penryn Corporation v. Holm* (1877), 2 Ex. D. 328; see note (*q*), p. 364, *ante*.

(*t*) *Chad v. Tilsed* (1821), 5 Moore (C. P.), 185, 192.

(*a*) *Beaufort (Duke) v. Swansea Corporation* (1849), 3 Exch. 413; *Healy v. Thorne* (1870), 4 I. R. C. L. 495.

(*b*) Hale, de Jure Maris, c. 5 (Hargrave, Law Tracts, pp. 18, 20); *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

(*c*) *Beaufort (Duke) v. Swansea Corporation*, *supra*; see Stuart Moore, History and Law of Foreshore, pp. 161, 162.

(*d*) *Le Strange v. Rowe*, *supra*.

(*e*) *A.-G. v. Jones* (1863), 2 H. & C. 347; *Calmady v. Rowe* (1848), 6 C. B. 861.

(*f*) *Constable's (Sir Henry) Case* (1600), Stuart Moore, History and Law of Foreshore, p. 233; *Constable's (Sir John) Case* (1575), Stuart Moore, History and Law of Foreshore, p. 224; *Beaufort (Duke) v. Swansea Corporation*, *supra*; *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12; *Biddulph v. Ather* (1755), 2 Wils. 23; see also Stuart Moore, History and Law of Foreshore, pp. 75, 648, 649; Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, p. 27): "foreshore may not only be parcel of a manor, but *de facto* it many times is so, and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor."

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The  
Seashore.

Grant of  
wreck.

Extent of  
grant.

How public  
right  
affected.

Proof of  
possession.

or known as part or parcel of the same (*g*), or with waters, wastes, fisheries, wreck etc., or other general words if there has been sufficient evidence of possession under the grant (*h*). Foreshore may also pass by the grant of a town in fee farm (*i*).

**672.** When the grant is of wreck or of royal fish *infra manerium* (*k*) there is a great presumption that the foreshore is part of the manor, for wreck and royal fish are not taken above the high-water mark (*l*); but a grant of these privileges *per se* does not necessarily confer a title to the foreshore (*m*).

**673.** A grant of foreshore, just as in the case of other lands, carries the whole materials below it *usque ad centrum* (*n*); but it does not convey the right to a several fishery over it (*o*).

**674.** Every grant of foreshore, whether by the Crown or by a subject, is subject to the *jus publicum*, namely, the right of navigation and the right of fishery where such exists; and neither the Crown nor its grantee can use the foreshore so as to be a nuisance to the Crown's subjects (*p*); and a user, which at the time of the grant was lawful, becomes unlawful if it becomes by any circumstance a nuisance, unless it has been sanctioned by Parliament (*q*).

**675.** In proving possession to foreshore the owner thereof is only required to prove that he has had all the beneficial user of the foreshore which would naturally have been enjoyed by a direct grantee of the Crown. Foreshore in its natural state cannot be exclusively possessed, because the public cannot be excluded from

(*g*) *Brew v. Haren* (1874), 9 I. R. C. L. 29.

(*h*) *Hamilton v. A.-G.* (1880), 5 L. R. Ir. 555; *Healy v. Thorne* (1870), 4 I. R. C. L. 495.

(*i*) *A.-G. v. Portsmouth Corporation* (1877), 25 W. R. 559.

(*k*) *Infra manerium* means within the manor, and not below or under the manor, as advocates for the Crown's title have frequently endeavoured to maintain; see Stuart Moore, *History and Law of Foreshore*, pp. 304, 646, 752, n.; *Lord Advocate v. Wemyss*, [1900] A. C. 48, 60.

(*l*) Hale, de Jure Maris, c. 6 (Hargrave, *Law Tracts*, p. 27); *A.-G. v. Emerson*, [1891] A. C. 649, 661; *Blundell v. Catterall* (1821), 5 B. & Ald. 268, 303; *R. v. Ellys* (1813), 1 M. & S. 652, 661, 662; see note (*f*), p. 368, *ante*.

(*m*) *Dickens v. Shaw* (1822), cited in Hall on Seashore, Appendix, p. xlv. The observations of the judges in this case must be taken with reference to the particular circumstances there in proof (*Calmady v. Rowe* (1848), 6 C. B. 861, *per* COLTMAN, J., at p. 892); for wreck may be granted *infra metas* and not *infra manerium*; see Stuart Moore, *History and Law of Foreshore*, pp. 48, 81, 470, 641, 648; *Penryn Corporation v. Holm* (1877), 2 Ex. D. 328; and note (*g*), p. 364, *ante*.

(*n*) *Lord Advocate v. Wemyss*, *supra*, at p. 69; compare titles MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 507, 508; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 156, note (*f*).

(*o*) *A.-G. v. Emerson*, *supra*, at p. 654; because a several fishery in the sea may exist as a separate incorporeal hereditament (*ibid.*, *per* Lord HERSCHELL, at p. 654).

(*p*) *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *A.-G. v. BurrIDGE* (1822), 10 Price, 350; *A.-G. v. Parmeter* (1811), 10 Price, 378; *A.-G. v. Terry* (1874), 9 Ch. App. 423; *Warren v. Mathews* (1703), 6 Mod. Rep. 73; *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266; see p. 372, *post*.

(*q*) *Williams v. Wilcox* (1838), 8 Ad. & El. 314, 329 (weir which by a change in the course of a river became a nuisance to navigation); see title FISHERIES, Vol. XIV., p. 592. By grant before Magna Charta the Crown could destroy the public right of fishing; see *ibid.*, p. 574.

exercising their rights belonging thereto, and moreover it is practically impossible to prevent occasional encroachment, because the cost of preventive measures will be altogether disproportionate to the value of the foreshore (*r*). No precise rule can be laid down as to the character and amount of possession necessary in order to prove a prescriptive right to foreshore; each case must depend upon its own circumstances, for the beneficial enjoyment of which the foreshore admits is an exceedingly variable quantity (*s*).

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**676.** In proving possession by acts done on the foreshore it is necessary that the acts were such that a lawful owner might do, and so done that those who were interested in disputing the ownership would be aware of them. Acts that tend to prove possession of a part of a tract of foreshore tend to prove ownership of the whole tract, if it is of such a common character as would raise a reasonable inference that possession of one part was possession of the whole (*t*). The weight of the aggregate of many acts of ownership taken together is very much greater than the sum of the weight of acts taken separately (*a*). The acts relied upon to prove possession must be done with the *animus possidendi* (*b*).

Acts of  
ownership.

Possession of foreshore can be proved by the same acts as are sufficient to prove possession to land above the high-water mark, and in particular by evidence of taking of sand, stones and seaweed, and licensing persons to do so; inclosing and embanking against the sea, and enjoyment of what is thus inclosed; erection of wharves, piers, groynes, and other works; taking of anchorage and groundage dues; mining; taking of wreck and royal fish, and

Examples.

(*r*) *Lord Advocate v. Young, North British Rail. Co. v. Young* (1887), 12 App. Cas. 544, 553; *A.-G. for Ireland v. Vandeleur*, [1907] A. C. 369 (where the owner of the shore neglected to take proceedings at law against a railway company, who had laid rails on the shore, and Lord LOREBURN, L.C., said at p. 371: "when he declined to encounter so great a litigation for so small a stake, he exhibited proof rather of his good sense than of any infirmity in his title. Still it is evidence against him, but is overborne by the other evidence").

(*s*) *Lord Advocate v. Young, North British Rail. Co. v. Young, supra* (taking of stone, sand and seaweed, and erecting a wall and a bathing box, held sufficient evidence to defeat the Crown's claim in Scotland). Usage for forty years, unless it can be shown to have originated in usurpation, is evidence from which usage anterior to that time may be presumed (*Chad v. Tilsed* (1821), 2 Brod. & Bing. 403; *Waterpark (Lord) v. Fennell* (1859), 7 H. L. Cas. 650).

(*t*) *Lord Advocate v. Blantyre (Lord)* (1879), 4 App. Cas. 770, 792; *Jones v. Williams* (1837), 2 M. & W. 326, 331; *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135, 165, 166; *A.-G. for Ireland v. Vandeleur, supra*, at p. 371; *Re Alston's Estate* (1857), 28 L. T. (o. s.) 337; it is not necessary that the acts should be brought to the knowledge of the person interested in disputing the title, but only that they are of such a character that he or his agents could have perceived them (*Jones v. Williams, supra*; *Lord Advocate v. Blantyre (Lord), supra*). As to proof of possession of a several fishery, see title FISHERIES, Vol. XIV., p. 585.

(*a*) *Lord Advocate v. Blantyre (Lord), supra*, at p. 791; *A.-G. v. Emerson*, [1891] A. C. 649, 659, 660.

(*b*) *Philpot v. Bath* (1905), 21 T. L. R. 634, C. A. (placing stones on foreshore for the sole purpose of protecting riparian land creates only an easement); see also *Le Strange v. Rowe* (1866), 4 F. & F. 1048.



## SECT. 2.

The  
Seashore.Acts of  
the public.

the enjoyment of a several fishery over the foreshore(c); shooting over the foreshore(d), and paying for the burial of dead bodies washed ashore or found thereon(e).

**677.** Acts done by the public on the foreshore are not the acts of the Crown upon which it can rely as evidence of possession by the Crown, though they may tend to derogate from the alleged possession of the person claiming a possessory title in the foreshore, and, if carried far enough, may deprive his possession of that exclusive character which is necessary in order to establish a prescriptive right(f).

Title by  
possession.

**678.** To establish a possessory title against the Crown sixty years' possession must be proved(g), but as between subjects twelve years' possession is sufficient(h).

(c) Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, p. 27); *A.-G. v. Jones* (1863), 2 H. & C. 347 (taking and preventing persons taking stones, sand and wreck); *A.-G. v. Tomline* (1879), 12 Ch. D. 214 (gravel); *A.-G. v. Hanmer* (1858), 31 L. T. (o.s.) 379 (coal); *Benest v. Pipon* (1829), 1 Knapp, 60, P. C. (seaweed); *Brew v. Haren* (1874), 11 I. R. C. L. 198, Ex. Ch. (trover lies for taking seaweed though ungathered); *Calmady v. Rowe* (1848), 6 C. B. 861 (sand, stones and seaweed); *Daly v. Murray* (1885), 17 L. R. Ir. 185, C. A. (seaweed); *Healy v. Thorne* (1870), 4 I. R. C. L. 495 (seaweed); *Chad v. Tilsed* (1821), 5 Moore (C. P.), 185, 192 (embankment of foreshore); *Le Strange v. Rowe* (1866), 4 F. & F. 1048 (wreck, groynes and licensing taking of mussels); *A.-G. for Ireland v. Vandeleur*, [1907] A. C. 369 (quay); *Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92, P. C. (piers are evidence of seisin of the foreshore); *Re Alston's Estate* (1857), 28 L. T. (o. s.) 337 (stages); *Lord Advocate v. Blantyre (Lord)* (1879), 4 App. Cas. 770 (cutting reeds, taking seaweed, sand, or stones, and depositing matter on foreshore); *Lord Advocate v. Young, North British Rail. Co. v. Young* (1887), 12 App. Cas. 544 (embanking foreshore and taking stones and seaweed); *Scrutton v. Brown* (1825), 4 B. & C. 485; *A.-G. v. Emerson*, [1891] A. C. 649 (letting of fishing places on shore by copy of court roll is evidence that the shore is within the manor). As to evidence of ownership of soil of fishery, see title FISHERIES, Vol. XIV., pp. 586 *et seq.* The fact that cattle stray from a marsh on to the foreshore is not evidence of possession, though it is if they are put there (*A.-G. v. Chambers, A.-G. v. Rees* (1859), 4 De G. & J. 55; *Lord Advocate v. Blantyre (Lord)*, *supra*).

(d) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; see pp. 373, 374, *post*.

(e) This is evidence of the right of the lord of the manor to wreck within his manor (Burial of Drowned Persons Acts, 1808 (48 Geo. 3, c. 75), s. 13, and 1886 (49 & 50 Vict. c. 20), s. 1). Burying the dead and looking after the living and securing the goods for the owners is a sufficient consideration for a custom to have the best anchor or chattel from a stranded ship (*Simpson v. Bithwood* (1691), 3 Lev. 307), but such a custom is bad unless there is an adequate consideration (*Geere v. Burkensham* (1682), 3 Lev. 85). As to the liability of local authorities to bury dead bodies found on the foreshore, see title BURIAL AND CREMATION, Vol. III., p. 547.

(f) *Lord Advocate v. Young, North British Rail. Co. v. Young, supra*, at p. 554; *A.-G. v. Emerson, supra*, at pp. 661, 662; *Blount v. Layard* (1888), [1891] 2 Ch. 681, n., C. A.; *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135; *Johnston v. O'Neill*, [1911] A. C. 552. Such acts do not necessarily lead to the inference that the owner of the foreshore has abandoned his right to the soil (*Fitzpatrick v. Robinson* (1828), 1 Hud. & B. 585).

(g) Crown Suits Act, 1769 (9 Geo. 3, c. 16); Crown Suits Act, 1861 (24 & 25 Vict. c. 62); see p. 366, *ante*; *Emmerson v. Maddison*, [1906]

(h) For note (h) see p. 371, *post*.

**679.** As against a trespasser it is not necessary for persons claiming foreshore to produce evidence of possession sufficient to displace the title of the Crown; and it is not open to the trespasser to give evidence of acts of ownership by the Crown, unless he can prove that they were done with the knowledge of the person claiming possession (i).

SECT. 2.  
The  
Seashore.  
—  
Trespasser.

SUB-SECT. 4.—*Islands.*

**680.** Where an island arises in the sea or in tidal waters, *primâ facie* belongs to the Crown, unless the *locus* on which the island is has been granted to or belongs to a subject, in which case the island is the property of the subject by reason of his grant or possession (j).

Islands in  
tidal waters.

**681.** Where an island arises in a river, whether tidal or non-tidal, to the soil of which the riparian owners are entitled *usque ad medium filum aquæ*, the property in the island is fixed by ascertaining where the *medium filum aquæ* would be irrespective of the island, and apportioning to the owner of the bed on each side of that line so much of the island as may lie between that line and his riparian land; for the ownership of an island follows the ownership of the soil before the island arose into existence (k).

Islands in  
rivers.

**682.** Where an island is caused by a sudden act of water in cutting off land or by a sudden recession of the water no change of ownership occurs. Where an island arises in a several fishery, the owner of which is owner of the bed, or in a river where one person owns the whole bed, the island belongs to the owner of the bed and not to the riparian owners (l).

Where no  
change in  
ownership.

**683.** When riparian owners are entitled to a part of an island, they should take possession and keep up their boundaries, otherwise they may lose their rights, because their ownership is affected by the position of the *medium filum*, for this is a movable line changing as the river gradually and imperceptibly changes its course and at the same time affecting the ownership of the bed and all that is on it.

Riparian  
owners.

A. C. 569, P. C.; *Doc d. Watt v. Morris* (1835), 2 Bing. (N. C.) 189. A less time will suffice if the circumstances allow of a jury presuming a lost grant; see Memorandum of Sir Thomas Farrer of the Board of Trade (Stuart Moore, *History and Law of Foreshore*, p. 598).

(h) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

(i) *Hastings Corporation v. Ivall* (1874), L. R. 19 Eq. 558; *Harper v. Charlesworth* (1825), 4 B. & C. 574, 593; *Johnson v. Barret* (1646), Ayleyn, 10.

(j) Hale, *de Jure Maris*, cc. 4, 6 (Hargrave, *Law Tracts*, pp. 17, 36).

(k) *Ibid.*; Stuart Moore, *History and Law of Foreshore*, p. 405; 2 Bract., c. 2. The above rule will not always be applied; see *Great Torrington Commons Conservators v. Moore Stevens*, [1904] 1 Ch. 347, where it was held in the circumstances of that case that one riparian owner's land only extended to the *medium filum* of the channel between the island and his riparian land. In America no account is taken of the smaller of the two channels where an island lies more to one side of the river than another (Angell, *Right of Property in Tide Waters*, p. 42).

(l) Hale, *de Jure Maris*, cc. 4, 6 (Hargrave, *Law Tracts*, pp. 17, 36); Stuart Moore, *History and Law of Fisheries*, p. 149.

## SECT. 2.

The  
Seashore.

Sand banks.  
Acquisition  
of easements.

**684.** The same rules seem to apply to a sandbank in a river which uncovers at low water (*m*).

## SUB-SECT. 5.—Easements.

**685.** Easements of all kinds may be acquired over the foreshore in exactly the same way as they may be acquired over any other land, provided that they do not interfere with public rights over the foreshore (*n*).

When the act relied on is an interference with the soil, such as the erecting of groynes to protect the adjoining land, it is a question whether such interference amounts only to an easement, or to an act of possession and ownership of the soil (*o*).

## SUB-SECT. 6.—Rights over the Foreshore.

## (i.) Navigation.

Extent of  
right.

**686.** All persons have a right to navigate over the foreshore, that is, to pass and repass in ships, including the rights attendant on the right of navigation, such as anchoring and mooring (*p*); but the right must be exercised reasonably and with due regard to the rights subservient to the right of navigation which the owner of the foreshore may have (*q*).

On the other hand, the owner of the foreshore must do nothing which interferes with the right of navigation (*r*).

## (ii.) Passage.

Extent of  
right.

**687.** The public has no right of passing along or across the foreshore (*s*), except in the exercise of the rights of navigation or

(*m*) *Wedderburn v. Paterson* (1864), 2 Macph. (Ct. of Sess.) 902.

(*n*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 243 *et seq.*; *Mercer v. Denne*, [1904] 2 Ch. 534; and the text, *infra*.

(*o*) *Philpot v. Bath* (1905), 21 T. L. R. 634, C. A. If the act is done without any *animus possidendi* only an easement is acquired (*ibid.*). As to the value to be attached to erections on the shore, and their change of position on the question of ownership, see also *Le Strange v. Rowe* (1866), 4 F. & F. 1048; *Beaufort (Duke) v. Aird & Co.* (1904), 20 T. L. R. 602.

(*p*) *Gann v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192; *A.-G. v. Wright*, [1897] 2 Q. B. 318, C. A. As to the rights of vessels employed to prevent smuggling, see p. 373, *post*; as to the extent and nature of the right of navigation, see p. 400, *post*.

(*q*) *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339; *The Octavia Stella* (1887), 6 Asp. M. L. C. 182; *The Swift*, [1901] P. 168.

(*r*) *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *R. v. Grosvenor (Lord)* (1819), 2 Stark. 511. The owner can only justify a nuisance on the foreshore if it was created under statutory power or after a writ of *ad quod damnum* and inquest thereon, for, as the Crown has no right to use its title to the foreshore as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects, so, too, the subject as the Crown's grantee cannot do so, as he takes subject to the restriction on the Crown (*A.-G. v. Johnson, supra*). The Crown has a right to abate a nuisance notwithstanding it be on the land of a subject (*A.-G. v. Burridge* (1822), 10 Price, 350; *A.-G. v. Parmeter* (1811), 10 Price, 378; *A.-G. v. Terry* (1874), 9 Ch. App. 423; *A.-G. v. Tomline* (1880), 14 Ch. D. 58, 59, C. A.). As to fisheries in relation to navigation, see title FISHERIES, Vol. XIV., pp. 591, 592.

(*s*) The foreshore is not a street, highway, or public place within the meaning of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 3 (*Maddock v. Wallasey Local Board* (1886), 55 L. J. (Q. B.) 267); see title GAS, Vol. XV., p. 326, note (*l*).



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The  
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fishery, or in respect of a lawfully dedicated right of way from one place to another over the foreshore; there is no right of stray or of recreation there, and no right to go across the foreshore for the purpose of getting to or from boats, except by such places only as usage or necessity has appropriated for that purpose (*t*).

There is no general right of loading or unloading, landing or embarking at pleasure upon any part of the seashore or land adjoining thereto except in case of peril or necessity (*u*).

**688.** By immemorial custom the inhabitants of a parish or the fishermen of a village may have acquired an easement over the foreshore or lands adjacent thereto (*w*). Though the public has no such right, the court is reluctant to assist by injunction the owner of the foreshore in restraining acts which in themselves cause no injury to him (*x*). Rights of inhabitants.

**689.** Any person who is duly employed for the prevention of smuggling when on duty may pass over any part of the foreshore, and the officer in charge of any vessel or boat employed for the prevention of smuggling or acting in his aid may haul such vessel or boat upon the shore, except where it is a garden, pleasure ground, or place ordinarily used for bathing machines, and may moor such vessel or boat upon the foreshore for such time as he deems necessary and proper (*y*). Prevention of smuggling.

(iii.) *Shooting.*

(1) *In General.*

**690.** The right to shoot and take birds on the foreshore is a *profit à prendre*, and can only be acquired in the same way and by the same class of persons as other *profits à prendre* are acquired (*z*). Nature of right.

As the public is incapable of acquiring a *profit à prendre*, there

(*t*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268, 301, approved in *Brinckman v. Matley*, [1904] 2 Ch. 313, 323, C. A.; compare title FERRIES, Vol. XIV., p. 556.

(*u*) *Blundell v. Catterall*, *supra*; *Brinckman v. Matley*, *supra*; see title FISHERIES, Vol. XIV., p. 575. As to the landing of wrecked goods, see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 548.

(*w*) *Mercer v. Denne*, [1904] 2 Ch. 534 (custom for fisherman inhabitants of a parish to dry nets allowed); *Ramsgate Corporation v. Debling* (1906), 22 T. L. R. 369 (custom for inhabitants to put chairs on the foreshore not allowed); *Aiton v. Stephen* (1876), 1 App. Cas. 456 (when fishermen have an immemorial right to beach boats on ground adjoining a harbour, and a local Act authorises a yearly payment for the privilege, the owner of the ground must either permit the fishermen to use the ground or provide other grounds equally suitable for the purpose).

(*x*) *Behrens v. Richards*, [1905] 2 Ch. 614. The court may, instead of granting an injunction, make a declaration of the owner's rights (*Blundell v. Catterall*, *supra*, at p. 316; *Llandudno Urban Council v. Woods*, [1899] 2 Ch. 705 (preaching on foreshore; injunction refused); *Brighton Corporation v. Packham* (1908), 72 J. P. 318 (same offence; injunction granted); compare *Brinckman v. Matley*, *supra*).

(*y*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 194, 196. As to the powers of a receiver of wreck, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 549 *et seq.*

(*z*) *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139. As to *profits à prendre* generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 336 *et seq.*

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Extent of  
right.

is no general right to shoot over the foreshore, either when the tide is in or when it is out (*a*). The same rule applies to channels of tidal rivers and to the sea, for the public has no right to use the highway of such tidal water for such a purpose (*b*).

**691.** Where the soil of the foreshore is in the Crown and no mischief or injury is likely to arise from the exercise of such a right by the public, it is not to be supposed that an unnecessary and injurious restraint upon the practice would be enforced by the Crown as the *parens patriæ* (*c*).

Where the foreshore belongs to a subject he is entitled to the right of shooting thereon (*d*).

Where the foreshore is parcel of a manor it forms part of the demesne lands, for it is part of the waste of the manor (*e*), and a grant of free warren will therefore extend to and include the foreshore (*f*).

(2) *Artillery and Rifle Ranges.*

Regulation  
by bye-laws.

**692.** Where any land, the use of which can be regulated by bye-laws under the Military Lands Acts, 1892 and 1900 (*g*), abuts on any sea or tidal water or shore, or where rifle or artillery practice is or can be carried on over any sea, tidal water or shore from any such land, bye-laws may be made in relation thereto to secure the public from danger (*h*).

Interference  
with private  
or public  
rights.

**693.** If a bye-law injuriously affects or obstructs the exercise of any private right of any person, that person must be compensated (*i*).

(*a*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139; see also *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142, C. A.; *Hickman v. Maisey*, [1900] 1 Q. B. 752, C. A.

(*b*) *Fitzhardinge (Lord) v. Purcell*, *supra*.

(*c*) *Blundell v. Catterall*, *supra*.

(*d*) *Fitzhardinge (Lord) v. Purcell*, *supra*.

(*e*) *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, 658, C. A.

(*f*) Grants of free warren seem invariably to have been restricted to the demesne lands of the grantee. When this restriction first originated is unknown, but it appears from a commission of the 5th June, 1280, enrolled on the Patent Roll, 8 Edw. 1, m. 15 d., that by reason of an ancient ordinance (now lost) the King did not grant free warren except over the demesne lands of the grantee. As to the restraining effect of Magna Charta on the royal right of fowling on the foreshore and banks of rivers, see Stuart Moore, *History and Law of Fisheries*, pp. 6 *et seq.*

(*g*) 55 & 56 Vict. c. 43; 63 & 64 Vict. c. 56; see, generally, title ROYAL FORCES, Vol. XXV., p. 99. "Land" means land under the management of a Secretary of State, whether vested in the Crown or in the Secretary of State, or in a person in trust for the Crown or the Secretary of State, or appropriated by or used by the Admiralty for any purpose of His Majesty's navy, or belonging to a county association or vested in that association, or in any person as trustee for the association, or belonging to the Royal Naval Volunteer Reserves; and includes the bed of the sea, or any tidal water, or any easement on or over lands or any right of interference with the free use of any land (Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 14 (3), 23; Military Lands Act, 1900 (63 & 64 Vict. c. 56), ss. 2 (1), 3; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9); Stat. R. & O., 1912, p. 1211; Naval Lands (Volunteers) Act, 1908 (8 Edw. 7, c. 25).

(*h*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (2); Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 14.

(*i*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (2) (a). The

If it injuriously affects any public right, the consent of the Board of Trade must be obtained (*k*).

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The  
Seashore.  
—  
Notices.

**694.** Before consenting to a bye-law, the Board of Trade must cause notice to be given by advertisement or otherwise in the locality in order that any town, harbour authority, or other local authority or person interested may have an opportunity of making objections. These objections must be considered, and the Board must make such inquiries as appear to be necessary for the purpose of ascertaining that the bye-law will not unreasonably interfere with any public right (*l*).

**695.** If the Board of Trade, after such inquiries, is satisfied that the restriction of any public right is required for the safety of the public or for the exigencies of the military or naval purpose for which the area to which the bye-law applies is used, the Board may consent to the restriction of the public right to such extent as in all the circumstances of the case seems reasonable (*m*). Where any part of the area to which the bye-law applies is vested in the Crown and under the management of the Commissioners of Woods and Forests, their consent in writing must be obtained (*n*).

Consent of  
Board of  
Trade.

**696.** After a bye-law is made, the boundaries of the area affected must be marked out by permanent marks, but if this cannot be conveniently done, the boundaries must be described in the bye-laws, and while the area is in use for military or naval purposes sufficient means must be taken to warn the public from entering the area (*o*).

Boundaries  
of area.

(iv.) *Bathing.*

**697.** There is no common law right for the public to use the foreshore for the purpose of bathing, and as there is no such right to bathe in the sea, the public may not go across the foreshore for that

No general  
right.

compensation if not agreed must be ascertained in manner provided by the Lands Clauses Acts, in respect of compensation for land taken otherwise than by agreement (Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (2) (a)); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 158 *et seq.* No bye-law may take away or prejudicially affect any right of common (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 14); see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 513.

(*k*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (2) (b). For this purpose "public right" means any right of navigation, anchoring, grounding, fishing, bathing, walking or recreation (*ibid.*, s. 2 (4)).

(*l*) *Ibid.*, s. 2 (3).

(*m*) *Ibid.*, s. 2 (2), (b).

(*n*) *Ibid.*, s. 2 (2) (c). As to foreshore under the management of the Commissioners of Woods and Forests, see title CONSTITUTIONAL LAW, Vol. VII., pp. 142 *et seq.*

(*o*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (5). If a person commits a breach of a bye-law he may be removed from the area by any constable or officer authorised in manner provided by the bye-law and be taken into custody without warrant, and he is liable to a fine not exceeding £5; any vehicle, animal, vessel or thing found in the area in contravention of the bye-law may be removed, and on due proof of such contravention may be declared by a court of summary jurisdiction forfeited to the Crown (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 17).



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The  
Seashore.

Custom or  
prescription.

Exercise of  
right.

Regulations  
by local  
authorities.

purpose either on foot or in bathing machines. This rule applies whether the foreshore is the property of the Crown or of a private person (*p*).

**698.** A right to use the foreshore for the purpose of bathing may be gained by custom or prescription either by the permanent or temporary inhabitants of a vill, parish, or district (*q*).

**699.** The right to bathe, if it exists, must be exercised in conformity with the general law, which forbids indecency, and it is an indictable offence, punishable as a misdemeanour, to bathe at any place where persons cannot bathe without indecent exposure. It is no defence that as long as living memory extends there has been a usage to bathe at that particular spot (*r*).

**700.** In certain localities (*s*) the local authority has power to make bye-laws (*t*) for fixing the stands for bathing machines, and the limits within which persons of each sex shall be set down for bathing, and within which they may bathe; for preventing indecent exposure; for regulating the manner in which bathing machines shall be used and the charges to be made for the same (*u*); and for regulating the distance at which vessels and boats plying for hire for pleasure shall be kept from persons bathing within the prescribed limits (*a*).

The local authority may also make bye-laws with regard to any public bathing, whether from machines or not, for regulating the hours of bathing, and for enforcing the provision and maintenance by persons providing accommodation for public bathing of life-saving apparatus or other means of protecting bathers from danger (*b*).

(*p*) *Brinckman v. Matley*, [1904] 2 Ch. 313, C. A.; *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Parker v. Clegg* (1903), 2 L. G. R. 608, 616.

(*q*) *Blundell v. Catterall*, *supra*, at pp. 289, 306; *Llandudno Urban Council v. Woods*, [1899] 2 Ch. 705, 709; *Brinckman v. Matley*, *supra*, where the right was claimed by prescription and by custom in respect of a particular tenement and as a common law right; see also *Laird v. Briggs* (1880), 16 Ch. D. 440 (claim for an easement over foreshore for bathing machines); *A.-G. v. Hanmer* (1858), 31 L. T. (o. s.) 379.

(*r*) *R. v. Reed* (1871), 12 Cox, C. C. 1 (bathing near a footpath frequently used by women); *R. v. Crunden* (1809), 2 Camp. 89 (bathing near recently erected houses from which the bathing may be seen); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537; as to the meaning of "place," see *R. v. Wellard* (1884), 14 Q. B. D. 63, C. C. R.

(*s*) Namely, places to which the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69, has been applied by Local Acts, or to which the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171, applies; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 500.

(*t*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69. The powers given by this provision apply to both public and private property (*Parker v. Clegg* (1903), 2 L. G. R. 608).

(*u*) This does not include power to fix the amount to be charged for the use of towels and bathing costumes (*Parker v. Clegg*, *supra*).

(*a*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171; see note (*s*), *supra*.

(*b*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 92; see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 500, 501.

**701.** Though a local authority may have power to license bathing machines, such licences do not confer on the licensees any right to place their machines on any part of the foreshore which is private property (*c*).

(v.) *Seaweed.*

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The  
Seashore.

Effect of  
licence.

**702.** There is not at common law a general right in the public of entering on the foreshore for the purpose of taking seaweed (*d*).

Above low-  
water mark.

Seaweed cast above the high-water mark is the property of the owner of the land there (*e*), and when cast on or growing on the foreshore it is the property of the owner of the foreshore, who can maintain trespass or trover for the taking thereof (*f*); and possession of the foreshore is sufficient to support such actions against trespassers (*g*); but drifted and ungathered seaweed is not the subject of larceny (*h*).

The regular taking of seaweed by the owner of the foreshore or his licensees is evidence of his possession and ownership of the foreshore (*i*). On the other hand, the taking of seaweed by the public does not displace a title to the foreshore founded on an ancient grant explained by the user of the grantee (*k*).

Seaweed below the low-water mark belongs to the sovereign within whose territory it is situated, and the lord of a manor or a subject can only establish a title thereto by a grant from the sovereign, or by such long and undisturbed enjoyment as to give him a title by prescription (*l*).

Below low-  
water mark.

**703.** A right to take seaweed from the foreshore may be acquired in exactly the same way as the right to any other *profit à prendre* is acquired (*m*).

Acquisition  
of right to  
take seaweed.

A grant of a right to take seaweed involves in it a grant of a way over the land if it cannot be taken without (*n*).

(vi.) *Shells.*

**704.** The public has no right to take shells from the foreshore, Shells.

(*c*) *Mace v. Philcox* (1864), 15 C. B. (N. S.) 600.

(*d*) *Howe v. Stawell* (1833), Alc. & N. 348.

(*e*) *Lowe v. Govett* (1832), 3 B. & Ad. 863; *Hamilton v. A.-G.* (1880), 5 L. R. Ir. 555, 575.

(*f*) *Calmaday v. Rowe* (1848), 6 C. B. 861; *Brew v. Haren* (1874), 11 I. R. C. L. 198, Ex. Ch.; *Mulholland v. Killen* (1874), 9 I. R. Eq. 471.

(*g*) *Hastings Corporation v. Ivall* (1874), L. R. 19 Eq. 588; *Stoney v. Keane* (1903), 37 I. L. T. 212.

(*h*) *R. v. Clinton* (1869), 4 I. R. C. L. 6, C. C. R.

(*i*) *Lord Advocate v. Blantyre (Lord)* (1879), 4 App. Cas. 770; *Daly v. Murray* (1885), 17 L. R. Ir. 185; *Healy v. Thorne* (1870), 4 I. R. C. L. 495; *Calmaday v. Rowe*, *supra*; *Stoney v. Keane*, *supra*.

(*k*) *Hamilton v. A.-G.*, *supra*; *Lord Advocate v. Young, North British Rail. Co. v. Young* (1887), 12 App. Cas. 544.

(*l*) *Benest v. Pipon* (1829), 1 Knapp, 60, P. C.

(*m*) *Hamilton v. A.-G.*, *supra*, at p. 576; *Wyse v. Leahy* (1875), 9 I. R. C. L. 384 (claim by occupier of a farm); *Stoney v. Keane*, *supra* (claim under Statutes of Limitation); *A.-G. v. Hanmer* (1858), 31 L. T. (o. s.) 379 (freeholders by prescription and copyholders by custom); see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 243 *et seq.*

(*n*) *Baird v. Fortune* (1861), 4 Macq. 127, 151, H. L.

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although there may be a general right to take the shell-fish which are there (*o*).

(vii.) *Gravel, Stones, and Sand.*

Ownership of  
gravel etc.

**705.** Gravel, stones, and sand, even when washed up by the sea on to the foreshore, are part of the freehold and belong to the owner of the foreshore (*p*), who may deal with them as he pleases and license others to do so (*q*), provided that such acts do not amount to the removal of a natural barrier against the inroads of the sea (*r*), or cause injury to the land abutting on the foreshore.

Right to take  
gravel etc.

**706.** A right to take gravel, stones, and sand is a *profit à prendre*, and can only be successfully claimed by the same class of persons who are able to sustain a claim to a *profit à prendre in alieno solo* (*s*). Consequently inhabitants of a parish, or occupiers of land, cannot, either by custom, prescription or grant, have a right to take sand, stones, or gravel from the foreshore, whether vested in the Crown or in a subject, for the purpose of manuring their lands or repairing the highways in the parish (*t*), and highway authorities are in the same position (*a*).

Right of  
highway  
authorities.

**707.** Highway authorities may take stones for the repair of the highways in their parishes from any foreshore therein, making satisfaction for damage done to the lands by carrying away the stones, but the consent of the owner of the land or a licence from the justices must also be obtained (*b*). In no case may they take stones from the foreshore if the removal will cause damage or injury by inundation to the lands adjoining or increase the danger of encroachments of the sea (*c*).

(*o*) *Bagott v. Orr* (1801), 2 Bos. & P. 472. As to the right of the public to deposit shell-fish on the foreshore, see title FISHERIES, Vol. XIV., p. 575.

(*p*) *Blewett v. Tregonning* (1835), 3 Ad. & El. 554 (sand blown by the wind above the foreshore belongs to the owner of the land); *Le Strange v. Rowe* (1866), 4 F. & F. 1048.

(*q*) *Hale, de Jure Maris*, c. 6 (Hargrave, Law Tracts, p. 27). The constant and usual fetching of gravel, seaweed, and sea sand is evidence of ownership of the foreshore (*ibid.*).

(*r*) *A.-G. v. Tomline* (1879), 12 Ch. D. 214; *Cowper (Earl) v. Baker* (1810), 17 Ves. 128; *Chalk v. Wyatt* (1810), 3 Mer. 688. As to the statutory restrictions on the taking of material from the foreshore, see pp. 383, 384, *post*.

(*s*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 341 *et seq.*; *A.-G. v. Hammer* (1858), 31 L. T. (o. s.) 379 (freeholders by prescription and copyholders by custom); *Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, C. A.

(*t*) *Constable v. Nicholson* (1863), 14 C. B. (N. S.) 230 (inhabitants of a parish); *Macnamara v. Higgins* (1854), 4 I. C. L. R. 326 (occupiers of land); *Oxenden v. Palmer* (1831), 2 B. & Ad. 236.

(*a*) *Padwick v. Knight* (1852), 7 Exch. 854; *Pitts v. Kingsbridge Highway Board* (1871), 25 L. T. 195 (claim by board as representing inhabitants); *Clowes v. Beck* (1851), 13 Beav. 347 (injunction granted against highway surveyor although plaintiff's title was purely legal and not clearly made out).

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 51; see, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 109 *et seq.*

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 52; *Pitts v. Kingsbridge Highway Board*, *supra*. As to whether the foreshore is within the parish, see p. 382, *post*.



**708.** All persons resident and dwelling in the counties of Devon and Cornwall may take sea-sand below the full sea mark for the bettering of their land and for the increase of corn and tillage, paying the duties in force in 1609 or such reasonable compositions as by agreement with the owners of the soil shall from time to time be made (*d*).

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Seashore.Rights in  
Devon and  
Cornwall.(viii.) *Wreck.*

**709.** Wreck of the sea is a royal franchise, and is one of the prerogative rights of the Crown (*e*). Except when the right has been granted out to a subject, it belongs to the Crown.

Persons  
entitled to  
wreck.

In the county of Cornwall the right of wreck belongs either to the Duke of Cornwall or to a subject, except when the right may have escheated or become vested in the Crown by purchase (*f*).

In the Counties Palatine the right of wreck belonged originally to the Earls Palatine as part of the *jura regalia* (*g*).

In Wales the Lords Marchers, spiritual and temporal, who had wreck of the sea within their lordships before the English common law was extended to that country, have that franchise confirmed to them by statute as though it had been expressly granted by charter (*h*).

Except as above indicated, a subject can only make title to wreck by charter or prescription at common law (*i*).

(*d*) Stat. (1609) 7 Jac. 1, c. 18, ss. 1, 2. This statute is not declaratory of the common law (*Macnamara v. Higgins* (1854), 4 I. C. L. R. 326; *Howe v. Stawell* (1833), Alc. & N. 348, 356), though Hall on the Seashore, p. 208, argues the contrary. It does not in any way interfere with private rights (*Calmadry v. Rowe* (1848), 6 C. B. 861, *per* MAULE, J., at p. 891); and it is evidence that the foreshore may belong to a subject (Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, p. 26)). The practice of taking sand by the residents in these counties recited in and legalised by this statute has its origin in a grant by Richard, King of the Romans, allowing all the inhabitants in Cornwall to take sea-sand without payment, and confirmed by King Henry III. on the 28th June, 1261 (Charter Rot. 45 Hen. 3, m. 2, No. 11). This charter shows that the foreshore within the county, by the reign of Henry III., had ceased to belong to the Crown; see note (*g*), p. 364, *ante*.

(*e*) Stat. De Prerogativa Regis (17 Edw. 2, stat. 2, c. 13); see title CONSTITUTIONAL LAW, Vol. VII., pp. 210 *et seq.* Before the passing of this statute the Crown had in a great many places parted with its rights. Richard I. is said to have released the Crown right to wreck throughout the kingdom, but his successors resumed the prerogative again (Hale, de Jure Maris, c. 7 (Hargrave, Law Tracts, p. 40)); see Stuart Moore, History and Law of Foreshore, pp. 1 *et seq.*, 69 *et seq.*, 139 *et seq.* As to the definition of "wreck," see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 548.

(*f*) See note (*g*), p. 364, *ante*. As to the power of the Board of Trade to purchase on behalf of the Crown any right to wreck possessed by any person other than the Crown, see note (*i*), *infra*.

(*g*) Hale, de Jure Maris, c. 7 (Hargrave, Law Tracts, p. 41); Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19).

(*h*) Stat. (1535—6) 27 Hen. 8, c. 26, s. 30; stat. (1554—5) 1 & 2 Ph. & M. c. 15, s. 6.

(*i*) Hale, de Jure Maris, c. 7 (Hargrave, Law Tracts, pp. 41, 42). Being a franchise, it is excluded from the Crown Suits Act, 1769 (9 Geo. 3, c. 16) (Hale, de Jure Maris, c. 7 (Hargrave, Law Tracts, p. 41); *Penryn Corporation v. Holm* (1877), 2 Ex. D. 328). The Earl of Cornwall had it by charter *per totum comitatum*, except where it had at the time of the charter been granted out; for instances of such grants, see Quo Warranto Rolls, Cornwall. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 528, the Board

## SECT. 2.

The  
Seashore.

What is  
wreck.  
Effect of  
grant.

**710.** Wreck can only be taken above the low-water mark, and then only when the tide is out, because nothing is wreck whilst it floats, but as soon as it is fixed to the ground, though the water be round it, it becomes wreck (*k*).

**711.** A grant of a right to wreck does not itself confer any right to the soil over which it is to be taken, because *primâ facie* the soil over which it is to be taken and the right itself belong to the Crown, and the Crown may grant both to one individual, or it may grant the soil without the wreck, or the wreck without the soil (*l*).

The grant carries with it a right of egress and regress to take it (*m*), and a grantee has a special property in wrecks within his liberty from the time they become wrecked and to all goods washed ashore, though they subsequently are shown by their owners claiming them within a year and a day not to be wreck of the sea, and he may maintain trespass against the captor though the taking was before any seizure on his behalf (*n*).

Claim by  
town etc.

**712.** Wreck may be claimed as parcel of or belonging to a hundred or as parcel of an honour or a manor (*o*), or to a town (*p*), and it may be included in a grant of liberties *in terrâ et in aquâ*, on stronde and on streme (*q*).

Foreshore.

**713.** Though a grant of wreck *per se* does not carry a right to the foreshore over which the wreck is to be gathered, yet, if the grant is coupled with words which indicate that the grantee is the owner of the foreshore, such as, for instance, *wreccum maris infra manerium suum*, or if the grant is not forthcoming and the right is claimed by prescription *infra manerium*, there is a great presumption that the foreshore was parcel of the manor (*r*).

of Trade, with the consent of the Treasury, may purchase for the Crown any right to wreck possessed by any person other than the Crown.

(*k*) *R. v. Two Casks of Tallow* (1837), 3 Hag. Adm. 294; *R. v. Forty-nine Casks of Brandy* (1836), 3 Hag. Adm. 257; *The Pauline* (1845), 2 Wm. Rob. 358; *Stackpoole v. R.* (1875), 9 I. R. Eq. 619, C. A. (logs which have grounded and been marked by the owner of the right to wreck cease to be wreck if they again float out to sea).

(*l*) *Dickens v. Shaw* (1822), cited in Hall on Seashore, Appendix, xlv.; see p. 368, *ante*. The observations of the judges in this case must be taken with reference to the particular circumstances of the case (*Calmady v. Rowe* (1848), 6 C. B. 861, *per* COLTMAN, J., at p. 892). Instances of grants of the soil and wreck to one person are very numerous (see Stuart Moore, History and Law of Foreshore, pp. 48, 81, 470, 641); but examples of grants of wreck without the soil are not; see *ibid.*, p. 648.

(*m*) *Dickens v. Shaw*, *supra*; Stuart Moore, History and Law of Foreshore, p. 453; *Anon.* (1704), 6 Mod. Rep. 149.

(*n*) *Dunwich Corporation v. Sterry* (1831), 1 B. & Ad. 831. As to the position where the captor is the receiver of wreck or coastguard, see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 551.

(*o*) Hale, de Jure Maris, cc. 6, 7 (Hargrave, Law Tracts, pp. 27, 41, 42); Quo Warranto Rolls, printed ed. p. 771 (Manor of Christchurch); *ibid.*, p. 201 (Manor of Hornsea); Coram Rege Roll, 25 Edw. 3, c. 49d (Hundred of Lamanwode); *Constable's (Sir John) Case* (1575), cited in Stuart Moore, History and Law of Foreshore, p. 224 (Manor and Lordship of Holderness).

(*p*) Quo Warranto Rolls, p. 735 (Town of Dunwich); compare *Dunwich Corporation v. Sterry*, *supra*.

(*q*) Quo Warranto Rolls, p. 318 (Abbot of St. Augustine, Canterbury).

(*r*) Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, pp. 26, 27), citing

A grant of a manor with a right to wreck, or royal fish, raises a presumption that the Crown intended to grant the foreshore with the manor (s). If by any means the right to wreck comes again to the Crown it merges in the Crown, and if the Crown grants out the manor or lands in respect of which the right was previously enjoyed such grant does not pass the wreck unless there are apt words in the grant to do so (a).

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The  
Seashore.  
—

**714.** Title to wreck by prescription may be made by showing user by the taking of wreck when it happens, or the receipt of the proceeds of wreck after it has been sold by the Crown, allowances by justices in eyre of the right, judgments in actions in respect of the right (b), and payments made for burying dead bodies cast ashore (c).

Prescription.

SUB-SECT. 7.—*Jurisdiction.*

(i.) *Judicial County.*

**715.** Foreshore, whether on the sea coast or on an arm of the sea which is within the body of a county (d), is within the jurisdiction of the civil and criminal courts.

Courts  
having juris-  
diction.

Formerly, foreshore on the sea coast, when covered with water, was within the jurisdiction of the admiral for all purposes (e), but now that jurisdiction is limited to certain matters (f).

*Nevill's (Sir Henry) Case* (1286) and *Constable's (Sir John) Case* (1575). The following, amongst other expressions, support this presumption: "*infra dominium suum*" (Close Roll, 5 Ric. 2, m. 9; Coram Rege Roll 25 Edw. 3, m. 49); "*ratione dominii nostri*" (Inq. Ad q. d. 5 Edw. 3, 19); "*super terram suam*" (Inq. Ad. q. d. 5 Edw. 3, 70); "*per omnes terras suas super mare*" (Charter Roll, 54 Hen. 3, m. 7, 1 n.); "*in omnibus dominicis suis*" (Charter Roll, 54 Hen. 3, m. 8); "*super feodum, ecclesiæ suæ*" (Quo Warranto Rolls, printed ed. p. 348); "*super solum suum*" (Coram Rege Roll 13 Edw. 2, m. 41); for other expressions, see also Stuart Moore, *History and Law of Foreshore*.

(s) *Le Strange v. Rowe* (1866), 4 F. & F. 1048, per ERLE, C.J.; *R. v. Ellis* (1813), 1 M. & S. 652; Hale, de Jure Maris, c. 6 (Hargrave, Law Tracts, pp. 26, 27).

(a) *Northumberland (Duke) v. Houghton* (1870), L. R. 5 Exch. 127; *Strata Mercella's (Abbot) Case* (1591), 9 Co. Rep. 24 a; Cru. Dig., tit. 27, ss. 91—100; see title CONSTITUTIONAL LAW, Vol. VI., p. 481.

(b) *Biddulph v. Ather* (1755), 2 Wils. 23 (allowances in eyre and judgment in trespass 400 years ago are not conclusive against a modern user for many years); *Talbot v. Lewis* (1834), 6 C. & P. 603 (where ancient surveys of manors made by commissioners appointed by law were held not to be evidence of the lord's title to wreck, though they are evidence as to the boundaries of the manor); see *R. v. Shirland* (1313—4) (Eyre of Kent), Vol. III., p. 181, Selden Society publications (Allowance in Eyre).

(c) Burial of Drowned Persons Act, 1808 (48 Geo. 3, c. 75).

(d) The test whether an arm of the sea is within the body of a county is said to be whether a man on one shore can see what is being done on the other (2 East, P. C. 804; *R. v. Cunningham* (1859), 28 L. J. (M. C.) 66 (Bristol Channel); *R. v. Bruce* (1812), 2 Leach, 1093 (Milford Haven); Hale, de Jure Maris, c. 4 (Hargrave, Law Tracts, p. 10)). Arms of the sea only extend as far as the tide flows and reflows (*ibid.*, p. 12).

(e) *R. v. Keyn* (1876), 2 Ex. D. 63, 168, 197, C. C. R.; *Constable's (Sir Henry) Case* (1600), cited in Stuart Moore, *History and Law of Foreshore*, p. 233; *R. v. Two Casks of Tallow* (1837), 3 Hag. Adm. 294; *The Pauline* (1845), 2 Wm. Rob. 358; *R. v. Musson* (1858), 8 E. & B. 900; *Embleton v. Brown* (1860), 3 E. & E. 234.

(f) As to the jurisdiction of the admiralty courts, see title ADMIRALTY,



## SECT. 2.

The  
Seashore.How far  
within parish.(ii.) *Administrative Parish.*

**716.** Foreshore, whether on the sea coast or on tidal rivers, is *primâ facie* extra-parochial, because it *primâ facie* belongs to the Crown (*g*), but it may be shown to be within a parish, and the burden of proving this is upon those who assert it (*h*).

On the 25th December, 1868, every accretion from the sea, and the part of the seashore to low-water mark and the bank of every river to the middle of the stream, which was not on that day in any parish, was for all civil parochial purposes annexed to and incorporated in the adjoining parish (*i*).

SUB-SECT. 8.—*Defences against Encroachments.*Duty of  
Crown.

**717.** It is part of the prerogative and is the duty of the Crown to preserve the realm from the inroads of the sea by appropriate defences, and every subject has a right to have that duty performed, but the courts are powerless to enforce it (*k*).

Duty of  
subject.

**718.** The same rule applies to a subject, because, as he derives his title to his land from the Crown, he can only take it subject to the Crown's duties. In his case the courts have jurisdiction to restrain him from removing a natural barrier to the sea, if by so doing he would cause an injury to his neighbour's lands, or expose them to the inroads of the sea (*l*). The subject, however, is not bound to do actual work to protect his lands (*m*), or to prevent his neighbour's lands from being inundated, unless he is bound by his tenure to keep out the sea (*n*).

Vol. I., pp. 59 *et seq.*; of criminal courts, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 274 *et seq.*

(*g*) *R. v. Musson* (1858), 8 E. & B. 900 (seashore at Yarmouth); *Bridgewater Trustees v. Bootle-cum-Linacre* (1866), L. R. 2 Q. B. 4 (foreshore of river Mersey); see, *contra*, *McCannon v. Sinclair* (1859), 2 E. & E. 53 (land above the high-water mark of medium tides is within the parish); *R. v. Gee* (1860), 1 E. & E. 1068; *R. v. Landulph (Inhabitants)* (1834), 1 Mood. & R. 393.

(*h*) *R. v. Musson*, *supra*; *Ipswich Dock Commissioners v. St. Peter's, Ipswich, Overseers* (1866), 7 B. & S. 310 (evidence of rating of lands reclaimed from the foreshore is of much more weight than evidence of parish perambulation); *Bridgewater Trustees v. Bootle-cum-Linacre*, *supra*; *Perrott v. Bryant* (1836), 2 Y. & C. (EX.) 61 (oyster layings on which tithes had been paid). It may be parcel of the vill or parish, and evidence for this will be the usual perambulation and common reputation, known metes and divisions and the like (Hale, *de Jure Maris*, c. 6 (Hargrave, Law Tracts, p. 30), citing *R. v. Oldsworth* (1637) (tithes on foreshore enclosed from the sea)).

(*i*) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27. This Act does not apply to structures below the low-water mark, which are outside the realm and cannot be rated (*Blackpool Pier Co. v. Fylde Union Assessment Committee* (1877), 46 L. J. (M. C.) 189; see also p. 396, *post*).

(*k*) *A.-G. v. Tomline* (1880), 14 Ch. D. 58, C. A.; *Isle of Ely Case* (1609), 10 Co. Rep. 141a; *Henly v. Lyme Corporation* (1828), 5 Bing. 91. As to embankments under Commissioners of Sewers, see title SEWERS AND DRAINS, Vol. XXV., pp. 773 *et seq.*

(*l*) *A.-G. v. Tomline*, *supra*.

(*m*) *Hudson v. Tabor* (1877), 2 Q. B. D. 290, C. A.; *A.-G. v. Tomline*, *supra*.

(*n*) *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449; *Keighley's Case* (1609), 10 Co. Rep. 139a; *R. v. Somerset Sewers Commissioners* (1799), 8 Term Rep. 312. In the absence of prescriptive liability a frontager is not bound to protect his lands against extraordinary storms (*ibid.*). Where lands are reclaimed under statutory powers the frontager is

If he interferes in any way with a sea wall he must take care to keep it up to the level of the rest of the wall. Otherwise he is liable for damage caused by water flowing over it, though, if the water overflowed by an act of God, he is not responsible for damage which was solely caused by the act of God and was not in any way contributed to by his neglect (*o*).

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**719.** A subject may erect groynes or such other defences as are necessary for the protection of his lands on the sea coast, though such erections may have the effect of rendering it necessary for his neighbour to do the same (*p*); but in the case of non-tidal, tidal, or navigable rivers he must not do any act in the *alveus* of the river which might injure another riparian proprietor, or be an interference with the navigation (*q*). He may, however, erect a fence or bulwark on the bank (*r*). Such acts may be evidence of ownership of the soil on which they are placed (*s*), or only evidence of an easement (*t*).

Erection of  
groynes.

**720.** The Board of Trade may (*u*) by notice published in the *London Gazette* prohibit under a penalty of £10 the taking of ballast or shingle from the shores or banks of any port (*w*), harbour or haven, as to which the Board finds it necessary

Removal of  
ballast or  
shingle.

sometimes bound to protect the back landowner (*Bramlett v. Tees Conservancy Commissioners* (1885), 49 J. P. 214).

(*o*) *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, C. A. (where a dock company cut a way through a sea wall to their docks but had omitted to keep the banks of the cut up to the level of the rest of the walls, namely, 4 feet 2 inches above Trinity high-water mark, and an extraordinary tide rising 4 feet 5 inches above that mark overflowed to the plaintiff's premises). An extraordinary natural event does not cease to be "an act of God" merely because it has happened before; it is enough that it is extraordinary, and such as could not reasonably be anticipated (*ibid.*, per FRY, J., at pp. 515, 516). As to liability for overflow, see also pp. 453 *et seq.*, *post*.

(*p*) *R. v. Pagham Level Sewers Commissioners* (1823), 2 Man. & Ry. (K. B.) 468.

(*q*) *A.-G. v. Lonsdale (Earl)* (1868), L. R. 7 Eq. 377; *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47; *Menzies v. Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414, H. L. It is not necessary for the complainant to prove that he has suffered damage or is likely to do so, but mere apprehension of damage is not sufficient ground for action, if the act complained of is on the bank and not in the bed of the river (*Bickett v. Morris, supra*).

(*r*) *Bickett v. Morris, supra*. As to the rights of riparian owners on non-tidal waters, see p. 406, *post*.

(*s*) *Le Strange v. Rowe* (1866), 4 F. & F. 1048, where it is suggested that a frontager might, in certain circumstances, be entitled to place groynes on the foreshore to protect his land. In the case of foreshore belonging to the Crown, the Board of Trade appears to insist on a money acknowledgment for such erections; see, for instance, Foreshore Return of 4th July, 1902 (Parliamentary Paper (259)).

(*t*) *Philpot v. Bath* (1905), 21 T. L. R. 634, C. A., where the placing of stakes on the foreshore to protect a house was held in the circumstances to amount only to an easement and not to have been done *animo possidendi*.

(*u*) Harbours Act, 1814 (54 Geo. 3, c. 159), s. 14. This power was originally vested in the Admiralty, but was transferred to the Board of Trade by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 16.

(*w*) The term "port" in the Harbours Act, 1814 (54 Geo. 3, c. 159), s. 14, was interpreted in *Nicholson v. Williams* (1871), L. R. 6 Q. B. 632, 640, to mean the fiscal port as defined by treasury warrant, and not

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to make such prohibition for the protection of such port, harbour, haven, or the works thereof; this power does not affect the rights of property, privileges, jurisdictions or any powers of conservancy belonging to any corporate body, lord of a manor, or other person whatsoever (x).

SECT. 3.—*Ports and Harbours.*

SUB-SECT. 1.—*Definition.*

Different  
meanings.

**721.** The term “port” is used to denote either a harbour, haven, or place of safety for ships and their cargo whilst being loaded or discharged (a), an area for certain purposes, such as pilotage, sanitation and registration of vessels (b), a franchise in the hands of the Crown or a subject (c), or an area for fiscal purposes (d).

Franchise  
port.

**722.** A port which is a franchise is *quid aggregatum*, consisting of (1) something that is natural, namely, a haven or access of the sea whereby ships may conveniently come; safe situation against winds where they may safely lie, and a good shore where they may well unlade; (2) something that is artificial, such as quays and wharfs and cranes and warehouses, and houses of common receipt; and (3) something that is civil, namely, privileges and franchises such as *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority (e).

It has a vill, city, or borough as its head for the receipt of mariners and merchants, and may include more than the bare place where ships unlade, and sometimes extends many miles (f).

a natural port, though the court said that the jurisdiction of the Board of Trade did not extend all over the coast of the kingdom, but only over such portions thereof as are within the ambit of a fiscal port, overlooking the fact that the fiscal ports comprise the whole coast. By the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 11, a port appointed by Treasury warrant is deemed to be a port within the meaning and for the purposes of the Harbour Act, 1814 (54 Geo. 3, c. 159), and of any other public Act for the protection of ports, harbours, shores, and navigable rivers. It has not been decided whether this Act applies to shingle above the high-water mark of ordinary tide; compare *A.-G. v. McCarthy*, [1911] 2 I. R. 260, 300.

(x) Harbours Act, 1814 (54 Geo. 3, c. 159), s. 28. The effect of this saving clause on the rights of owners of foreshore has not been interpreted; see *Burton v. Hudson*, [1909] 2 K. B. 564; *Nicholson v. Williams* (1871), L. R. 6 Q. B. 632, 640; *Anderson v. Jacobs* (1905), 93 L. T. 17. A *bonâ fide* claim of right as owner of the foreshore to take shingle ousts the jurisdiction of the justices to impose a fine (*Burton v. Hudson*, *supra*).

(a) As to the tests to be used in determining the meaning of “port” in business transactions, see *Sailing Ship “Garston” Co. v. Hickie* (1885), 15 Q. B. D. 580, C. A.; *Hunter v. Northern Marine Insurance Co.* (1888), 13 App. Cas. 717; title SHIPPING AND NAVIGATION, Vol. XXVI., p. 182.

(b) See titles LOCAL GOVERNMENT, Vol. XIX., pp. 292, 293; SHIPPING AND NAVIGATION, Vol. XXVI., pp. 17, 597.

(c) See the text, *infra*, p. 386, *post*.

(d) See p. 385, *post*.

(e) Hale, de Portibus, c. 2; *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266, 285. As to the *jus mercati*, see *Tynemouth's (Prior) Case* (1292), cited in Stuart Moore, History and Law of Foreshore, p. 111, where the prior was restrained from holding a market at Shields to the prejudice of the port of Newcastle-on-Tyne. As to the right of public user of ports, see title CONSTITUTIONAL LAW, Vol. VI., pp. 460, 461.

(f) Hale, de Portibus, c. 2; *Exeter Corporation v. Warren* (1844), 5 Q. B. 773 (the port of Exeter includes Teignmouth).



**723.** A fiscal port is an area of the coast formerly defined by Royal Commission and now by Treasury warrant (*g*). By such warrant the Treasury may appoint any port and declare limits to the port and appoint proper places there to be legal quays for the lading and unlading of goods (*h*). In these ports the Commissioners of Customs may appoint stations or places where ships arriving or departing are to bring to for the boarding or landing of officers of customs, and the particular places where ships laden with any particular cargo are to moor or discharge; and may declare in what ports goods cleared for drawback or from the warehouse are to be carried or water-borne to be put on board any ship for exportation, or taken from a ship for importation (*i*).

SECT. 3.  
Ports and  
Harbours.  
Fiscal port.

SUB-SECT. 2.—*Creation of Ports.*

**724.** Ports which are a franchise in the hands of the Crown may be created by proclamation, but when in the hands of a subject must have originated by grant, prescription, or Act of Parliament, for a subject is incapable of making a port even for the landing of his own goods by his own tenants, and he cannot land any goods which are customable on his own lands, or anywhere which is not a public port and a place where such goods may be landed (*k*).

Mode of  
creation.

**725.** The Crown may grant the franchise of a port over the grantee's land, or over the lands of any other person, and, unlike the case of a market, a port may be created to the damage of another port so long as it is outside the precincts of such other port (*l*). For a port is a gate of the kingdom and for the benefit of the kingdom, but it requires an Act of Parliament to obstruct or wholly deface a port or to exclude ships from resorting thereto (*m*). The King when granting to a subject a franchise port may confer upon him, as a consideration for dedicating his land to the public and of his repairing the port, a right to levy dues in respect of the various commodities imported (*n*).

Grant of  
franchise.

(*g*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 11.

(*h*) These ports are deemed to be ports for the purposes of the Harbours Act, 1814 (54 Geo. 3, c. 159), and other public Acts for the protection of the ports, harbours, shores and navigable rivers of the United Kingdom (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 11). As these fiscal ports embrace the whole of the coast of the kingdom, this provision was probably enacted to remove the doubt raised in *Nicholson v. Williams* (1871), L. R. 6 Q. B. 632, as to the jurisdiction of the Board of Trade to prohibit the taking of shingle from the coast within the ambit of a port.

(*i*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 14, 16; see title REVENUE, Vol. XXIV., pp. 587 *et seq.*

(*k*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 458, 459. However commodious a place may be for the shelter of ships, it is not a port unless established by authority of the Crown (Hale, de Portibus, cc. 3, 4, 5). As to inferring that a port has been created, see *Foreman v. Whistable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266. As to ports in the Duchy of Cornwall, see note (*g*), p. 364, *ante*. A lord of a county palatine cannot erect a common port within his palatinate (Hale, de Jure Maris, c. 3 (Hargrave, Law Tracts, p. 53)).

(*l*) Hale, de Portibus, c. 3 (Hargrave, Law Tracts, p. 50).

(*m*) Hale, de Portibus, c. 5; Hale, First Treatise (Stuart Moore, History and Law of Foreshore, p. 351); Rot. Parl., 11 Hen. 6, m. 38, 39 (making the town of Poole a port and annulling the port of Melcombe); *Exeter Corporation v. Warren* (1844), 5 Q. B. 773.

(*n*) *Jenkins v. Harvey* (1835), 1 Cr. M. & R. 877.

## SECT. 3.

## Ports and Harbours.

## Definition.

SUB-SECT. 3.—*Dockyard Ports.*

**726.** Wherever the King has any dock, dockyard, steam factory yard, victualling yard, arsenal, wharf, or mooring in, on, or near to any port, harbour, haven, roadstead, sound, channel, creek, bay, or navigable river there is a dockyard port; but until its limits are defined and regulations made for its conservancy, it is subject to the general law as to ports and harbours (*o*). Even when the limits have been defined and regulations made, any right of property, privilege or jurisdiction or any powers of conservancy belonging to anyone in, to, upon, or over any part of the port or of the shores and banks thereof are saved (*p*), and the public right of entering, navigating, anchoring, and mooring is unaffected thereby, except as to any special regulations made by Order in Council (*q*).

SUB-SECT. 4.—*Ownership of the Soil of Ports.*

## Crown.

**727.** Where the port is a franchise and extends over tidal waters, the ownership of the soil is *primâ facie* in the Crown on the same principle that the foreshore is presumed to belong to the Crown, but it may belong to the grantee or some other person, for the King can create a port without any regard to the question of who is the owner of the soil (*r*).

## Grantee.

**728.** Except where by custom there is a right to land goods, the owner of a port must own some portion of the shore of the port, for otherwise he cannot make the wharves and landing places which are necessary for the enjoyment of the franchise, the King being unable to grant a liberty to unload on the bank of a port without the consent of the owner (*s*).

(*o*) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), ss. 2, 3. Orders in Council define the limits of and make regulations for the following dockyard ports: Berehaven, 12th August, 1907; 9th February, 1914; Chatham and Sheerness, 29th June, 1888; 24th October, 1911; 9th February, 1914; Cromarty, 19th December, 1913; Deptford, 29th February, 1868; Dover, 10th June, 1912; 9th February, 1914; Pembroke, 26th September, 1891; 9th February, 1914; Plymouth, 11th October, 1912; 9th February, 1914; Portsmouth, 18th December, 1912; Portland, 30th March, 1914; Queenstown, 10th August, 1903; Rosyth, 4th March, 1911; 9th February, 1914; Woolwich, 29th February, 1868. As to criminal offences in connexion with royal dockyards, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 480, 773.

(*p*) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 23. Thus the following, amongst other authorities, have jurisdiction: at Plymouth, the Cattewater Commissioners; at Chatham and Sheerness, the Medway Conservancy; at Woolwich and Deptford, the Port of London Authority; at Queenstown, the Cork Harbour Commissioners.

(*q*) *Denaby and Cadeby Main Collieries, Ltd. v. Anson*, [1911] 1 K. B. 171, C.A.

(*r*) Where a subject claims a port by custom or prescription, the presumption is that he has not only the franchise, but the very water and soil within the port, for a *portus maris* is *quid aggregatum*, as a manor (Hale, *de Jure Maris*, cc. 5, 6 (Hargrave, Law Tracts, pp. 22, 23).

(*s*) Hale, *de Portibus*, c. 6; Hale, *First Treatise* (Stuart Moore, *History and Law of Foreshore*, p. 352). For examples of the owner of a port not owning the soil, see the port of Newcastle, belonging to the corporation of Newcastle (*Tynemouth's (Prior) Case* (1292), Stuart Moore, *History and Law of Foreshore*, p. 111; *A.-G. v. Newcastle-upon-Tyne Corporation* (1903), 67 J. P. 155); and the port of London, belonging to the Port of London Authority (*River Thames Conservators v. Port of London*



SUB-SECT. 5.—*Conservancy of Ports.*

## SECT. 3.

## Ports and Harbours.

Duty to protect public rights.

**729.** The King by his prerogative has the conservancy of all ports and harbours, and he is entrusted with the protection of the public rights in such places (*t*), and the grantee of a port takes it subject to the same obligations (*u*). At the present time the conservancy of ports is to a great extent regulated by statutory provisions (*w*). Every owner of a port is bound to conserve it so that it is reasonably fit for use as a port (*a*).

**730.** There are certain common law nuisances which may occur in ports (*b*), such as the filling or choking up of ports by sinking of vessels and throwing in of rubbish (*c*); the decay of wharves and quays and piers for the landing of merchandise and safeguard of shipping; the building of fresh obstructions, or enhancing of old ones, and the straitening of the port by building too far into it (*d*); or obstructing the mooring of vessels (*e*). These nuisances may be

Nuisances in ports.

*Sanitary Authority*, [1894] 1 Q. B. 647; for instances to the contrary, see *Hale, de Portibus*, cc. 4 (port of Toppesham and Sutton Pool); 5 (port of Beverley).

(*t*) *Hale, de Portibus*, c. 7; *de Jure Maris*, c. 5 (Hargrave, Law Tracts, pp. 23, 87).

(*u*) *A.-G. v. Tomline* (1880), 14 Ch. D. 58, C. A.; *A.-G. v. Wright*, [1897] 2 Q. B. 318, 324, C. A.

(*w*) As to such provisions generally, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 634 *et seq.* As to prohibiting the removal of shingle from ports, see pp. 383, 384, *ante*. As to removing obstructions in the River Mersey, see *Jones v. Mersey Docks and Harbour Board* (1913), 108 L. T. 722.

(*a*) See p. 390, *post*.

(*b*) *Hale, de Portibus*, c. 7

(*c*) As to the duty of conservators to remove wrecks, see Harbours Act, 1745 (19 Geo. 2, c. 22), s. 3; title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 554, 642. It is an offence for the owner or the person having the command of a ship run on shore, sunk, stranded, or brought or driven in a ruinous or shattered condition into a haven, port, channel, or navigable river, to take away the rigging, tackle, and other valuable parts and to permit the hull to sink into the sand, for which justices may convict, and then issue a warrant for the removal and sale of the wreck, and after payment of the expenses of clearing the harbour and removing and selling the vessel out of the proceeds of sale, the overplus, if any, is to be given to the owner of the manor where the wreck happened (*Harbours Act*, 1745 (19 Geo. 2, c. 22), s. 3). As to the provisions regulating the discharge of ballast, filth etc. from ships and prohibiting its deposit below high-water mark or on land where it may be washed into the water by storm or floods, see stat. (1542-3) 34 & 35 Hen. 8, c. 9, s. 6; *Harbours Act*, 1745 (19 Geo. 2, c. 22); *Harbours Act*, 1814 (54 Geo. 3, c. 159), ss. 11, 13, 15, 16; *United Alkali Co. v. Simpson*, [1894] 2 Q. B. 116; see also title SHIPPING AND NAVIGATION, Vol. XXVI., p. 644. There are also certain provisions regulating tin mining in the counties of Devon and Cornwall, so as to prevent the choking up of the ports of Plymouth, Dartmouth, Teignmouth, Falmouth and Fowey; see stats. (1531) 23 Hen. 8, c. 8; (1535-6) 27 Hen. 8, c. 23.

(*d*) It is a question of fact whether building in a port is a nuisance or not (*Hale, de Portibus*, c. 8); see p. 403, *post*. By the Public Harbours Act, 1806 (46 Geo. 3, c. 153), as amended by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 15, it is an offence punishable by a fine of £200 to erect any pier, quay, wharf, jetty, breast or embankment in or adjoining any public harbour or any river immediately communicating therewith so far up as the tide flows without giving one month's notice of the intention so to do to the Board of Trade.

(*e*) *A.-G. v. Wright, supra*. The suit may be at the relation of the Attorney-General (*ibid.*); see also pp. 404, 405, *post*.



SECT. 3.  
Ports and  
Harbours.

Right to  
take tolls and  
dues.

Considera-  
tion.

remedied by the same means as nuisances on a highway on land are remedied (*f*).

SUB-SECT. 6.—*Port Tolls and Dues.*

**731.** As an incident to a port there may be a right to take tolls and dues for the use of it, such as anchorage and tonnage dues (*g*). These dues may arise from the ownership of the soil of the port, or may be a consequence of the franchise independently of the ownership of the soil. The right to take dues in respect of a port may arise by Act of Parliament, grant, or immemorial usage (*h*).

**732.** Wherever the Crown has established a port with a suitable landing place, whether the port be naturally or artificially formed, if vessels avail themselves of the port a sufficient consideration for the port dues arises (*i*).

Where the toll is claimed in respect of a harbour or other locality which is not a port some consideration for the toll must be shown, unless it was imposed by Parliament, for a toll is a mode of paying for a public service, and must be for the public advantage and reasonable in amount (*j*).

The Crown cannot create a toll which affects the public right of navigation without some additional consideration, but it is not necessary that the benefit conferred by the owner of the toll be precisely that in respect of which the toll is demanded (*k*).

SUB-SECT. 7.—*Conservancy of Dockyard Ports.*

**733.** The conservancy of dockyard ports is vested in the King's Harbour Master for each port, and his duties when not specified in

King's  
Harbour  
Master.

(*f*) Hale, de Portibus, c. 7; see title NUISANCE, Vol. XXI., p. 574.

(*g*) Anchorage is a toll for every anchor cast in the port (Hale, de Portibus, c. 6; *Gann v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192). If an anchorage due is claimed in respect of the soil and not of a franchise port, it must be shown that the soil was originally in the precincts of a port, or that some service or aid to navigation was rendered by the owner of the soil, and the establishment of an oyster fishery, though it may be a public benefit, is wholly unconnected with the right of navigation and cannot be the foundation for such a due (*Gann v. Whitstable Free Fishers*, *supra*; *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266); see title CONSTITUTIONAL LAW, Vol. VI., pp. 458, 459. For various instances of dues that may be claimed, either in respect of the franchise or of the soil, such as ballastage, busselage, keelage, petty customs, lestage, prisage, towage, moreage, terrage, cranage, wharfage, housellage, tronage, pesage, and measurage, see Hale, de Portibus, c. 6. The origin of these, except ballastage, which arises from ownership of the soil, is either grant, custom, or prescription (*ibid.*). In the Thames the right of ballastage belongs to the Port of London Authority and the Thames Conservancy by statute, and not because they are owners of the soil; see p. 410, *post*.

(*h*) *Kingston-upon-Hull Dock Co. v. La Marche* (1828), 8 B. & C. 42; *Foreman v. Whitstable Free Fishers and Dredgers*, *supra*; *Exeter Corporation v. Warren* (1844), 5 Q. B. 773. As to dues in the Port of London, see note (*g*), p. 423, *post*.

(*i*) *Foreman v. Whitstable Free Fishers and Dredgers*, *supra*, at p. 281; *Exeter Corporation v. Warren*, *supra*; *Yarmouth Corporation v. Eaton* (1763), 3 Burr. 1402; *Vinkensterne v. Ebdon* (1698), 1 Ld. Raym. 384.

(*j*) *Falmouth (Lord) v. George* (1828), 5 Bing. 286 (toll on all fishing boats frequenting Sennan Cove for use of the capstan); *Vinkensterne v. Ebdon*, *supra*; *Haspurt v. Willis* (1669), 1 Mod. Rep. 47; *Warren v. Prideaux* (1673), 1 Mod. Rep. 104.

(*k*) *Foreman v. Whitstable Free Fishers and Dredgers*, *supra*, at p. 285; *Gann v. Whitstable Free Fishers*, *supra*.

the Dockyard Port Regulation Act, 1865 (*l*), are determined by Order in Council made under that Act.

SECT. 3.

Ports and Harbours.

Regulations by Order in Council.

**734.** Regulations may be made by Order in Council prohibiting the mooring or anchoring of vessels so as to obstruct the navigation into, in, or out of the port; appropriating mooring spaces for the exclusive use of His Majesty's vessels (*m*); prohibiting or restricting the having of gunpowder or use of guns in any specified part of the port, and regulating the loading and discharge of gunpowder in the port; restricting the use of fire or light, and the having of combustible substances on board any vessel in any specified part of the port; regulating the speed of steam vessels in parts of the harbour; requiring the continuous presence of watchmen on board vessels of a certain size; and prohibiting or regulating the breaming (*n*) of vessels (*o*).

There is also power by Order in Council to make regulations for such other purposes as may seem necessary with a view to the proper protection of His Majesty's vessels, dockyard, or property, or for the requirements of the naval service (*p*).

**735.** On the joint recommendation of the Admiralty and Board of Trade His Majesty may make rules for preventing collisions between vessels in the port, or in the approaches thereto. The rules have to be obeyed by His Majesty's vessels and by merchant vessels, and have the same effect as if they had been made under the Merchant Shipping Act, 1894 (*q*).

Prevention of collision.

**736.** The regulation and protection of each dockyard port is entrusted to the King's Harbour Master, who is appointed by the Admiralty (*r*). He has power to cause any vessel to be moved so that she is placed in the port in conformity with the provisions of the Order in Council relating to the port, and for that purpose may

Powers of King's Harbour Master.

(*l*) 28 & 29 Vict. c. 125.

(*m*) The space allotted must not be used so as to obstruct the navigation into, in, or out of the port (*ibid.*, s. 5).

(*n*) That is, burning tar, grease etc., from a vessel's bottom, when in dry dock, or on a gridiron, slipway etc. (Paasch, Dictionary of Naval Terms, 4th ed., p. 577).

(*o*) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 5. The penalty for a breach of any of these regulations is not exceeding £10 (*ibid.*, s. 6), to be recovered summarily (*ibid.*, s. 17), and can be enforced by distress and sale of the vessel (*ibid.*, s. 19). If by the wrongful act of another the owner of a vessel is compelled to pay a penalty or expenses and costs, he can recover from the actual wrongdoer (*ibid.*, s. 16). For the provisions relating to similar matters in harbours generally, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 643, 644.

(*p*) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 5.

(*q*) *Ibid.*, s. 7. These rules when any are made are usually to be found in the Order in Council defining the limits of the port. As to the several rules under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 418, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 359 *et seq.*; for the local rules, see *ibid.*, p. 480, note (*a*).

(*r*) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 4; see title CONSTITUTIONAL LAW, Vol. VII., p. 90. By Order in Council of the 7th August, 1869, the Admiralty may appoint assistant King's Harbour Masters in all dockyard ports, having all the powers of a King's Harbour Master, but to act under his directions.

SECT. 3.  
Ports and  
Harbours.

do all necessary acts (s). He and any person authorised in writing by the Admiralty may enter any vessel and search for gunpowder, shotted or loaded guns, fire, light, or combustible substances had on board in contravention of the Order in Council, and may extinguish any such fire or light (t).

Removal of  
obstructions.

**737.** The King's Harbour Master may remove any wreck and other obstructions to the port or its approaches, or any floating timber that impedes the navigation, or any vessel laid by or neglected as unfit for sea service in a part of the harbour not specified for that purpose (u). The expenses of removal must on demand be paid by the owner of the thing removed; if not, the King's Harbour Master may sell it, and out of the proceeds pay all expenses incurred, rendering the surplus, if any, to the owner on demand; any deficiency may be recovered from the owner (w).

Removal of  
vessels.

**738.** The King's Harbour Master, whether representing the owner of the soil of a dockyard port, or in exercise of his statutory power, has power to remove from the port a vessel which enters the port not in the exercise of any right of navigation (a).

SUB-SECT. 8.—*Repair of Ports.*

Common law  
duty.

**739.** As the public has a right to use ports, whether tolls are payable in respect thereof or not, it is the duty of the owner of the port to take reasonable care that the port is in a fit state of repair, so that those who choose to navigate it may do so without danger to their lives or property (b). When a port is allowed to get into

(s) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 11. Any expenses incurred in doing so must be paid by the master of the vessel (*ibid.*).

(t) *Ibid.*, s. 12. His power appears to be limited to search (except as to fires and light), though he would have power to remove the vessel to the part of the harbour where such things are allowed to be on board; see *ibid.*, s. 5.

(u) *Ibid.*, ss. 13, 14. Besides the powers to remove wrecks above mentioned, the King's Harbour Master, as a person entrusted with the management and regulation of a harbour, has the powers of removal of wrecks given by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 530—534; see *ibid.*, s. 742, defining "harbour," "harbour authority," "conservancy authority." As to the removal of wrecks, see, further, title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 554, 555.

(w) Dockyard Port Regulation Act, 1865 (28 & 29 Vict. c. 125, s. 15. These expenses are recoverable by summary procedure (*ibid.*, s. 17).

(a) Such as, for instance, a vessel intended to be moored as a coal hulk for the supplying of ships with coal (*Denaby and Cadeby Main Collieries, Ltd. v. Anson*, [1911] 1 K. B. 171, C. A., per BUCKLEY, L.J., at p. 213). It is immaterial that under the regulations in force the King's Harbour Master cannot exclude generally merchant or private vessels from the port (*ibid.*).

(b) *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 2, 23, 230, Ex. Ch.; *R. v. Williams* (1884), 9 App. Cas. 418, P. C. There is a lack of reasonable care when after notice of a nuisance to the port the port authority omits to give any warning to persons resorting thereto (*R. v. Williams, supra*). The port authority cannot transfer its duty to see that the port is safe for navigation to persons who are not its servants, such as local Trinity House pilots (*The Bearn*, [1906] P. 48, C. A.). If a port authority advertises a certain depth of water in a dock sill, it must use reasonable care to see that there is sufficient water to enable vessels to get to that dock (*Bede Steamship Co. v. River Wear Commissioners*, [1907] 1 K. B. 310, C. A.). As to the maintenance and repair of harbours, see pp. 420, 421, *post*.



such a state that a public nuisance is created, in the absence of any special legislation relating to such nuisance, it may be remedied as a common law nuisance (*c*).

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Ports and  
Harbours.

**740.** When a port is created or governed by Act of Parliament, the Act may contain special provisions as to its maintenance and repair (*d*), and may authorise this to be undertaken by some body other than the port authority (*e*).

Statutory  
provisions.

#### SECT. 4.—*Tidal Navigable Rivers.*

##### SUB-SECT. 1.—*Definition.*

**741.** A “tidal navigable river” means a river which is subject to the vertical flow and reflow of the ordinary tides and navigable as such. It includes the navigable parts of the river where the fresh water is arrested by the tidal influence, and is not restricted to the part affected by the horizontal flow of the tide (*f*).

Rivers  
included.

The expression “navigable,” when used in relation to tidal water, means not only that navigation is possible, but that there must be ebb and flow of the tide (*g*). It is a relative and comprehensive term containing within it all such rights upon a waterway as in relation to the circumstances of that locality are necessary for the full and convenient passage of vessels or boats (*h*). The flow of the ordinary tides is strong *prima facie* evidence of a public navigation (*i*); but it is not conclusive, for, if the river is broad and deep, calculated for the purpose of commerce, it may be assumed to be a public navigation, but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it may be presumed that it never has been a public navigable river (*k*).

Meaning of  
“navigable.”

**742.** Moreover, a river in which the ordinary tides flow is not necessarily a public navigable channel, although sufficiently large for

Rivers  
ceasing to be  
navigable.

(*c*) *Hale, de Portibus*, c. 7; see title NUISANCE, Vol. XXI., pp. 503 *et seq.*; p. 387, *ante*.

(*d*) See, for instance, Port of London Act, 1908 (8 Edw. 7, c. 68), ss. 2, 6, 30, 44.

(*e*) As to the liability of harbour authorities for non-repair, and as to powers of such authorities and the Trinity House to remove obstructions, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 554, 641, 642, 647. By the General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), s. 8, the Board of Trade is empowered to repair or remove any works authorised by any Provisional Order which are abandoned or suffered to fall into decay. The majority of the owners of franchise ports have obtained from time to time additional powers for their government by private and local Acts of Parliament.

(*f*) *Reece v. Miller* (1882), 8 Q. B. D. 626; *West Riding of Yorkshire Rivers Board v. Tadcaster Rural District Council* (1907), 97 L. T. 436; *Calcraft v. Guest* (1897), cited in Stuart Moore, *History and Law of Fisheries*, p. 102.

(*g*) *Ilchester (Earl) v. Raishleigh* (1889), 61 L. T. 477.

(*h*) *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339.

(*i*) *Miles v. Rose* (1814), 5 Taunt. 705; *Murphy v. Ryan* (1868), 2 I. R. C. L. 143; *Lynn Corporation v. Turner* (1774), 1 Cowp. 86; but ebb and flow is not conclusive evidence of a public navigation, for the *locus* may be a creek in a person's private estate (*Miles v. Rose, supra*; *Murphy v. Ryan, supra*); see also pp. 400 *et seq.*, *post*.

(*k*) *R. v. Montague* (1825), 4 B. & C. 598; *Ilchester (Earl) v. Raishleigh, supra*.

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Tidal  
Navigable  
Rivers.

that purpose; for it may have ceased to be navigable by Act of Parliament, writ of *ad quod damnum* and inquisition thereon (*l*), by act of Commissioners of Sewers (*m*), or by natural causes. When a navigable river has been obstructed for a long time, and there is nothing to show how this obstruction arose, it must be presumed to have been done by one of the above modes, and the obstruction cannot be removed (*n*).

Right of  
public.

**743.** The question whether a river is navigable or not is one for a jury (*o*); but once a river is subject to the public right of navigation, no act by a private person, however long continued, will destroy the right of the public (*p*).

SUB-SECT. 2.—*Ownership of Soil.*

River  
foreshore.

**744.** The ownership of the foreshore in tidal navigable waters is determined by the same rules as the ownership of the seashore is ascertained (*q*).

River bed.

The ownership in the bed under such waters belongs to the Crown either by virtue of the *primâ facie* presumption that it is waste of the kingdom not granted or by reason of escheat, forfeiture, or purchase, or it belongs to a subject; this is ascertained by the same rules of law by which the ownership of the seashore is determined (*r*). It does, however, happen that in a great many instances the proprietary right of the owners of manors abutting upon tidal navigable waters which are *inter fauces terræ* extends below the low-water mark, and even as far as the centre of the river opposite to such manors (*s*).

SUB-SECT. 3.—*Rights not Amounting to Ownership.*

(i.) *Landing.*

Extent of  
right.

**745.** As an incident of navigation there is no right of landing or embarking persons or goods on the foreshores or banks of tidal navigable waters, except at such places as necessity or usage have appropriated to those purposes, or in cases of peril, or necessity (*t*).

(*l*) As to the writ of *ad quod damnum*, see Jacobs, Law Dictionary.

(*m*) As to Commissioners of Sewers, see title SEWERS AND DRAINS, Vol. XXV., pp. 773 *et seq.*

(*n*) *R. v. Montague* (1825), 4 B. & C. 598 (obstruction of Yantlet Creek by a road); *Lynn Corporation v. Turner* (1774), 1 Cowp. 86.

(*o*) *Vooght v. Winch* (1819), 2 B. & Ald. 662.

(*p*) *Dewell v. Sanders* (1618), Cro. Jac. 490; see also pp. 401, 402, *post*.

(*q*) See pp. 365 *et seq.*, *ante*. As to fishing rights in tidal navigable rivers, see title FISHERIES, Vol. XIV., pp. 574, 576.

(*r*) *Malcomson v. O'Dea* (1863), 10 H. L. Cas. 593; see p. 369, *ante*.

(*s*) Thus, the *medium filum aquæ* is the common boundary of the river Severn, whatsoever course the river takes (Hale, de Jure Maris, c. 1 (Hargrave, Law Tracts, p. 6); *Fitzhardinge (Lord) v. Purcell*, [1908] 2 Ch. 139). Riparian manors extending to the midstream of tidal waters are also found in the Tyne, Tees, Trent, Ouse, Derwent, Mersey, Dee, Leven, and in such comparatively narrow rivers as the Crouch, Roach, Itchen, Helford etc. In the broader parts of the Thames and Humber, the manors appear to be limited to the foreshore. The oyster ground at Whitstable is an instance of ownership of the soil below low-water mark, and not *inter fauces terræ*.

(*t*) Hale, de Portibus, c. 6; *Blundell v. Catterall* (1821), 5 B. & Ald. 268.

In ports there are certain landing places at which customable goods must be landed, and if there are not free landing places, yet a person is entitled to land thereat on tendering the lawful dues (*u*).

SECT. 4.

Tidal  
Navigable  
Rivers.(ii.) *Towing.*

**746.** There is no right at common law of towing along the banks of tidal navigable waters, for the right of navigation is simply a right of way and is limited to the waterway, and involves no right of property in the banks (*w*). Extent of right.

In places there may be such a right by custom, statute, or grant from the owner of the bank (*x*).

(iii.) *Access.*

**747.** Every owner of land abutting on water, whether it be the sea, or a tidal or non-tidal river, or a lake, is entitled to access and regress to and from that water opposite to his frontage (*a*). Right of access.

It is essential that the land in respect of which the right of access is claimed is in actual daily contact with water, for which purpose lateral contact is as good as vertical (*b*). It is true that the bank of a tidal river or of the sea, the foreshore of which is left bare at low water, is not always in contact with the water, but it is in such contact for a great part of every day in the ordinary and regular course of nature, and such contact is amply sufficient to support such a right of access (*c*).

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There is a right to land and store goods in cases of shipwreck by statute; see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 550.

(*u*) See Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 11, 14, 143; Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 33; and p. 422, *post*.

(*w*) *Ball v. Herbert* (1789), 3 Term Rep. 253; *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *A.-G. v. Terry* (1874), 9 Ch. App. 423, 431; *Williams v. Wilcox* (1838), 8 Ad. & El. 314; *River Lee Navigation Conservators v. Button* (1881), 6 App. Cas. 685.

(*x*) *Peirse v. Fauconberg (Lord)* (1757), 1 Burr. 292 (a towing path of each side of the river Tees between Yarum bridge and Low Worsall established). Slight evidence of usage is generally sufficient to support a claim to a tow-path on the ground of public convenience (*Winch v. Thames Conservators* (1872), L. R. 7 C. P. 458). For instances of rights of towage on the Bristol Avon, Tyne, and Trent, see *Hale, de Portibus*, cc. 6, 7. By stat. (1531—2) 23 Hen. 8, c. 12, it is declared that time out of mind there has been a towing path on each side of the river Severn, 1½ feet broad, and a penalty of 40s. was imposed for obstructing persons using the path.

(*a*) *A.-G. of the Straits Settlement v. Wemyss* (1888), 13 App. Cas. 192, P. C. (the sea); *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662 (tidal river); *Hindson v. Ashby*, [1896] 2 Ch. 1, C. A. (non-tidal river); *Marshall v. Ulleswater Co.* (1871), L. R. 7 Q. B. 166 (navigable lake). There is no distinction in principle between riparian rights on navigable and non-navigable water, and the decision in *Lyon v. Fishmongers' Co.*, *supra*, is applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive or binding authority of the *lex loci* (*North Shore Rail. Co. v. Pion* (1889), 14 App. Cas. 612, P. C.). As to user of the shore and banks of tidal waters for fishing, see title FISHERIES, Vol. XIV., pp. 575, 582 *et seq.*

(*b*) *North Shore Rail. Co. v. Pion*, *supra*; *Lyon v. Fishmongers' Co.*, *supra*.

(*c*) *Lyon v. Fishmongers' Co.*, *supra*.



## SECT. 4.

Tidal  
Navigable  
Rivers.Accreted  
land.Land not in  
contact with  
water.Nature of  
right.Exercise of  
right.Mooring of  
vessels  
alongside.

**748.** If in the course of time the water gradually recedes from the riparian land owing to the land gaining upon the water, the right of access is not affected because the accreted land becomes clothed with riparian rights (*d*).

A person who owns land not in actual contact with water can only have a right of access to the water by special grant, or because his land has been granted to him by the owner of the riparian lands in such terms that the grantor is estopped from denying that the land granted is riparian land (*e*).

**749.** The right of access to water belongs *jure naturæ* to the bank or riparian land, being in no way connected with the ownership of the land covered with water and wholly distinct from the right of navigation which every member of the public is entitled to enjoy (*f*). It is a private and not a public right, and any interference with it is actionable without proof of special damage (*g*).

**750.** The right of access may be exercised not only by the owner of the riparian land but by his lessees and licensees, and the riparian owner and those whom he permits have a right to use the foreshore as a means of access to the water; he must not, however, do anything to interfere with the public right of navigation, or put down anything which disturbs the soil of the foreshore, though if there is an erection on the foreshore, such as a pier or causeway, he may use it as a means of access (*h*).

As incident to the right of access there is the right of landing or of passing over the shore or bed at all states of the water for that purpose, even when such shore or bed is private property (*i*), and also of passing over any obstruction that prevents the enjoyment of the right (*k*).

**751.** In the exercise of his right of access the riparian owner is not entitled to keep vessels on the soil adjacent to his

(*d*) *A.-G. of the Straits Settlement v. Wemyss* (1888), 13 App. Cas. 192, P. C.; *Mercer v. Denne*, [1904] 2 Ch. 534; *Hindson v. Ashby*, [1896] 2 Ch. 1, C. A.

(*e*) *Mellor v. Walmesley*, [1905] 2 Ch. 164, C. A. (grant of land describing it as bounded by the sea); *Roberts v. Karr* (1809), 1 Taunt. 495 (lease of land described as abutting on a road). It is doubtful whether an owner of riparian land can grant any right of access to a non-riparian owner as against the owner of the waterway or of the soil thereunder; compare p. 427, *post*.

(*f*) *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

(*g*) *Ibid.*; *A.-G. of the Straits Settlement v. Wemyss*, *supra*; *Rose v. Groves* (1843), 5 Man. & G. 613.

(*h*) *North Shore Rail. Co. v. Pion* (1889), 14 App. Cas. 612, P. C.; *A.-G. v. Johnson* (1819), 2 Wils. (Ch.) 87 (neither the Crown nor a subject may use land for any purpose so as to be a nuisance); *Marshall v. Ulleswater Co.* (1871), L. R. 7 Q. B. 166 (pier built partly on the riparian owner's soil and partly on the soil of another person); *Coppinger v. Sheehan*, [1906] 1 I. R. 519.

(*i*) *A.-G. of the Straits Settlement v. Wemyss*, *supra*; *Hindson v. Ashby*, *supra*; *Macey v. Metropolitan Board of Works* (1864), 10 Jur. (N. S.) 333.

(*k*) *Marshall v. Ulleswater Co.*, *supra* (pier erected without statutory authority); *Eastern Counties Rail. Co. v. Dorling* (1859), 5 C. B. (N. S.) 821 (barge moored to a wharf).

land for any longer period than is required to load or unload them ; but, in the case of tidal waters, if he cannot load or unload in one tide, he may keep them there until this operation is completed (*l*).

His right is only to be exercised at reasonable times and for a reasonable time, and he must not moor vessels opposite to his land so as to interfere with the right of access to any other riparian land, or so as to impede the navigation of the water which everybody is entitled to use (*m*).

**752.** Interference with the private right of access is actionable without proof of special damage ; but if the interference complained of is an interference with the right of navigation, which thereby affects the right of access, then special damage must be proved (*n*), for interference with the right of navigation which only renders access more difficult, but not impossible, is an interference with a public and not a private right, and special damage must be proved by the riparian owner who complains of such interference (*o*).

**753.** The right of access is of such a nature that any works authorised by any statute incorporating the Lands Clauses Acts which take it away (*p*) are an “injuriously affecting” of the riparian land so as to give a right to compensation (*q*).

#### SUB-SECT. 4.—*Jurisdiction.*

**754.** Tidal navigable rivers, when they are *inter fauces terræ*, form part of the adjoining county for both civil and criminal purposes. In the case of the death of a man or a mayhem done on great ships being or hovering in the main streams of great rivers beneath the bridges nigh to the sea, the Admiralty, the Central Criminal Court, and the courts of oyer and terminer and gaol delivery have a concurrent jurisdiction to try prisoners (*r*).

SECT. 4.

Tidal  
Navigable  
Rivers.

Interference  
with right.

Injuri-  
ously  
affecting  
right.

Courts  
having  
jurisdiction.

(*l*) *Macey v. Metropolitan Board of Works* (1864), 10 Jur. (N. S.) 333, *per* WOOD, V.-C., at p. 335 ; *Temple Pier Co. v. Metropolitan Board of Works* (1865), 11 Jur. (N. S.) 337 ; see also p. 401, *post*.

(*m*) *Macey v. Metropolitan Board of Works*, *supra* ; *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713 (question of reasonableness a question for a jury).

(*n*) *Bell v. Quebec Corporation* (1879), 41 L. T. 451, P. C. ; *Rose v. Miles* (1815), 4 M. & S. 101 ; *Rose v. Groves* (1843), 5 Man. & G. 613 (obstructing a house whereby people were prevented from reaching it by water) ; *Dobson v. Blackmore* (1847), 9 Q. B. 991 ; *Land Securities, Ltd. v. Commercial Gas Co.* (1902), 18 T. L. R. 405.

(*o*) *A.-G. v. River Thames Conservators* (1862), 1 Hem. & M. 1 (building a pier which rendered access more difficult).

(*p*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*q*) *Buccleuch (Duke) v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418 (loss of use of a causeway over foreshore from riparian land) ; *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243 (loss of access from a house to a public dock). As to such right being an “estate or interest in, to, or out of land,” see *Plimmer v. Wellington Corporation* (1884), 9 App. Cas. 699, P. C. ; and compare titles REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 157, note (*d*) ; SALE OF LAND, Vol. XXV., p. 290, note (*o*).

(*r*) See Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 22 ; Admiralty Offences Act, 1844 (7 & 8 Vict. c. 2), ss. 1, 2 ; stat. (1391) 15 Ric. 2, c. 3 ; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 186. As to the jurisdiction of the Admiralty Division of the High Court, see title

## SECT. 4.

Tidal  
Navigable  
Rivers.  
Parochial  
purposes.

**755.** Before the 25th December, 1868, it was a question of evidence whether the foreshores and beds of tidal navigable rivers were within the adjoining parishes, for *primâ facie* they belonged to the Crown and were therefore extra-parochial (s). On that day the part of the seashore to the low-water mark and the bank of every river to the middle of the stream which was not within a parish was annexed to and incorporated with the parish to which such part or bank adjoined for all civil parochial purposes (t).

## SECT. 5.—Non-tidal Rivers and Streams.

## SUB-SECT. 1.—Ownership of Soil.

Presumption  
of ownership.

**756.** The bed (u) of non-tidal rivers and streams belongs, in the absence of any evidence of ownership to the contrary, by presumption of law, in equal moieties to the owners of the riparian lands (a).

This presumption that the riparian owners own the bed of the river *usque ad medium filum aquæ* applies whether that land is freehold, copyhold, or leasehold (b), and whether the river is navigable or non-navigable (c).

Grant of  
adjoining  
land.

**757.** A grant or lease of land described as abutting on a river made by a person who is in a position to part with the soil of the bed is sufficient to pass half the bed of the river without any

ADMIRALTY, Vol. I., p. 59; and of the county courts having admiralty jurisdiction, see *ibid.*, pp. 127 *et seq.*

(s) See p. 382, *ante*.

(t) Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27. There is some doubt whether the bed of such rivers is annexed to the adjoining parishes. If the term "seashore" is here used in its ordinary meaning as being foreshore and is not restricted to foreshore on the sea coasts (see *Mellor v. Walmsley*, [1905] 2 Ch. 164, C. A.), then the bed of such river is not annexed to the adjoining parishes; and this seems to be the meaning, because the expression "bank of the river to the middle of the stream" is the apt expression with regard to non-tidal rivers, but not to tidal rivers; see Stuart Moore, *History and Law of Fisheries*, pp. 113—119.

(u) For the meaning of "bed," see *Menzies v. Breadalbane (Marquis)* (1901), 4 F. (Ct. of Sess.) 55, where it was held that when the bed is divided by an island into a main and subsidiary channel, the latter being at times dry, the *medium filum aquæ* is the centre of the bed from bank to bank and not the centre of the main stream; and see also title FISHERIES, Vol. XIV., p. 583.

(a) *Lamb v. Neubiggin* (1844), 1 Car. & Kir. 549; *Bristow v. Cormican* (1878), 3 App. Cas. 641, 666; *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133, C. A. As to fishing rights in non-tidal watercourses, see title FISHERIES, Vol. XIV., pp. 573, 577, 578, 581.

(b) *Tilbury v. Silva* (1890), 45 Ch. D. 98, C. A., *per* KAY, J., at pp. 108, 109: "It is a law of conveyancing that, *primâ facie*, where a man grants land on the bank of a river, having himself the soil *ad medium filum*, without any words describing the boundary to be the *medium filum*, the soil *ad medium filum* passes by the grant. It is a law by which you ascertain the parcel of a grant. It does not matter whether the land is copyhold, freehold, or leasehold"; *Davies v. Jones* (1902), 18 T. L. R. 367; *Doe d. Freeland v. Burt* (1787), 1 Term Rep. 701.

(c) *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, 570; *Foster v. Wright* (1878), 4 C. P. D. 438; *Hindson v. Ashby*, [1896] 2 Ch. 1, 10, C. A.; *Central London Railway v. City of London Land Tax Commissioners*, [1911] 2 Ch. 467, C. A.



reference in the document to the river (*d*), and the fact that the river is of great breadth does not affect the case (*e*).

The presumption may be rebutted by showing (1) that there exists over the bed of the moiety in question a several fishery not belonging to the grantor, because the presumption that the owner of a several fishery is owner of the bed displaces the presumption that arises in favour of the riparian owners (*f*); or (2) that at the time of the grant of the riparian land there was no intention on the grantor's part to part with the bed *ad medium filum aquæ* (*g*); to ascertain this, the facts known to the parties at the time of the conveyance may be investigated, but not circumstances which afterwards occur (*h*); or (3) that the grantor had not the bed of the river to convey (*i*). The riparian presumption refers only to the origin of title, for the right to the bed of the river is not inseparably bound up for ever with the right to the land, and an owner may retain one and part with the other (*k*).

**758.** Ownership of the bed of a non-tidal river may be proved by documentary evidence of title supported by possession (*l*), or by possession sufficient to raise the presumption of a lost grant, or to give a statutory title, but what amount of acts of possession is requisite must vary according to the circumstances (*m*).

SECT. 5.  
Non-Tidal  
Rivers and  
Streams.

When  
presumption  
rebutted.

Proof of  
ownership.

(*d*) *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133, C. A. The presumption applies even though the grant is by plan and quantity and the grantor is owner of the whole of the bed; compare *Berridge v. Ward* (1861), 10 C. B. (N. S.) 400; and this presumption applies to the grant of a manor on its subinfeudation (*Chesterfield (Lord) v. Harris*, [1908] 2 Ch. 397, C. A., *per* BUCKLEY, L.J., at p. 417). As to the application of this presumption in cases of Inclosure Acts, see *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; and in cases of Crown grants, *Maclaren v. A.-G. for Quebec*, [1914] A. C. 258, P. C.

(*e*) *Dwyer v. Rich* (1870), 4 I. R. C. L. 424.

(*f*) *Hindson v. Ashby*, [1896] 2 Ch. 1, C. A. It is not necessary that the fishery should be described in ancient documents as a several fishery; see *Beaufort (Duke) v. Aird & Co.* (1904), 20 T. L. R. 602; *Hanbury v. Jenkins*, [1901] 2 Ch. 401.

(*g*) *Devonshire (Duke) v. Pattinson* (1887), 20 Q. B. D. 263, C. A. (fishery in lease at the time of grant).

(*h*) *Micklethwait v. Newlay Bridge Co.*, *supra*. Thus, the presumption is rebutted by facts showing that it was the intention of the grantor to do something which made it necessary for him to retain the soil in the half of the bed (*ibid.*, *per* COTTON, L.J., at pp. 145, 147).

(*i*) *Ecroyd v. Coulthard*, *supra*, at p. 568.

(*k*) *Smith v. Andrews*, [1891] 2 Ch. 678, 697 (Thames).

(*l*) *Blount v. Layard* (1888), [1891] 2 Ch. 681, n., C. A.; *Smith v. Andrews*, *supra*, at pp. 694 et seq.

(*m*) *Lord Advocate v. Lovat (Lord)* (1880), 5 App. Cas. 273, 281; *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135. Acts sufficient to establish a title to dry land are equally effective if done in respect of the bed of the river, and amongst other acts the following, when proved, are evidence of possession, namely: ownership of a several fishery over the *locus in quo* (*Hindson v. Ashby*, *supra*; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; as to proof, see title FISHERIES, Vol. XIV., p. 587); ownership of eyots and islands (Hale, *de Jure Maris*, c. 6 (Hargrave, Law Tracts, p. 36)); making and scouring a ditch in the bed and making a causeway (*Hindson v. Ashby*, *supra*); taking of gravel, stones and sand, and placing stakes in river, though even these, if done by a riparian owner, may not be sufficient to upset the presumption that the owner of a several fishery owns the bed (*Hanbury v. Jenkins*, *supra*); building of piers, boathouses, and cutting of reeds (*R. v. Old Alresford (Inhabitants)* (1786), 1 Term Rep. 358).

## SECT. 5.

Non-Tidal  
Rivers and  
Streams.Effect of  
accretion.Rights of  
public.Rivers made  
navigable.Extent of  
right.

**759.** The rules of law which determine the ownership of the sea-shore when there is either a gradual and imperceptible increase or decrease, or a sudden change, apply equally to non-tidal waters, and the ownership of the bed of non-tidal rivers is determined by these rules (*n*).

SUB-SECT. 2.—*Navigation on Non-tidal Rivers.*

**760.** The public may have a right to navigate non-tidal rivers, but there is no general common law right to do so. Such right as the public has can only have arisen by grant from the owners of the soil of such rivers, or by immemorial usage, or by Act of Parliament, and the right to navigate is established by evidence similar to that which would raise the presumption of a right of way on land (*o*).

**761.** A person at his own charge may make his private stream navigable for boats and barges either by the making of locks or cuts or drawing together other streams. This does not necessarily imply that the public has any rights of navigation thereover; for the owner may destroy it or apply it to his own private use. If, however, it was made navigable at a common charge or by a public authority, or has been freely devoted to the public use for a long time or has been made by way of recompense or compensation for some other public stream that has been stopped for the owner's convenience, then the navigation is public (*p*).

**762.** The right of navigation in non-tidal water may extend to the whole width of the river, or may be limited to a portion or particular channel of the river, or to certain reaches thereof (*q*).

(*n*) *Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer* (1905), 21 T. L. R. 637, P. C.; Hale, de Jure Maris, cc. 1, 6 (Hargrave, Law Tracts, pp. 5, 28); Bract., tit. 2, c. 2; see p. 362, *ante*; title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 122.

(*o*) See Woolrych on Waters, c. 3; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Bourke v. Davis* (1880), 44 Ch. D. 110; *Bower v. Hill* (1835), 2 Scott, 535. Certain rivers seem to have been common highways or public streams from time immemorial, for Magna Charta, c. 26, enacts that all weirs were to be put down throughout the Thames and Medway, also in all England except on the sea coast. This was held to apply only to navigable rivers (*Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657). There are numerous instances of rivers being made navigable by Act of Parliament, such as, for instance, the Wye and Lugg (stat. (1662) 14 Car. 2, c. 14 (private)); the Itchen (stat. (1664) 16 & 17 Car. 2, c. 12 (private); see *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582); the Avon from Christchurch to New Sarum (stat. (1664) 16 & 17 Car. 2, c. 12); the Medway (stat. (1664) 16 & 17 Car. 2, c. 12 (private)); the Witham (*R. v. Betts* (1850), 16 Q. B. 1022). As to fisheries in relation to navigation, see title FISHERIES, Vol. XIV., pp. 591, 592. As to navigation generally, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 372 *et seq.*

(*p*) Hale, de Jure Maris, c. 3 (Hargrave, Law Tracts, p. 10), which continues as follows: "If he purchaseth the King's charter to take a reasonable toll for the passage of the King's subjects and puts it in use these seem to be devoting and, as it were, consecrating of it to the common use. . . . For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence"; see, however, *Simpson v. A.-G.*, [1904] A. C. 476, where it was held that the appellant, who by charter was entitled to take tolls from persons using locks constructed on his lands, was not bound to maintain them, and that there was no public highway through the locks.

(*q*) *Orr Ewing v. Colquhoun*, *supra*, at pp. 839, 842, 845 (River Leven;

The right of navigation, when established over non-tidal waters, is similar in character to the right of navigating tidal waters (*r*).

SECT. 5.  
Non-Tidal  
Rivers and  
Streams.

SUB-SECT. 3.—*Towing and Landing.*

**763.** As in the case of tidal navigable rivers, there is no right to tow boats along or to land upon the banks of non-tidal waters as an incident to navigation(*s*), but such rights may be created by custom, statute, or grant (*t*).

Rights of  
public.

SECT. 6.—*Lakes and Pools.*

SUB-SECT. 1.—*Ownership of Soil.*

**764.** The soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown(*u*), and the law as to the ownership of the soil is the same as that applied to inland non-tidal waters whatever the size of the water space may be (*w*).

Principles  
applied.

SUB-SECT. 2.—*Navigation.*

**765.** As in the case of inland non-tidal waters, so in lakes and pools, there is no common law right of the public to navigate thereover, but the right may be acquired by the same means as it is acquired in non-tidal waters (*a*).

Right of  
the public.

**766.** When navigation is permissible on a lake, and there is no one to make regulations for preventing collisions between vessels

Collision  
regulations.

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navigation restricted to navigable channel); *Micklethwait v. Vincent* (1892), 67 L. T. 225 (Hickling Broad; navigable all over); *Simpson v. A.-G.*, [1904] A. C. 476 (River Ouse; certain section only formerly navigable); *Williams v. Wilcox* (1838), 8 Ad. & El. 314, 329 (River Severn; channel extends from bank to bank).

(*r*) See pp. 400 *et seq.*, *post*.

(*s*) *Ball v. Herbert* (1789), 3 Term Rep. 253.

(*t*) See p. 393, *ante*. Numerous local statutes have been passed authorising the creation of a towing path along navigable rivers. Towing paths when they lawfully exist are not affected by an Act of Parliament for enclosing waste lands bordering on the river (*Simpson v. Scales* (1801), 2 Bos. & P. 496). When a towing path is abandoned and another substituted under an Act of Parliament, a private right of way over the abandoned path is not transferred to the substituted path (*Kinloch v. Neville* (1840), 6 M. & W. 795).

(*u*) *Johnston v. O'Neill*, [1911] A. C. 552. The Crown may have it by forfeiture or transference (*ibid.*, at p. 593; *Bristow v. Cormican* (1878), 3 App. Cas. 641, 666).

(*w*) *Johnston v. O'Neill*, *supra*, per Lord MACNAGHTEN, at p. 578; *Bristow v. Cormican*, *supra*; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732; *Bloomfield v. Johnston* (1868), 8 I. R. C. L. 68, Ex. Ch. As to the law relating to the ownership of the soil of non-tidal waters, see p. 396, *ante*. As to the application of the presumption of ownership to the *medium filum* in the case of lakes, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 120. As to fishing rights in ponds and lakes, see title FISHERIES, Vol. XIV., pp. 581, 582.

(*a*) See p. 398, *ante*. Rights of navigation have been acquired in many lakes, such as Ulleswater (*Marshall v. Ulleswater Steam Navigation Co.*, *supra*); Windermere (see note (*b*), p. 400, *post*); the Norfolk Broads (*Micklethwait v. Vincent*, *supra*); Lough Neagh (*Johnston v. O'Neill*, *supra*, at p. 605).



SECT. 6. navigating there, they can be made by Order in Council on the application of any person interested in the navigation (b).  
Lakes and Pools.

## Part III.—Rights of Navigation.

### SECT. 1.—On Tidal Watercourses.

#### SUB-SECT. 1.—Nature and Extent of the Right.

Nature of right.

**767.** The right of navigation in tidal waters is a right of way thereover for all the public (c) for all purposes of navigation, trade, and intercourse. It is a right given by the common law, and is paramount to any right that the Crown or a subject may have in tidal waters, except when such rights are created or allowed by Act of Parliament (d). Consequently every grant by the Crown in relation to tidal waters must be construed as subject to the public rights of navigation (e). It is not a right of property; it is merely a right to pass and repass, and to remain for a reasonable time (f).

Extent of right.

**768.** *Primâ facie* the right of navigation extends to all waters that are tidal, though this is not always the case (g). Where the right does exist in a river it extends to the whole space over which the tide flows, and is not suspended when the tide is out too low for vessels to float (h).

Exercise of right.

**769.** Though the public has this paramount right over tidal waters, it must be exercised reasonably, and where it conflicts with a right of fishing the right must not be abused so as to work an injury to the right of fishing (i).

(b) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 421. Regulations have been made for Windermere by Order in Council of the 19th November, 1902 (Stat. R. & O., 1902, No. 869).

(c) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Horne v. Mackenzie* (1839), 6 Cl. & Fin. 628; *Bourke v. Davis* (1889), 44 Ch. D. 110. As to the meaning of "navigable" and "tidal," see p. 391, *ante*. As to navigation in relation to fisheries, see title FISHERIES, Vol. XIV., pp. 591, 592.

(d) As in the case of artillery ranges; see p. 374, *ante*.

(e) *Williams v. Wilcox* (1838), 8 Ad. & El. 314, 329; *A.-G. v. Tomline* (1880), 14 Ch. D. 58, C. A.; *Gunn v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192, 207, 208; *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339, 394; *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266, 283.

(f) *Orr Ewing v. Colquhoun*, *supra*; *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713; *Anon.* (1808), 1 Camp. 517, n.; *Rose v. Miles* (1815), 4 M. & S. 101; *Williams v. Wilcox*, *supra*; *Colchester Corporation v. Brooke*, *supra*.

(g) See p. 392, *ante*. As to the local navigation rules affecting particular rivers, see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 480, note (a). As to navigation in a narrow channel, see *ibid.*, pp. 465 *et seq.*; for some tidal waters in which the narrow channel rule has been held to apply, see *ibid.*, p. 465, note (r).

(h) *A.-G. v. Terry* (1874), 9 Ch. App. 423, 431; *Williams v. Wilcox*, *supra*; *Colchester Corporation v. Brooke*, *supra*; *The Octavia Stella* (1887), 6 Asp. M. L. C. 182; *The Swift*, [1901] P. 168.

(i) *Original Hartlepool Collieries Co. v. Gibb*, *supra*; *Anon.*, *supra*. A vessel may ground in a fishery in the ordinary course of navigation

**770.** The public right of navigation has, as incident thereto, the right of anchoring, and of mooring and grounding in the ordinary course of navigation, and that without any liability to the payment of tolls or other acknowledgment to the owner of the soil, except where such person happens to be the owner of a port, or has the right to demand some acknowledgment for the use of the soil in return for some benefit conferred (*k*).

SECT. 1.  
On Tidal  
Water-  
courses.

Anchoring  
etc.

**771.** As part of the right of navigation there is the right to load and unload cargo, and to remain on the waterway for any period, so long as the right is not abused so as to work a private injury (*l*). The right of navigation does not, however, include the right of landing on or mooring to the banks, or of towing along them, except in places where custom has given the right (*m*).

Loading etc.

**772.** The right of navigation can only be extinguished by an Act of Parliament, or by a writ of *ad quod damnum* and inquisition thereon (*n*), or in certain cases by Commissioners of Sewers (*o*), or by natural causes, such as the recession of the sea, or an accumulation of mud rendering navigation impossible (*p*). When the obstruction

Extinction  
of right.

(*Colchester Corporation v. Brooke* (1845), 7 Q. B. 339); but every precaution in mooring her must be taken to prevent injury to the fishing (*The Octavia Stella* (1887), 6 Asp. M. L. C. 182). A vessel which must ground on a fishery as the tide falls should only be anchored at the usual and customary place for vessels of her size (*The Swift*, [1901] P. 168), and damage caused by negligent navigation over a fishery renders the vessel liable for the consequences in an action *in rem* (*ibid.*). See, further, title FISHERIES, Vol. XIV., pp. 591, 592.

(*k*) *Gann v. Whitstable Free Fishers* (1865), 11 H. L. Cas. 192, 215; *Foreman v. Whitstable Free Fishers and Dredgers* (1869), L. R. 4 H. L. 266; *Colchester Corporation v. Brooke*, *supra*; *Anon.* (1808), 1 Camp. 517, n.; *R. v. Hammond* (1717), 10 Mod. Rep. 382; *Rose v. Miles* (1815), 4 M. & S. 101; *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713; *The Swift*, [1901] P. 168; *Land Securities Co., Ltd. v. Commercial Gas Co.* (1902), 18 T. L. R. 405; *A.-G. v. Wright*, [1897] 2 Q. B. 318, C. A. (where it was held that the right of mooring was an ordinary incident of navigation and included the right to fix moorings into the soil and so to occupy a portion of the navigable highway for an indefinite period). The right of user is, therefore, in this respect more extensive than a right of way on land, as to which see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49 *et seq.* Where, however, the moorings are for the use of a vessel which is not used in navigation, but for the purpose of coaling vessels used in navigation, this right to occupy the soil does not exist, for such a purpose is not an incident of navigation (*Denaby and Cadeby Main Collieries, Ltd. v. Anson*, [1911] 1 K. B. 171, C. A.).

(*l*) *Original Hartlepool Collieries Co. v. Gibb*, *supra*; *Anon.* (1808), 1 Camp. 517, n.

(*m*) *Ipswich (Inhabitants) v. Browne* (1581), Sav. 11, 14; Hale, de Portibus, c. 6. The King may not grant a liberty to unload on the bank without the consent of the owner unless custom has made the liberty free to all (*Ball v. Herbert* 1789), 3 Term Rep. 253; *Wyatt v. Thompson* (1794), 1 Esp. 252 (custom for barges to moor to posts off wharves in the Thames for one tide)).

(*n*) As to the writ of *ad quod damnum*, see Jacobs, Law Dictionary.

(*o*) As to the Commissioners of Sewers, see title SEWERS AND DRAINS, Vol. XXV., pp. 773 *et seq.*

(*p*) *R. v. Montague* (1825), 4 B. & C. 598 (where the presence of an old road across Yantlet Creek was held to raise the presumption that the navigation through the creek had been extinguished by one of the modes

SECT. 1.  
On Tidal  
Water-  
courses.

Obstruction  
of right.

is removed, the right of navigation revives, and when a tidal river takes a new channel the right of navigation follows it (*q*).

SUB-SECT. 2.—*Obstruction of the Right of Navigation.*

**773.** Without the authority of Parliament (*r*), or an inquisition *ad quod damnum*, no one can lawfully put into tidal waters, or maintain there, anything which is an obstruction or nuisance to the right of navigation, and it is no excuse that the obstruction only occurs at certain states of the tide (*s*).

It makes no difference to whom the soil on which the obstruction is placed belongs, for neither the Crown nor a subject may use the soil for any purpose amounting to a nuisance (*t*).

Erection  
becoming  
obstruction.

**774.** When an erection has stood in a waterway for a great number of years without being an obstruction, yet, if it becomes so by reason of a change in the course of the navigable channel, it may be abated (*u*). This, however, does not apply to weirs the erection of which has been sanctioned by Parliament (*w*).

Obstruction  
authorised  
by public  
authority.

**775.** Neither the Board of Trade as representing the Crown's interest in navigation nor a board of conservators can legally authorise any erection in navigable waters which is a nuisance, unless acting under special powers granted by Parliament, though

above mentioned); compare Fitz. Nat. Brev. 225; *Isle of Ely Case* (1609), 10 Co. Rep. 141a; and pp. 391, 392, *ante*.

(*q*) *Williams v. Wilcox* (1838), 8 Ad. & El. 314 (a weir in a side channel of a river and not an obstruction may become so by reason of such channel becoming the navigable part of the river); *Carlisle Corporation v. Graham* (1869), L. R. 4 Exch. 361 (a river forming a new channel).

(*r*) *Kearns v. Cordwainers' Co.* (1859), 6 C. B. (N. S.) 388; *A.-G. v. River Thames Conservators* (1862), 1 Hem. & M. 1 (powers of Thames Conservancy to license obstructions); *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662 (where it was held that whilst the conservators could grant a licence for the erection of an embankment which would affect the public navigation, their licence would not protect the licensee who thereby obstructed the right of access of another riparian owner); *Jolliffe v. Wallasey Local Board* (1873), L. R. 9 C. P. 62. By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16, railway companies are empowered to execute works in navigable tidal rivers as well as in non-navigable rivers, but they have no power to divert or alter the entire course of such rivers or obstruct the whole of the navigation (*Abraham v. Great Northern Rail. Co.* (1851), 16 Q. B. 586); see title RAILWAYS AND CANALS, Vol. XXIII., pp. 654, 655, 659, 673, 696, 697. By stat. (1539) 31 Hen. 8, c. 4, the Corporation of Exeter is empowered to remove obstructions in the river Exe (*Exeter Corporation v. Devon (Earl)* (1870), L. R. 10 Eq. 232).

(*s*) *A.-G. v. Terry* (1874), 9 Ch. App. 423.

(*t*) *Ibid.*; see title NUISANCE, Vol. XXI., p. 512.

(*u*) *Williams v. Wilcox*, *supra*.

(*w*) By the reign of John the navigation of rivers and ports had become so obstructed by weirs that Magna Charta, c. 26, enacted that "all weirs from henceforth shall be utterly put down through Thames and Medway and through all England except by the sea coast." This was not entirely effective, and the Hundred Rolls of Edward I. have numerous presentations of weirs obstructing navigation. A weir if erected before the reign of Edward I. is legalised by stat. (1350-1) 25 Edw. 3, st. 4, c. 4, although obstructing the whole or part of the navigable river. Several statutes were subsequently passed and numerous commissioners appointed to survey navigable rivers and to restrict weirs; see Stuart Moore, *History and Law of Fisheries*, pp. 24, 171 *et seq.*



the fact that they have authorised an erection is some evidence that it is not an obstruction (*x*) to the public right of navigation (*y*). No right to obstruct can be acquired by any length of user, though user without complaint for a great many years may be evidence that there is no obstruction in fact (*a*).

SECT. 1.  
On Tidal  
Water-  
courses.

**776.** A nuisance to navigation may take these shapes :—It may be an actual erection in the soil, such as piers, wharves, bridges, piles and weirs (*b*); or it may be the mooring of floating structures (*c*); or the deposit of unbuoyed anchors (*d*); or the deposit of rubbish and filth causing a silting up of the navigable channel (*e*); or the straitening of the sides of the channel (*f*); or a deposit of oyster beds to the hindrance of navigation (*g*); or failure to cleanse and keep in repair when bound to do so (*h*); or obstructing navigation by unreasonable user (*i*); or obstruction in accordance with statutory requirements but without authority (*k*); or obstruction

Examples of  
obstructions.

(*x*) *R. v. Hollis* (1819), 2 Stark. 536; *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *R. v. Grosvenor (Lord)* (1819), 2 Stark. 511. The Public Harbours Act, 1806 (46 Geo. 3, c. 153), as amended by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 15, though requiring notice of any erections in tidal waters to be given to the Board of Trade, does not empower the Board to legalise them; compare *Exeter Corporation v. Devon (Earl)* (1870), L. R. 10 Eq. 232.

(*y*) *A.-G. v. Johnson, supra*; *A.-G. v. Parmeter* (1811), 10 Price, 378, 412; *A.-G. v. Burridge* (1822), 10 Price, 350.

(*a*) *Vooght v. Winch* (1819), 2 B. & Ald. 662; *Booth v. Ratté* (1890), 15 App. Cas. 188, P. C. If the obstruction is of a private right of navigation, a right to obstruct can be acquired (*Bower v. Hill* (1835), 1 Bing. (N. C.) 549).

(*b*) *Liverpool and North Wales Steamship Co., Ltd. v. Mersey Trading Co., Ltd.*, [1908] 2 Ch. 460 (pier); *A.-G. v. Terry* (1874), 9 Ch. App. 423 (wharf); *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 (piers for bridge); *Williams v. Wilcox* (1838), 8 Ad. & El. 314 (weir); *R. v. Clark* (1702), 12 Mod. Rep. 615 (building locks in the Thames); *A.-G. v. Richards* (1795), 2 Anst. 603 (wharf); *A.-G. v. Parmeter, supra*; *A.-G. v. Burridge, supra* (building between high- and low- water mark); *Newcastle (Duke) v. Clark* (1818), 2 Moore (C. P.), 666 (dam); *A.-G. v. Johnson, supra*; *R. v. Ward* (1836), 4 Ad. & El. 384 (making an embankment in the waterway); *R. v. Grosvenor (Lord), supra* (wharf obstructing the Thames); *R. v. Randall* (1842), Car. & M. 496 (wharf erected between high- and low- water mark); *Dimes v. Pelley* (1850), 15 Q. B. 276 (erection of a wharf and jetty within the flow of the tide and below low-water mark); *White v. Phillips* (1863), 15 C. B. (N. S.) 245 (erection of a dangerous campshed); *A.-G. v. Lonsdale (Earl)* (1861), L. R. 7 Eq. 377 (pier); *Bower v. Hill, supra* (bridge). As to the effect of the navigable channel shifting, compare title FISHERIES, Vol. XIV., p. 592.

(*c*) *Booth v. Ratté, supra* (houseboat).

(*d*) *Jolliffe v. Wallasey Local Board* (1873), L. R. 9 C. P. 62.

(*e*) *R. v. Stephens* (1866), L. R. 1 Q. B. 702.

(*f*) *Hale, de Portibus*, c. 7.

(*g*) *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339; see title FISHERIES, Vol. XIV., p. 592.

(*h*) *Lynn Corporation v. Turner* (1774), 1 Cowp. 86. A corporation is not bound at common law to repair and maintain a navigable creek or fleet (*ibid.*), though it may be so bound by the terms of its charter or by prescription.

(*i*) *Rose v. Miles* (1815), 4 M. & S. 101; *Rose v. Groves* (1843), 5 Man. & G. 613; *Dobson v. Blackmore* (1847), 9 Q. B. 991.

(*k*) *Brownlow v. Metropolitan Board of Works* (1863), 13 C. B. (N. S.) 768, affirmed (1864), 16 C. B. (N. S.) 546, Ex. Ch.

SECT. 1.  
On Tidal  
Water-  
courses.

Principles  
guiding the  
courts.

Wreck  
causing  
obstruction.

endangering safe navigation (*l*); or obstructing navigation by building a bridge (*m*); or obstruction by unreasonable delay in opening a swing bridge (*n*).

**777.** Whether an obstruction is a nuisance or not is a question of fact; but the court does not interfere when the encroachment is of a trifling nature (*o*), or when the encroachment, though an injury to navigation, confers on the public at that place a benefit of a much greater amount than the injury occasioned (*p*).

**778.** When a vessel is sunk in a navigable river so that it may be an obstruction it is the duty of the owner so long as he has possession and control to take precautions to prevent other vessels striking against it, but once he has abandoned possession, or some authority has undertaken the duty of watching the wreck, his obligation ceases (*q*).

The duty of watching and lighting a wreck may be cast by statute on the authority whose duty it is to remove wrecks (*r*).

SUB-SECT. 3.—*Protection of the Right of Navigation.*

(i.) *In General.*

Abatement.

**779.** Where a private person sustains special damage by reason of any obstruction to navigation he may abate it, but only in so far as is necessary to enable him to exercise his right, and he is not justified in doing this on the ground that it is a nuisance to the public (*s*).

Action.

**780.** Instead of his remedy by abatement he may have his action in respect of his special damage (*t*). Other remedies for the

(*l*) *White v. Phillips* (1863), 15 C. B. (N. S.) 245.

(*m*) *North Staffordshire Rail. Co. v. Hanley Corporation* (1909), 73 J. P. 477, C. A. As to a temporary bridge, see *Priestley v. Manchester and Leeds Rail. Co.* (1840), 4 Y. & C. (EX.) 63.

(*n*) *Wiggins v. Boddington* (1828), 3 C. & P. 544.

(*o*) *Hale, de Portibus*, c. 7; *R. v. Betts* (1850), 16 Q. B. 1022; *R. v. Randall* (1842), Car. & M. 496; and see *R. v. Shepard* (1822), 1 L. J. (O. S.) (K. B.) 45; *R. v. Bell* (1822), 1 L. J. (O. S.) (K. B.) 42; *A.-G. v. Lonsdale (Earl)* (1868), L. R. 7 Eq. 377; *A.-G. v. Terry* (1874), 9 Ch. App. 423 (where the court interfered when the obstruction was for 3 feet in a channel of 60 feet width); *R. v. Tindall* (1837), 6 Ad. & El. 143. A person is not responsible criminally for an obstruction which renders a harbour in some extreme cases less secure (*R. v. Russell* (1854), 3 E. & B. 942).

(*p*) *A.-G. v. Terry*, *supra*, per JESSEL, M.R., at pp. 427, 428, overruling *R. v. Russell* (1827), 6 B. & C. 566; *R. v. Ward* (1836), 4 Ad. & El. 384. It is not sufficient that the inconvenience is counterbalanced by the benefit conferred (*R. v. Randall, supra*).

(*q*) *S.S. "Utopia" (Owners) v. S.S. "Primula" (Owners and Master)*, "*The Utopia*," [1893] A. C. 492, P. C.; *The Bten*, [1911] P. 40; see *White v. Crisp* (1854), 10 Exch. 312, and *Brown v. Mallett* (1848), 5 C. B. 599, explained in *S.S. "Utopia" (Owners) v. S.S. "Primula" (Owners and Master)*, "*The Utopia*," *supra*, at pp. 496, 497; see also *Harmond v. Pearson* (1808), 1 Camp. 515.

(*r*) See title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 554, 555.

(*s*) *Dimes v. Pelley* (1850), 15 Q. B. 276; *Davies v. Mann* (1842), 10 M. & W. 546; *Colchester Corporation v. Brooke* (1845), 7 Q. B. 339; see title NUISANCE, Vol. XXI., p. 547.

(*t*) *Rose v. Miles* (1815), 4 M. & S. 101 (where a barge-owner had to unload his vessel and carry his cargo over land because the navigable channel was entirely blocked by another vessel).

protection of the right of navigation are by information by the Attorney-General on behalf of the Crown in respect of its prerogative right of conserving navigation (*a*), or by action in the name of the Attorney-General at the relation of some class of persons (*b*), or by indictment (*c*).

SECT. 1.  
On Tidal  
Water-  
courses.

(ii.) *Port of London.*

**781.** The limits of the Port of London commence at an imaginary straight line (known as the landward limit) drawn from the high-water mark on the bank of the Thames at the boundary line between the parishes of Teddington and Twickenham to high-water mark on the Surrey bank immediately opposite to the point first mentioned, and extend down both sides of the Thames to an imaginary straight line (known as the seaward limit) drawn from the pilot mark at the entrance of Havengore Creek in Essex to the Land's End at Warden Point in the Isle of Sheppey, and include all islands, rivers, streams, creeks, waters, watercourses, channels, harbours, docks, and places contained in the above limits, and all places which under any Act of Parliament are to be deemed to be within the Port of London, but not any part of the river Medway above the seaward limit of the jurisdiction of the Medway Conservancy, or any part of the river Swale, or any part of the river Lee or Bow Creek within the jurisdiction of the Lee Conservancy Board, or any part of the Grand Junction Canal (*d*).

Limits.

**782.** Within these limits the Port of London Authority has power to take such steps as it may consider necessary for the improvement of the river and the accommodation and facilities afforded in the Port of London (*e*), and, so far as navigation of the Thames below the landward limit of the Port of London is concerned, this authority has all the powers that had been conferred on the Thames Conservancy before the 31st March, 1909 (*f*).

Powers of  
Port of  
London  
Authority.

(*a*) *A.-G. v. Johnson* (1819), 2 Wils. (CH.) 87; *A.-G. v. Parmeter* (1811), 10 Price, 378; *A.-G. v. Richards* (1795), 2 Anst. 603.

(*b*) *A.-G. v. Terry* (1874), 9 Ch. App. 423; *A.-G. v. Wright*, [1897] 2 Q. B. 318, C. A.

(*c*) *R. v. Russell* (1827), 6 B. & C. 566; *R. v. Ward* (1836), 4 Ad. & El. 384; *R. v. Betts* (1850), 16 Q. B. 1022; *R. v. Russell* (1854), 3 E. & B. 942. But indictment does not lie when the obstruction happens by accident or misfortune (*R. v. Watts* (1798), 2 Esp. 675).

(*d*) Port of London Act, 1908 (8 Edw. 7, c. 68), Sched. V.

(*e*) *Ibid.*, s. 2 (1). The Port of London Authority is a body corporate consisting of eighteen elected members, ten appointed members, and a chairman and vice-chairman appointed by the Port Authority (*ibid.*, s. 1). The undertakings of various dock companies (see title METROPOLIS, Vol. XX., p. 410) were transferred to the Port of London Authority by the Port of London Act, 1908 (8 Edw. 7, c. 68), s. 3; and this authority was further empowered to purchase certain other undertakings (*ibid.*, s. 4), piers and landing places (*ibid.*, s. 5).

(*f*) *Ibid.*, s. 7; see *London County Council v. Port of London Authority* (1914), 30 T. L. R. 406. Prior to 1908 the conservancy of the Thames from Cricklade to Yantlet Creek was vested in the Thames Conservancy. The powers of the Thames Conservancy which have been transferred to the Port of London Authority included all the powers and authorities, rights and privileges with respect or relating to the conservancy and regulation of the Thames and of the several rivers, streams and watercourses, within the flow and reflow of the tides of the Thames, and upon the banks, shores



SECT. 1.  
On Tidal  
Water-  
courses.

Extension of  
powers.

Rights of  
public.

**783.** The powers of dredging the river within the limits of the Port of London may by provisional order of the Board of Trade be extended to parts of the Thames Estuary and the shores thereof lying to the eastward of the seaward limit of the port (g).

SECT. 2.—*On Natural Inland Watercourses.*

SUB-SECT. 1.—*Extent and Nature of the Right of Navigation.*

**784.** As the soil of non-tidal rivers is *primâ facie* the property of the riparian owners and not of the Crown, there is no common law right in the public of navigating thereover, but the right may have been acquired by dedication or presumed dedication as evidenced by long user, or by Act of Parliament (h).

The right of navigation in non-tidal waters when acquired by the public is simply a right of way similar to a right of way on land (i). It may extend over the whole width of the watercourse, or be restricted to a particular part thereof (j). It carries with it no right to the soil, or any right of fishing or fowling or of recreation over the soil (k).

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and wharfs of the Thames and Port of London which immediately before the passing of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), were vested in or might be exercised by or which had heretofore been exercised by Her Majesty in right of her Crown or which at any time before the passing of that Act were given or granted to or had been exercised by or which were vested in or might be exercised by the mayor and commonalty and citizens of London or by the mayor and aldermen of the City or by the Common Council or by the Lord Mayor by any statutory enactment in force immediately before the passing of that Act, and not repealed by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), or by prescription, usage, or charter or otherwise, and were vested in the conservators immediately before the passing of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 60, and the powers set out at pp. 408 *et seq.*, *post*, and the powers of dredging the channel of the Thames from the Nore to Gravesend conferred by the Thames Conservancy Act, 1905 (5 Edw. 7, c. xcvi.). The powers and duties of the Watermen's Company with respect to the registration and licensing of craft and boats, the licensing of lightermen and watermen, and the government, regulation and control of lightermen and watermen, including the appointment of plying places and inspectors, have been transferred to the Port of London Authority, but the power of licensing lightermen and watermen may, by arrangement, be exercised by the Watermen's Company on behalf of the Port Authority, unless the authority otherwise determines (Port of London Act, 1908 (8 Edw. 7, c. 68), s. 11). As to the powers of the Commissioner of Police in the metropolitan area, see title POLICE, Vol. XXII., p. 471.

(g) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7 (2) (d) ).

(h) See note (o), p. 398, *ante*. As to canals and other artificial watercourses, see titles FISHERIES, Vol. XIV., p. 581; RAILWAYS AND CANALS, Vol. XXIII., pp. 779 *et seq.*

(i) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839.

(j) *Williams v. Wilcox* (1838), 8 Ad. & El. 314, 329; *Micklethwait v. Vincent* (1892), 67 L. T. 225; *Orr Ewing v. Colquhoun*, *supra*.

(k) *Orr Ewing v. Colquhoun*, *supra*; *Micklethwait v. Vincent*, *supra*; *Smith v. Andrews*, [1891] 2 Ch. 678; *Blount v. Layard* (1888), [1891] 2 Ch. 681, n., C. A. By no amount of user can the public acquire a right to recreate (*Bourke v. Davis* (1889), 44 Ch. D. 110; see also *Simpson v. A.-G.*, [1904] A. C. 476, 492). In the case of the River Thames, it is provided by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 72, that the public may navigate the Thames for either pleasure or profit; see p. 411, *post*.

**785.** The right of navigation does not include a right of towing along the banks (*l*), though such a right may be acquired in any of the ways above mentioned (*m*). It is doubtful whether the right of anchoring or of placing fixed moorings, which is an incident of the right of navigation in tidal water, is also an incident of navigation in non-tidal water, except in cases of necessity or at places where such a right has been acquired by custom (*n*).

SECT. 2.  
On Natural  
Inland  
Water-  
courses.

Ancillary  
rights.

**786.** A subject may make a watercourse navigable by means of locks and cuts and obtain a charter enabling him to take tolls from boats using them, but if there is no evidence that the way through the locks has been dedicated as a highway the subject is not bound to maintain the locks, or allow the public to navigate through them (*o*).

Locks.

#### SUB-SECT. 2.—Obstruction.

**787.** Obstructions which existed at the time the right of navigation in non-tidal water originated cannot be removed, for the right to navigate must have been acquired subject to the continuance of such obstructions; but obstructions placed subsequently may be remedied in the same way as obstructions in tidal waters (*p*).

How far  
recoverable.

**788.** When the whole width of a river was a common passage for boats and ships before the reign of Edward I. weirs erected since that time are unlawful, and so too is any enlargement of ancient weirs (*q*). Once the right of navigation exists over a particular locality no one may without the authority of Parliament place anything there which is a nuisance to the navigation (*r*).

Weirs.

**789.** Where a river changes its course, the right of navigation passes with it (*s*), even though the change is sudden (*t*), but

Change of  
course.

(*l*) *Ball v. Herbert* (1789), 3 Term Rep. 253, 264, citing *Vernon v. Prior* (1747), unreported.

(*m*) See p. 393, *ante*.

(*n*) Thus, where the right of navigation owes its origin to dedication, and, as stated in *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, 854, is simply a right to pass through a private estate in order to get to some place, similar to a right of way on land, it follows that there is no right to delay on the way longer than is reasonably necessary; compare *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713, *per* JESSEL, M.R., at p. 721. Moreover, in non-tidal water, navigation is acquired subject to the rights of the landowners, whilst in tidal water the owner of the soil takes subject to the rights of navigation. As to proof of custom, see title CUSTOM AND USAGES, Vol. X., pp. 236 *et seq.*

(*o*) *Simpson v. A.-G.*, [1904] A. C. 476.

(*p*) See p. 402, *ante*.

(*q*) *Williams v. Wilcox* (1838), 8 Ad. & El. 314, 329; stat. (1350-1) 25 Edw. 3, st. 4, c. 4; stat. (1472) 12 Edw. 4, c. 7. This later statute only applies to navigable rivers (*Rolle v. Whyte* (1868), L. R. 3 Q. B. 286). An ancient brushwood weir must not be converted to a stone weir (*Weld v. Hornby* (1806), 7 East, 195).

(*r*) *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47; *Orr Ewing v. Colquhoun*, *supra*; *A.-G. v. Lonsdale (Earl)* (1869), L. R. 7 Eq. 377.

(*s*) *Foster v. Wright* (1878), 4 C. P. D. 438.

(*t*) *Carlisle Corporation v. Graham* (1869), L. R. 4 Exch. 361; *Thakurain Ritraj Koer v. Thakurain Sarfaraz Koer* (1905), 21 T. L. R. 637, P. C.

SECT. 2.  
On Natural  
Inland  
Water-  
courses.

when the part of the river over which there does exist a right of navigation becomes blocked there is no right to have abated an obstruction in the other part of the river the removal of which would enable the navigation of the river to be continued over that other part (*u*).

SUB-SECT. 3.—*Protection of the Right.*

(i.) *In General.*

Means of  
protection.

**790.** The right of navigation on natural inland watercourses is, in the absence of any express parliamentary enactment, protected by the same means as the navigation on tidal watercourses is protected (*a*).

(ii.) *Thames.*

Conservancy  
jurisdiction.

**791.** For the purpose of conservancy by the Thames Conservancy the Thames means so much of the rivers Thames and Isis as are between the town of Cricklade and the landward limit of the Port of London and so much of the river Kennett as is between the common landing-place at Reading and the river Thames and all locks, cuts and works within the said portions of such rivers (*b*).

Powers of  
conservators.

**792.** Subject to the special provision of the Thames Conservancy Act, 1894 (*c*), the conservators have power to improve and complete the navigation of the Thames whether for profit or pleasure, and for that purpose may make, erect, maintain, alter, extend, discontinue, remake and re-erect such tow-paths, banks, roads, bridges, ferries and ways, for the towing of vessels with horses or otherwise, and such locks, pounds, turnpikes, wharfs, weirs, bucks, sluices, winches, spikes, dams, floodgates, engines, toll-houses and watch-houses for the use of the navigation as they think fit (*d*); and may regulate the flow of water and prevent mill-owners from drawing off the water below a certain level (*e*).

Sunken  
vessels.

**793.** The conservators must cause any vessel sunk or stranded in the Thames to be raised, or blown up, or otherwise destroyed; if the vessel or any part of her or her cargo is saved they must be sold in such manner as the conservators determine; the latter may recoup themselves out of the proceeds for the expenses incurred and any expenses incurred in watching and controlling

(*u*) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Williams v. Wilcox* (1838), 8 Ad. & El. 314; *Ball v. Herbert* (1789), 3 Term Rep. 253, 263; see title FISHERIES, Vol. XIV., p. 592.

(*a*) See pp. 404, 405, *ante*. In respect of many waters, Parliament has conferred the duty of conservancy on statutory bodies or other corporations; as, for example, in respect of the Thames, on the Thames Conservancy; the Severn, on the Severn Commissioners; the Trent, on the Trent Navigation Commissioners. Where Parliament has created an authority to repair and cleanse a non-tidal river, such authority is not authorised to cut a new channel in the bed of the river so as to give access to a wharf (*Partheriche v. Mason* (1774), 2 Chit. 658).

(*b*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 3; Port of London Act, 1908 (8 Edw. 7, c. 68), Sched. V. As to the landward limits of the port of London, see p. 405, *ante*.

(*c*) 57 & 58 Vict. c. clxxxvii.

(*d*) *Ibid.*, s. 62.

(*e*) *Ibid.*, ss. 75, 76.



the vessel, and the surplus, if any, is held for the person entitled thereto; the owner of the vessel is liable for any deficiency (*f*).

**794.** The conservators may remove anything causing an obstruction in the river, or to the use of the towing-path, or any floating timber which obstructs the navigation, but when the obstruction is a tree, bush, shrub or projection the conservators may apply to a court of summary jurisdiction to order the owner to cut, prune, or lop such tree, bush, or shrub or remove the projection, and on his failing to comply with the order the conservators may do the work (*g*).

**795.** When any wharf, pier, or artificial bank is out of repair so as to be dangerous to life or to vessels lying alongside or to the navigation, the conservators may order the owner to repair to the satisfaction of their engineer, and on his failing to do so the conservators may do the work (*h*). They may also remove at the cost of the owner broken, dangerous, or useless piles, mooring chains, or other nuisances, and remove or shorten any waterways, causeways, stairs, or other projections injurious to navigation (*i*).

**796.** For the purpose of making and improving and keeping the navigation free from obstruction the conservators may dredge, cleanse, and scour the river (*k*), or alter, deepen, restrict, enlarge, widen, diminish, lengthen, shorten, straighten and improve the bed and channel (*l*), and reduce or remove any shoals, shelves, banks, mudbanks, or other accumulations and shorten any bend and remove any angle, and abate or remove all obstructions and all nuisances and abuses whatsoever in the river or on the banks or shores thereof (*m*).

For the repair of the towing paths and roads and the straightening and improving the course of the Thames, and filling up and raising creeks, inlets, bends, flats, and sloblands in or adjoining the river, they may dredge and raise gravel, sand, and other substances (*n*), and license persons to do so (*o*). Below Teddington

SECT. 2.  
On Natural  
Inland  
Water-  
courses.

Obstructions.

Dangerous  
works.

Dredging etc.

(*f*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 77. The deficiency may be recovered although the owners of the vessel sunk have abandoned her before the expenses were incurred (*The Annie* (1887), 12 P. D. 50; *The Wallsend*, [1907] P. 302). In estimating the expenses the cost of special apparatus used may be taken into account (*The Harrington* (1888), 13 P. D. 48).

(*g*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), ss. 78, 79. The conservators are not liable for an obstruction of which they have or can have had no knowledge (*Gridley v. River Thames Conservators* (1886), 3 T. L. R. 108, C. A.); see also *Queens of the River Steamship Co. v. Easton, Gibb & Co. and River Thames Conservators* (1907), 96 L. T. 901, C. A.; *Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116; and title SHIPPING AND NAVIGATION, Vol. XXVI., p. 647.

(*h*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 80.

(*i*) *Ibid.*, s. 81. Except in cases of emergency they may not exercise this power above the City Stone above Staines Bridge, unless the owner or occupier has had seven days' written notice to remove the nuisance (*ibid.*).

(*k*) *Ibid.*, s. 83 (1) (a).

(*l*) *Ibid.*, s. 83 (1) (b).

(*m*) *Ibid.*, s. 83 (1) (c). "Shore" means the shore of the Thames as far as the tides flow and reflow between high- and low- water mark of ordinary tides (*ibid.*, s. 3).

(*n*) *Ibid.*, ss. 83 (1) (d), 84.

(*o*) *Ibid.*, ss. 83 (2), 87. But material dredged above the City Stone

SECT. 2.  
On Natural  
Inland  
Water-  
courses.  
—

Lock they may dredge ballast for ships, and may undertake to supply ships with ballast, or to ballast or unballast them (*p*).

**797.** The conservators may license all erections on the bed or shores, and may maintain mooring chains, and remove on making compensation any private mooring chains in the tideway (*q*).

They may also erect such piers and landing places below Teddington Lock as they shall deem most advantageous to the public and causing the least obstruction to the navigation, and may remove or close them, though if it is a landing place which has been marked by the Watermen's Company that is affected a new one must be made in its place (*r*).

Beacons.

**798.** The conservators are the authority for erecting and maintaining the beacons necessary for the navigation, but no lighthouse may be placed below London Bridge. As such authority they have power below Teddington Lock to remove, alter, or screen any light on or near the river which they think likely to mislead persons navigating (*s*).

Offences.

**799.** Any person commits an offence who without lawful excuse in a reasonable time after notice fails to remove any obstruction to the towing path (*t*), or who unloads, throws, puts, causes, or suffers to fall any ballast, stone, earth, mud, ashes, dirt, soil, rubbish, or refuse from manufacture into the Thames or on the shore or into any tributary of the Thames within three miles of the Thames so that it may be carried into the Thames, or knowingly puts any of those things anywhere where they are likely to be carried by floods or extraordinary tides into the Thames (*u*).

It is also an offence for any person to obstruct the navigation by

above Staines Bridge must be used above that stone (Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 83 (2)). Conservators have no power in the Upper Thames to license persons to dredge ballast for sale (*Palmer v. Thames Conservators*, [1902] 1 Ch. 163). As to their powers to license persons in the tidal portion of the Thames, see *Thames Conservators v. Smead, Dean & Co.*, [1897] 2 Q. B. 334, C. A., disapproving *Pearce v. Bunting, R. v. Wedd, Ex parte Pearce*, [1896] 2 Q. B. 360.

(*p*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 83 (3), (5), (6).

(*q*) *Ibid.*, ss. 109, 112, 115. No erections or mooring can be put on the bed or shores of the river without the conservators' licence (*ibid.*, ss. 111, 114). But this licence will not legalise any injury to the rights of others (*Lawes v. Turner* (1892), 8 T. L. R. 584); see also note (*b*), p. 408, *ante*.

(*r*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), ss. 119, 124.

(*s*) *Ibid.*, ss. 135, 136, 137. The power of erecting beacons and light-houses within the Port of London has been transferred to the Port of London Authority; see p. 405, *ante*.

(*t*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 82. The penalty is not exceeding £5, and a daily penalty not exceeding £2 (*ibid.*).

(*u*) *Ibid.*, s. 92. The penalty is not exceeding £20, and a daily penalty not exceeding £10 (*ibid.*). In the notice the conservators must specify the place where the nuisance is (*Thames Conservators v. Chertsey Rural Sanitary Authority* (1885), 1 T. L. R. 535). It is not an offence to put rubbish into the Thames below the seaward limits of the river (*Fuller v. Payne* (1887), 3 T. L. R. 729).

means of any weir, bridge, pile, dam, chain, barrier, or other implement (*a*).

**800.** Subject to the provisions of the Thames Conservancy Act, 1894 (*b*), all persons, whether for pleasure or profit, may go and be, pass and repass, in vessels over and upon any and every part of the Thames through which Thames water flows, including all such backwaters, creeks, tide channels, bays and inlets as form part of the river (*c*). The conservators may, for purposes connected with the navigation or with any public works or for the preservation of public order, for a limited time exclude the public from specified portions of the river (*d*).

**801.** This right of navigation includes the right to anchor, moor, or remain stationary for a reasonable time in the ordinary course of pleasure navigation, subject to such restrictions as the conservators may make by bye-laws (*e*).

The conservators are bound to make special regulations to prevent annoyance to any occupier of a riparian residence by reason of the loitering or delay of any houseboat or steamboat; and the riparian owner may exercise any legal remedies he possesses for preventing the anchoring, mooring, loitering, or delay of any vessel (*f*).

**802.** Besides complying with any bye-laws relating to navigation made by the conservators, every vessel navigating the Thames must be navigated with care and caution and at a speed and in such a manner as not to endanger the lives of, or cause injury to, persons or endanger the safety of, or cause damage to, other vessels or any mooring, or to the banks of the river or other property, and special care must be used when passing vessels of all kinds, especially those of the smaller class and such as are employed in dredging or removing sunken vessels or other obstructions (*g*).

SECT. 2.  
On Natural  
Inland  
Water-  
courses.

Rights of  
public.

Right of  
anchoring  
etc.

Speed of  
vessels.

(*a*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 72 (6). This does not apply to obstructions which existed for twenty years before August, 1885 (*ibid.*). The penalty is not exceeding £5, and a daily penalty not exceeding £2 for every day such obstruction remains after notice from the conservators (*ibid.*).

(*b*) 57 & 58 Vict. c. clxxxvii.

(*c*) *Ibid.*, s. 72 (1). Private or artificial cuts for the purpose of drainage or irrigation, and also artificial inlets for moats, boathouses, ponds and other like private purposes, and all channels made by agreement with the conservators under the powers of the stats. (1623) 21 Jac. 1, c. 32; (1750) 24 Geo. 2, c. 8; (1761) 11 Geo. 3, c. 45; (1775) 15 Geo. 3, c. 11; (1798) 28 Geo. 3, c. 51; (1795) 25 Geo. 3, c. 106; (1812) 52 Geo. 3, c. xlvii., or which had lawfully existed for twenty years before the 14th August, 1885, are not part of the Thames for the purpose of navigation (Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 72 (1)).

(*d*) *Ibid.*, s. 72 (3).

(*e*) *Ibid.*, s. 72 (4).

(*f*) *Ibid.*, s. 72 (4), (5). No vessel may anchor, moor, fasten or lie in any part of Taplow mill-stream between the lock and Clemarsh meadow, under a penalty not exceeding £5 (*ibid.*, s. 73). As to the right to fix moorings in the tidal part of the Thames, see *A.-G. v. Wright*, [1897] 2 Q. B. 318, C. A.

(*g*) Thames Conservancy Act, 1894 (57 & 58 Vict. clxxxvii.), s. 154. The penalty for breach of this provision is not exceeding £20 (*ibid.*).



SECT. 2.  
On Natural  
Inland  
Water-  
courses.  
Bye-laws.

**803.** The conservators may make bye-laws for, *inter alia*, regulating the navigation, preventing obstructions, compelling vessels to carry lights, prescribing, below Teddington Lock, limits above which various classes of vessels to be defined by such bye-laws and used only and principally for carrying passengers or for excursions shall not navigate, preventing disturbances of the navigation, purposes of recreation, and regulating the passage of vessels on occasions when large crowds may assemble (*h*).

Harbour  
master.

**804.** The conservators may appoint a harbour master, who has power to regulate the time and manner in which a vessel may enter into, go out of or lie in the river, and her position whilst there, the manner in which she shall take in or discharge cargo or ballast (*i*), and to remove any vessel disobeying his orders (*k*).

## Part IV.—Harbours, Docks, Piers and Wharves.

SECT. 1.—*Harbours, Docks and Piers.*

SUB-SECT. 1.—*Construction.*

Power to  
construct.

**805.** Whenever a harbour, dock, pier or wharf (*l*) is to be constructed and may be an obstruction to navigation, or in respect of the use of which it is desired to have power to levy tolls and rates,

(*h*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 191. On so much of the Thames as is within the limits of the Metropolitan Police area, the Chief Commissioner may also regulate the passage of vessels on like occasions (*ibid.*); see, further, title POLICE, Vol. XXII., pp. 467, 471. Within the Port of London, the Port Authority may arrange that the Thames Conservators shall exercise the powers of the Port Authority for regulating the passage of vessels on the occasion of a regatta, boat race, or other similar occasion (Port of London Act, 1908 (8 Edw. 7, c. 68), s. 10).

(*i*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), ss. 126, 128. This power does not apply to any part of the river where by Act of Parliament it is declared that no vessel shall lie, nor has the harbour master any power to unmoor or remove from any part appointed as a boarding landing, landing, or quarantine station any vessel placed there under the authority of the Commissioners of Customs, or to place a vessel within low-water mark alongside any quay, custom-house station, or any place appropriated to the service of the customs (*ibid.*, s. 128). By *ibid.*, s. 127, assistant harbour masters may be appointed.

(*k*) *Ibid.*, ss. 130, 132. Disobedience to the harbour master's orders is punishable by a fine not exceeding £5 (*ibid.*, s. 129).

(*l*) Except where otherwise stated, this part of the present title relates to the construction and maintenance of harbours, docks, and piers to which, by Act of Parliament, the provisions of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), are made to apply, and the expression "the harbour, dock, or pier" means the harbour, dock, or pier and the works connected therewith authorised by the special Act. For other definitions of "harbour," see note (*n*), p. 413, note (*w*), p. 420, *post*; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742; *R. v. Hannam* (1886), 2 T. L. R. 234, C. A. As to the management of vessels in harbour and provisions for the safety of harbours, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 639 *et seq.*, 643, 644.

a special Act of Parliament must be obtained, unless the expense to be incurred does not exceed £100,000, in which case a provisional order may be obtained for that purpose from the Board of Trade (*m*).

SECT. 1.  
Harbours,  
Docks and  
Piers.

(i.) *Under Special Acts of Parliament.*

**806.** When a person or corporation (hereinafter referred to as the harbour authority (*n*)) is authorised by a special Act of Parliament to construct or improve a harbour, dock, or pier, it is usual to find incorporated by reference in that special Act all or some of the provisions of the Harbours, Docks, and Piers Clauses Act, 1847 (*o*). Where the special Act authorises the acquisition of land otherwise than by agreement, the provisions and restrictions in the Lands Clauses (Consolidation) Act, 1845 (*p*), apply (*q*).

Incorporation  
of statutes.

**807.** In addition to lands authorised to be compulsorily taken, the harbour authority may by agreement purchase lands for any of the following purposes, namely: making and providing additional yards, wharves and places for receiving, depositing and loading and unloading goods (*r*), and for the erection of weighing machines, toll houses, offices, warehouses, sheds, and other buildings or conveniences; and making convenient roads to the harbour, dock, or pier, or any other purpose which may be requisite or convenient for the formation and use thereof (*s*).

Purchase of  
lands.

Errors in the plans and books of reference deposited in compliance with the Standing Orders of the Houses of Parliament may, after ten days' notice to the persons affected, be corrected by two justices of the peace, and their certificate and plans and sections of alterations and the original plans and sections have to be deposited with the clerk of the peace for the county in which the lands are situate (*t*).

On the deposit of these documents the harbour authority may commence the works (*u*).

(*m*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 3. As to the collection and recovery of harbour rates, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 634 *et seq.*

(*n*) By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, the term "harbour authority" includes all persons or bodies of persons corporate or unincorporate being proprietors of or intrusted with the duty or invested with the power of constructing, improving, managing, regulating, maintaining or lighting a harbour. For the purpose of limiting liability (see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 612 *et seq.*) the term "owner of a dock" includes any person or authority having the control or management of any dock, including wet dock and basin, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places, and jetties (Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict. c. 32), s. 2 (4), (5)).

(*o*) 10 & 11 Vict. c. 27.

(*p*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*q*) Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 6.

(*r*) The term "goods" includes wares and merchandise of every description, and all articles in respect of which rates or duties are payable under the special Act (*ibid.*, s. 3).

(*s*) *Ibid.*, s. 20.

(*t*) *Ibid.*, ss. 7, 9. Clerks of the peace are authorised to give certified copies of these documents, which are receivable in evidence (*ibid.*, s. 10).

(*u*) *Ibid.*, s. 8.

## SECT. 1.

Harbours,  
Docks and  
Piers.

## Deviation.

**808.** When constructing the works the harbour authority must not deviate from the line laid down in the deposited plans more than the prescribed number of yards, and when no number is prescribed, then not more than ten yards, and the authority must not take or use for the purpose of deviation land not mentioned in the book of reference or certificate of the justices without the written consent of the owner of the land (*a*).

Consents  
required.

**809.** When the works are to be on the seashore or on any land between the high- and low- water mark, they must not be constructed without the consent of the Commissioners of Woods and Forests and Board of Trade, and then only according to such plans and under such restrictions and regulations as those departments approve of, and without the like approval these works may not be extended or altered (*b*). Alteration or deviation from the deposited plans must have the same approval (*c*).

If the harbour authority constructs the works without such approval, the Board of Trade, at the expense of the harbour authority, may abate and remove and restore the site to its former condition.

Where the works are in a navigable river and there is a conservancy authority, its approval must be obtained (*d*).

Warehouses  
etc.

**810.** As part of its undertaking the harbour authority may construct such warehouses, storehouses, sheds, and other buildings and works as the authority deems necessary for the accommodation of goods to be shipped or unshipped, and may erect such cranes, weighing machines and other conveniences, weights or measures, as it thinks necessary for unloading, loading, measuring and weighing such goods, and may hire persons to work the same; or the authority may lease the warehouses, wharves, cranes etc. for any period not exceeding three years (*e*).

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(*a*) Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 11. "Deviation," as used in Acts of Parliament, simply means shifting the work in its integrity from one site to another which may be deemed more suitable; it does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it (*Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, *per* Lord WATSON, at 517).

(*b*) Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 12. It seems that under this Act the approval by the Commissioners of Woods and Forests and Board of Trade of works below the low-water mark is not required; though such works may not be done without the consent of the Crown when the Crown is owner of the bed. If the shore belongs to a private person his rights thereto must not be prejudiced, except in so far as power to purchase the same is given by the special Act (*ibid.*). As to the Commissioners of Woods and Forests, see title CONSTITUTIONAL LAW, Vol. VII., pp. 122 *et seq.*; as to the Board of Trade, see *ibid.*, pp. 102, 103.

(*c*) Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 13.

(*d*) *Ibid.*, s. 12.

(*e*) *Ibid.*, ss. 21—23. As to the provision of weighing machines by the Port of London Authority, see *Port of London Authority v. Cairn Line of Steamers, Ltd.*, [1913] 1 K. B. 497; title SHIPPING AND NAVIGATION, Vol. XXVI., p. 639, note (*m*). As to meters and weighers appointed by a harbour authority, see *ibid.*, p. 643.



**811.** When the works are completed and the chairman of quarter sessions has certified that the harbour, dock, or pier is fit for the reception of vessels, the rates authorised by the special Act may be enforced (*f*).

If required by the Commissioners of Customs, the harbour authority must erect and maintain a watch-house and boathouse for the use of tide surveyors of customs, and a sufficient number of huts for the revenue officers, with all fit and necessary weighing materials (*g*).

(ii.) *Under Provisional Orders.*

**812.** Any person or company intending to make application to the Board of Trade for a provisional order to authorise the construction of any pier, harbour, quay, wharf, jetty, or excavation on or near the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, or to levy rates at any existing or at any new works, must, in the month of October or November preceding such application, publish a notice of their intention (*h*).

This notice must be inserted once at least in each of two consecutive weeks in some one and the same newspaper published in the city, town, or place where the works will be made, or if there is no such newspaper, then in a newspaper published in the county where the city, town, or place or some part thereof is situate, and if there be none, then in one published in the adjoining county, and the advertisement must also be inserted once at least in the *London Gazette* (*i*).

The notice is to be included in one advertisement, headed with a short title descriptive of the undertaking or application, and is to state the objects of the application, specifying such of the following when comprised among the objects of the application:—(1) Extension of time for completion of works already authorised; (2) power for a company to amalgamate with another; (3) power to sell, purchase, lease, or take on lease an undertaking; (4) amendment or repeal of any local or special Act of Parliament or of any former provisional order; (5) power to levy any tolls, rates, or duties, or to alter any existing tolls, rates, or duties; (6) the conferring, varying, or extinguishing of any exemption from tolls, rates, or duties, or of any other right or privilege; (7) constitution or alteration of the constitution of any harbour authority, and also a general description of the nature of the proposed works, the times and places at which the copy of the advertisement and of the plans and sections of the

SECT. 1.  
Harbours,  
Docks and  
Piers.

Completion  
of works.

Notice of  
intention.

Contents of  
notice.

(*f*) Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), ss. 25, 26, 33. As to the liability of a dock owner for the condition of the dock, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 647, 648; *Pymon Steamship Co. v. Hull and Barnsley Railway*, [1914] 2 K. B. 788.

(*g*) *Ibid.*, ss. 14, 15. As to the provision of a lifeboat and rocket apparatus, tide-gauge and barometer, lighthouses, buoys and beacons, see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 645.

(*h*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), ss. 2, 3; General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), s. 3.

(*i*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), Sched. B, Part I., (3), (4).

SECT. 1.  
Harbours,  
Docks and  
Piers.

Deposits.

works will be made, and an office in London, or at the place to which the application relates, at which printed copies of the draft provisional order may be obtained (*k*).

**813.** On or before the 30th November there must be deposited at the Board of Trade and at the office of the clerk of the peace for the county, riding, or division in which the works or any part thereof are to be, a copy of the advertisement, and a proper plan and section, prepared according to such regulations as the Board of Trade may from time to time prescribe, of the proposed works (*l*).

On or before the 23rd December there must be deposited at the Board of Trade:—(1) the memorial of the persons asking for the provisional order, signed by one of them, headed in the same way as the advertisement, addressed to the Board of Trade and praying for a provisional order; (2) a printed draft of the provisional order as prepared by the memorialist; and (3) an estimate of the expense of the proposed works signed by the person making it. Printed copies of the proposed provisional order must also be deposited for public inspection at the custom-house, if any, of the port, outport, or creek to which the application relates (*m*).

Security for  
expenses.

**814.** The Board of Trade before making any order may require and take security for the payment of costs, charges, and expenses necessarily incurred by the Board in relation to the order (*n*).

Restrictions  
on making  
of order.

**815.** A provisional order, except such as relates to the levying of rates only, cannot be made without the consent of the Commissioners of Woods and Forests (*o*), and no order may abrogate or prejudice the right of His Majesty in right of his Crown, or of his Duchy or County Palatine of Lancaster, or of the Crown or Duke of Cornwall in right of that Duchy (*p*), or extend or be applicable to the Port of London or the river Thames, the port and harbour of Liverpool or the river Mersey, the port and harbour of Glasgow and the river Clyde, the port and harbour of Sunderland and the river Wear, the port of Kingston-upon-Hull or the river Humber, or the river Tyne or the port and harbour of Newcastle-upon-Tyne (*q*). Moreover, the promoter cannot obtain authority either by the provisional order or by any Act confirming the same to do anything to prejudice or affect any right, privilege, power, jurisdiction, or authority belonging to any person by charter, prescription, or local, personal, or private Acts for the purpose of executing any works such as are contemplated by the provisional order, or for the management or conservancy thereof, or for protecting the navigation of any tidal water or navigable river, or for making any river navigable, or

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(*k*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), Sched. B, Part I. Any person applying for a copy of the draft provisional order is entitled to have one on payment of 1s. (*ibid.*, Part III.).

(*l*) *Ibid.*, s. 3, Sched. B, Part II.

(*m*) *Ibid.*, s. 5, Sched. B, Part III.

(*n*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 4.

(*o*) *Ibid.*, s. 10.

(*p*) *Ibid.*, ss. 11, 12.

(*q*) *Ibid.*, s. 13.

otherwise improving, maintaining, or continuing the navigable passage thereof or any works connected therewith, or which shall, or shall tend to, prejudice or injuriously affect the access to and from any quay, pier, harbour, basin, dock, or inland navigation or the channels or passages thereof or leading thereto or therefrom, or the use and enjoyment of any quay, harbour, basin, dock, or inland navigation without the consent in writing of such person (*r*).

The Board of Trade cannot make any provisional order taking away or abridging any right, privilege, power, jurisdiction, or authority given or reserved to any person or corporation by any local or special Act of Parliament without their consent in writing (*s*).

**816.** After such inquiries as the Board of Trade may think expedient, and with the consent of the Commissioners of Woods and Forests and, if required, of such persons mentioned above whose consent in writing is necessary, the Board may make a provisional order, but any such order is subject to the following provisions, namely: it must specify who are to be the undertakers, and may provide for the election or appointment of commissioners as undertakers, and may incorporate them. It may empower the undertakers to take a limited amount of land on lease or otherwise (*t*) by agreement, to levy and recover rates, to make and alter bye-laws for the management of the works subject to the approval of quarter sessions, and to borrow on mortgage or bond to a limited extent on the security of the rates with provision for payment of interest and repayment of principal (*u*).

**817.** The provisional order may also incorporate by reference the Commissioners Clauses Act, 1847 (*w*), the Companies Clauses Consolidation Act, 1845 (*x*), the Lands Clauses Consolidation Act, 1845 (*y*), or any part thereof, except such part of the Lands Clauses Consolidation Act, 1845 (*y*), as relates to purchase of lands otherwise than by agreement, and provide for the due audit of the accounts and receipt and expenditure at the works (*z*).

In every provisional order made after 1862 the provisions of the Harbours, Docks, and Piers Clauses Act, 1847 (*a*), except when specially excepted, are incorporated therein (*b*).

SECT. 1.  
Harbours,  
Docks and  
Piers.

Contents of  
order.

Incorporated  
statutes.

(*r*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 14.

(*s*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), s. 25.

(*t*) Presumably this includes power to purchase in fee, because by the General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 20, the undertakers may grant in fee to the Secretary of State for War lands for the erection of fortifications for the protection of the harbour.

(*u*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 15. As to the power of borrowing from the Public Works Loan Commissioners, see p. 419, *post*.

(*w*) 10 & 11 Vict. c. 16.

(*x*) 8 & 9 Vict. c. 16; see title COMPANIES, Vol. V., pp. 674 *et seq.*

(*y*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*z*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 15.

(*a*) 10 & 11 Vict. c. 27; see pp. 413 *et seq.*, *ante*.

(*b*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), s. 19.



## SECT. 1.

Harbours,  
Docks and  
Piers.Deposit of  
order.Confirmation  
of order.Supervision  
of Board of  
Trade.

**818.** After the provisional order is made, a copy must be deposited with the clerk of the peace for the county, riding, or division in which the works referred to in the order are situate; and a notice of such deposit must be published in some newspaper circulated in that county (*c*).

**819.** After the Board of Trade has been certified that the deposit and notice have been made, and that fourteen days have elapsed since such advertisement, the Board must introduce a Bill in Parliament to confirm the order; but the order has no validity until confirmed (*d*). Petitions against the provisional order may be lodged, and petitioners are allowed to appear and oppose when the Bill is in committee as in the case of private Bills (*e*).

**820.** Before commencing the construction of any works authorised by the provisional order there must be deposited with the Board of Trade for its approval working drawings of the whole of the works, and the works must not be constructed otherwise than in accordance with such approval (*f*). After the works are commenced or constructed they must not be altered or extended without first obtaining the like approval (*g*).

The Board of Trade may, at the expense of the undertakers, at any time cause a local survey and examination of the works (*h*), and may, if any works have been commenced, constructed, altered, or extended without the Board's approval, at the like expense abate and remove them, and restore the site to its former condition (*i*). If any work is allowed to fall into disuse or decay, the Board may at the expense of the undertakers either repair and restore it, or abate and remove it (*j*). During the whole time of construction such lights for the guidance of vessels as the Board specifies must be exhibited and kept burning every night between sunset and sunrise (*k*). The works must be completed within five years after the passing of the Act confirming the provisional order, or within such time as the provisional order directs, and after such time the power of the order ceases except as to so much of the works as is completed (*l*).

SUB-SECT. 2.—*Financial Assistance from Local Authorities.*Power to  
assist.

**821.** The council of any county or of any urban or rural district

(*c*) General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), s. 16.

(*d*) *Ibid.*,

(*e*) *Ibid.*, s. 17; see title PARLIAMENT, Vol. XXI., pp. 747 *et seq.*

(*f*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), s. 7.

(*g*) *Ibid.*,

(*h*) A pier which is not constructed in accordance with the provisional order is a nuisance (*Liverpool and North Wales Steamship Co., Ltd. v. Mersey Trading Co., Ltd.*, [1908] 2 Ch. 460, *per* NEVILLE, J., at p. 473; affirmed, without deciding this point, [1909] 1 Ch. 209, C. A.).

(*i*) General Pier and Harbour Act, 1861, Amendment Act (25 & 26 Vict. c. 19), ss. 7, 9.

(*j*) *Ibid.*, s. 8.

(*k*) *Ibid.*, s. 11. Omission to do this entails a penalty not exceeding £10 for each offence (*ibid.*).

(*l*) *Ibid.*, s. 12.

may be empowered to assist financially any public body<sup>(m)</sup> authorised by a provisional order under the General Pier and Harbour Act, 1861<sup>(n)</sup>, to raise a loan for the construction of any works as defined in that Act in any place. The council may do this when empowered by that or any other order to do so, and if it thinks fit, for the benefit of the inhabitants of the place<sup>(o)</sup>.

SECT. 1.  
Harbours,  
Docks and  
Piers.

**822.** To provide such assistance the council is enabled to charge any fund or rate under its control for the purpose of aiding the public body in raising such loan or any part thereof from the Public Works Loan Commissioners, or by guaranteeing the principal and interest of the loan, or by borrowing the required sum and advancing it to the public body, or partly in one of these ways and partly in another, or in any other manner provided by the order<sup>(p)</sup>.

Method of  
assistance.

**823.** The order must require a special resolution of the council to give the guarantee, that is, a resolution passed at one meeting of the council, published as directed by the order, and confirmed at a second meeting held not less than fourteen days after the first of such public notices has been given, and not less than three months after the first meeting<sup>(q)</sup>.

Contents of  
order.

The order must also provide for the time and mode in which the money borrowed by the council is to be repaid, for the effectual recovery out of the fund or rate of the sum guaranteed and of the principal and interest, for the reimbursement of the fund or rate out of the income of the works or otherwise by the public body, and such other incidental provisions as may be necessary<sup>(r)</sup>.

**824.** The promoters of the order proposing to confer such power on the council must, a reasonable time before applying to the Board of Trade to settle the order, submit to the Local Government Board a statement of the proposal. If the latter Board declares that in its opinion the financial condition of the council does not warrant the proposed liability, the proposed provision for conferring such power must be omitted from the order<sup>(s)</sup>.

Sanction  
of Local  
Government  
Board.

**825.** When the aggregate amount of principal due by any harbour authority to the Commissioners under the Harbours and Passing Tolls, etc. Act, 1861<sup>(t)</sup>, exceeds £100,000, the rate of interest on the

Rate of  
interest.

(m) The expression "public body" means any rating authority, *i.e.*, any county council, or urban or rural district council, or any commissioners or trustees or other body who manage or undertake the works without any view to the payment of any dividend or profits out of the revenue from such works (Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), s. 7; Public Works Loans Act, 1887 (50 & 51 Vict. c. 37), s. 4).

(n) 24 & 25 Vict. c. 45.

(o) Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), s. 7 (1).

(p) *Ibid.* As to loans from the Public Works Loan Commissioners, see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*; as to the borrowing powers of local authorities generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 282, 283, 317, 337, 361.

(q) Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), s. 7 (2).

(r) *Ibid.*, s. 7 (3).

(s) *Ibid.*, s. 7 (4).

(t) 24 & 25 Vict. c. 47.

SECT. 1.  
Harbours,  
Docks and  
Piers.

excess is  $3\frac{1}{2}$  per cent., or such higher rate, not exceeding 4 per cent., as will in the judgment of the Treasury secure the Exchequer against loss (u).

SUB-SECT. 3.—*Maintenance and Repair.*

Loans.

**826.** For the purpose of maintaining (v) a public harbour, as well as for its construction, improvement, and lighting, or for carrying into effect any other shipping purpose (w), a harbour authority may, with the written consent of the Board of Trade, whether it has or has not power to borrow under a special Act (a), obtain a loan from the Public Works Loan Commissioners of such sum of money as may be required subject to the following conditions, namely:—When the amount borrowed does not exceed £100,000, the interest is  $3\frac{1}{2}$  per cent. ; over that amount, interest is payable on the excess at  $3\frac{1}{2}$  per cent., or such higher rate not exceeding 5 per cent. as the Treasury thinks necessary to enable the loan to be made without loss to the Exchequer (b).

A loan must be repaid within fifty years (c), and is secured

(u) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 10 ; Public Works Loans Act, 1892 (55 & 56 Vict. c. 61), s. 2.

(v) For provisions for the safety of harbours, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 643, 644. As to the liability of a dock owner, see note (f), p. 415, *ante*.

(w) "Harbours" here includes harbours properly so-called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works in or at which ships can obtain shelter or ship and unship goods or passengers ; and "shipping purposes" includes the constructing or doing any work or thing that conduces to the safety or convenience of ships or that facilitates the shipping or unshipping of goods and the management and superintending the same and the maintenance of any lifeboat or other means of preserving life in case of shipwreck (Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 2).

(a) Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), ss. 20, 21. This does not apply to a company which by its special Act is restricted from borrowing until a definite portion of capital is subscribed for or taken or paid up (*ibid.*). Loans made under the Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), and the above Act are not thereby given equality as to order of charge or of payment of principal or interest with any loan made or to be made under any special Act, except only as to such portion (if any) of the moneys raised under the Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), as might have been raised under the special Act solely. As to the power of the Public Works Loan Commissioners to grant priority to mortgagees other than themselves, see Public Works and Fisheries Acts Amendment Act, 1863 (26 & 27 Vict. c. 81) ; and see title MONEY AND MONEY-LENDING, Vol. XXI., p. 60, note (g). For the special provisions relating to the Port of London Authority, see Port of London Act, 1908 (8 Edw. 7, c. 68), ss. 6, 18—20.

(b) Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 3. The power of borrowing also includes power to borrow for purposes of paying off debts having priority over security for loans by Public Works Loan Commissioners (Public Works and Fisheries Acts Amendment Act, 1863 (26 & 27 Vict. c. 81), s. 4). As to the powers of local authorities to guarantee a loan made by the Public Works Loan Commissioners to a harbour authority for the construction of works under a provisional order, see Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), s. 7 ; Public Works Loans Act, 1887 (50 & 51 Vict. c. 37), s. 4 ; and pp. 418, 419, *ante*.

(c) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 10, 11 ; Public Works Loans Act, 1911 (1 & 2 Geo. 5, c. 17), s. 4. In certain cases the Board of Trade may authorise the suspension of the sinking fund (Harbour Loans Act, 1866 (29 & 30 Vict. c. 30), s. 1).



upon all or any of the rates leviable by the harbour authority either alone or together with such other property or income as may be agreed on (*d*).

SECT. 1.  
Harbours,  
Docks and  
Piers.

**827.** When the harbour authority has power to levy rates and tolls immediately or prospectively, or is or may be entitled to any other income or property applicable to shipping purposes, it may borrow on the security of such rates, tolls, income, or property, or any part thereof (*e*).

Security.

**828.** If the harbour authority is the proprietor of a private harbour, money cannot be borrowed unless such regulations are made in respect of rates to be taken and the user of the harbour by the public as the Board of Trade approves (*f*).

Private  
harbours.

For the purpose of making and enforcing such regulations an Order in Council may be made declaring that the Harbours, Docks, and Piers Clauses Act, 1847 (*g*), applies to such harbour, and fixing a schedule of rates to be taken therein (*h*).

**829.** If the proprietor of such a harbour is only entitled to a limited estate therein, he may make his loan a charge on his estate and on the estate and interest of every person taking under the same settlement any estate or interest in such harbour in defeasance or expectancy or by destination on the determination of such limited estate, but the charge is subject to all incumbrances on the harbour subsisting at the time of the charge; and no advance may be made to any person entitled to a limited estate so as to charge the estate or interest of any person taking in defeasance or expectancy or by destination, except an amount specified in a certificate issued by the Board of Trade, and such certificates may only be issued when it has been proved to the satisfaction of the Board of Trade that the amount specified in such certificate has been properly expended upon the harbour (*i*).

Limited  
owners.

## SECT. 2.—Wharves.

### SUB-SECT. 1.—Access.

**830.** A wharfinger has a right of access to the water from the part of the wharf which fronts the river, and he may also have a similar right of access from the sides of his wharf (*j*).

Right of  
access.

(*d*) Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 3 (2)—(4).

(*e*) *Ibid.*, s. 3 (5). For the purpose of such loans to harbour authorities, the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), with respect to mortgages by commissioners applies, except when inconsistent with the Public Works Loans Act and Acts therein mentioned (Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 3 (6)).

(*f*) *Ibid.*, s. 3 (7).

(*g*) 10 & 11 Vict. c. 27; see p. 413, *ante*.

(*h*) Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 3 (7).

(*i*) *Ibid.*, s. 3 (8), (9).

(*j*) As to rights of access, see, generally, *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; and pp. 393 *et seq.*, *ante*. In some rivers under the jurisdiction of conservators it is the practice to license the building of wharves with a right of access from the front only and not from the sides.

## SECT. 2.

## Wharves.

Extent of  
right.

**831.** The right of access is not necessarily co-extensive at all times with and limited to the riparian frontage, for a wharfinger may moor to his wharf a vessel of such a length as to overlap his neighbour's frontage, such a vessel being entitled in the ordinary course of navigation to navigate to the wharf and to be there for a reasonable time (*k*).

Overlapping  
vessel.

The rights of both riparian owners in this respect are, however, equal, neither having the right to the exclusive occupation of the space in front of his land for all time, and each being only entitled to use it at such times as are properly required for the exercise of his right of access (*l*). If, therefore, the neighbour wishes to use the access to his land, the overlapping vessel must be moved; and a person who places a vessel or other object in front of his land so as to prevent a ship getting to his neighbour's wharf is guilty of an unlawful obstruction of the right of navigation up to the wharf (*m*).

Passing over  
obstruction.

**832.** Where a person is entitled to access to a wharf he may pass over any vessel or object that is placed in front of the wharf which interferes with his right of access (*n*).

SUB-SECT. 2.—*Remuneration for Use of Wharf.*

Rates.

**833.** A man for his own private advantage may set up a wharf and may take what rates he and his customers can agree, but when the wharf is a public wharf, that is, a wharf to which anyone is entitled or bound to come, then the rates must be reasonable and moderate (*a*).

Deposit of  
goods.

**834.** When goods have been deposited with a wharfinger under the authority of the Merchant Shipping Act, 1894 (*b*), Part VII., he is entitled to rent in respect of the same, and may at the expense of the owner of the goods do all such reasonable acts as he thinks necessary for their proper custody and preservation, and he has a lien on the goods for the rent and expenses (*c*).

Whenever goods are deposited with a wharfinger subject to a lien

(*k*) *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713 (obstructing access to a dock by a vessel overlapping from a neighbouring wharf, and mooring timber in front of dock to prevent vessel going to such wharf).

(*l*) *Dalton v. Denton* (1857), 1 C. B. (N. S.) 672 (wharfinger who places a projection from the wharf which an overlapping vessel on the fall of the tide damaged, is not entitled to recover damages).

(*m*) *Original Hartlepool Collieries Co. v. Gibb*, *supra*; *Land Securities Co., Ltd. v. Commercial Gas Co.* (1902), 18 T. L. R. 405. Wharfingers sometimes agree days when each shall use the berth at the wharf; see *South Wales and Liverpool Steamship Co., Ltd. v. Nevill's Dock and Rail Co., Ltd.* (1913), 108 L. T. 568.

(*n*) *Eastern Counties Rail. Co. v. Dorling* (1859), 5 C. B. (N. S.) 821.

(*a*) Hale, de Portibus, c. 6 (Hargrave, Law Tracts, pp. 77, 78); *London County Council v. General Steam Navigation Co., Ltd.* (1907), 97 L. T. 863, C. A. The owner of a wharf for which rates are settled by Parliament may, if he gives special facilities to persons landing at their request, make additional charges to the rates authorised (S. C. (1907), 96 L. T. 57). As to the appointment of legal and sufferance wharves for the deposit of customable goods, see Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 11, 14, 15.

(*b*) 57 & 58 Vict. c. 60, ss. 492—501; see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 279 *et seq.*

(*c*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 499. A wharfinger here means the occupier of a wharf, quay, dock, or premises in or

for freight, and the lien is not discharged, and no deposit of a sum equal in amount to the lien is made, the wharfinger may, and if required by the shipowner shall, at the expiration of ninety days from the time the goods were deposited, or, if the goods are of a perishable nature, at such earlier time as he thinks fit, sell them by public auction, and from the proceeds he may deduct the expenses of the sale and his rent, rates, and charges (*d*).

When the goods are deposited in other circumstances the wharfinger has the ordinary lien of a bailee for his charges (*e*).

**835.** If the wharf is part of a harbour, dock, or pier constructed under a special Act which incorporates the Harbours, Docks, and Piers Clauses Act, 1847 (*f*), and is owned by the harbour, dock, or pier authority, the authority is entitled to such remuneration for the use of the wharf as is specified in such special Act, and can enforce the payment thereof as directed by the Harbours, Docks, and Piers Clauses Act, 1847 (*g*).

SECT. 2.  
Wharves.

Statutory  
charges

SUB-SECT. 3.—*Obligations of the Wharfinger.*

**836.** As incidental to his business, a wharfinger may transport his customers' goods from their ships to his wharf, and, so long as he does not hold himself out as ready to carry goods for persons other than his customers, he is only liable for negligence, and is not subject to the common law liability of a common carrier (*h*).

Safety of  
goods.

**837.** A wharfinger who for the purpose of profit to himself invites a ship to come to his wharf must give notice if there is any hidden danger attaching to the wharf or the berth alongside it, and if he has not satisfied himself that the berth alongside is reasonably fit, it is his duty to warn those in charge of the ship that he has not done so (*i*). He is also liable for the consequence of any orders

Safety of  
berth.

upon which any goods when landed from ships may be lawfully placed (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 492).

(*d*) *Ibid.*, ss. 497, 498. As to the shipowner's lien for freight, see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 283, 284.

(*e*) *Moet v. Pickering* (1878), 8 Ch. D. 372; *Naylor v. Mangles* (1794), 1 Esp. 109; *Spears v. Hartly* 1800, 3 Esp. 81. The wharfinger may also exercise his lien in respect of the balance of a general account as well as for his charges unless there is a local custom to the contrary (*Holderness v. Collinson* (1827), 1 Man. & Ry. (K. B.) 55). As to the powers and obligations of wharfingers, see, further, title BAILMENT, Vol. I., p. 547.

(*f*) 10 & 11 Vict. c. 27; see p. 413, *ante*.

(*g*) 10 & 11 Vict. c. 27, ss. 43, 44, 68; see pp. 414, 415, *ante*. As to charges in the port of London, see Port of London Act, 1908 (8 Edw. 7, c. 68), ss. 13—15, 23 (2), 27, 43; Port of London (Port Rates on Goods) Provisional Order Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. c.), Schedule: *The Katherine* (1913), 30 T. L. R. 52 ("dues"); *British Oil and Cake Mills Ltd. v. Port of London Authority*, [1914] 1 K. B. 5; *Anglo-American Oil Co. Ltd. v. Port of London Authority*, [1914] 1 K. B. 14.

(*h*) *Consolidated Tea and Lands Co. v. Oliver's Wharf*, [1910] 2 K. B. 395; *Sideways v. Todd* (1818), 2 Stark. 400; see title CARRIERS, Vol. IV., p. 3. A wharfinger may, however, by custom be in the same position as a common carrier (*North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* (1877), 5 Ch. D. 569, C. A., *per* JESSEL, M. R., at pp. 573, 574).

(*i*) *White v. Phillips* (1863), 15 C. B. (N. S.) 245; *Curling v. Wood* (1847), 16 M. & W. 628, Ex. Ch.; *The Moorcock* (1889), 14 P. D. 64, C. A.; *Tredegar*



SECT. 2. given by him to the ship, if when so doing negligence can be proved  
 Wharves. against him (k).

## Part V.—Rights and Obligations in Respect of Water.

### SECT. 1.—*Water Flowing in a Known Channel.*

#### SUB-SECT. 1.—*General Nature of Riparian Rights.*

Extent of  
rights.

**838.** Every riparian owner (a) on a natural watercourse flowing in a known and defined channel (b), whether on the surface of the land or below it, or in an artificial channel of a permanent character (c), has as incident to his property in the riparian land a proprietary right to have the water flow to him in its natural state in flow, quantity, and quality, neither increased nor diminished, whether he has yet made use of it or not. He has also the right that the water shall go from his lands without obstruction (d), and he is entitled to make certain uses of the water which comes to him whilst it is on his property (e).

Known and  
defined  
channel.

By "known" is meant the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground; the word is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. "Defined" means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge (f).

*Iron and Coal Co. v. Steamship "Calliope" (Owners), The "Calliope,"* [1891] A. C. 11; *The Burlington* (1895), 72 L. T. 890, C. A.; *The Bearn*, [1906] P. 48, C. A.

(k) *Cory & Son, Ltd. v. France, Fenwick & Co., Ltd.*, [1911] 1 K. B. 114, C. A.

(a) This means the owner of land in actual contact with the watercourse. The distance the land extends back from the watercourse has no bearing on the definition; compare *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478, where the plaintiff bought from the defendant a piece of riparian land for the purpose of gaining a right of action for pollution; see p. 358, *ante*. As to the meaning of "actual contact," see *A.-G. v. Rowley Brothers and Oxley* (1910), 75 J. P. 81. See also title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 588.

(b) As to the meaning of "known" and "defined," see the text, *infra*.

(c) *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427; *Bailey & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649, C. A.

(d) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839, 854; *Mason v. Hill* (1833), 5 B. & Ad. 1; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Claxton v. Claxton* (1873), 7 I. R. C. L. 23. The lower riparian owners must not interfere and stop the flow to their land, whilst the upper riparian owners must not send the water down in an irregular way so that it does damage (*Robinson v. Byron (Lord)* (1785), 1 Bro. C. C. 588; see p. 425, *post*).

(e) *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, C. A.; *Sandwich (Earl) v. Great Northern Rail. Co.* (1878), 10 Ch. D. 707; *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch. As to water rights of riparian owners generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 311 *et seq.* As to pollution, see pp. 432 *et seq.*, *post*.

(f) *Black v. Ballymena Township Commissioners* (1886), 17 L. R. Ir.

**839.** This right of every riparian owner does not depend on prescription, grant, or acquiescence of the riparian owner above, but arises *ex jure naturæ* as an incident of the land through which the water passes (*g*). For flowing water is *publici juris* only to the extent that all may reasonably use it who have a right of access to it, and that no one can have any property in the water itself, except in the particular portion which he may choose to abstract and possess (*h*).

SECT. 1.  
Water  
Flowing in  
a Known  
Channel.

Origin of  
rights.

SUB-SECT. 2.—*Rights Relating to Quantity of Water.*

(i.) *In General.*

**840.** Although every riparian owner is entitled to enjoy the water which comes to him, the general rule above mentioned is subject to certain qualifications with respect to the quantity of water to which each riparian owner is entitled to receive, for he has not an absolute and exclusive right to the flow of all the water in the channel, but his right is always subject to the similar rights of all the proprietors of the lands on each side of the watercourse to the reasonable enjoyment thereof, and he must so use and apply the water as to work no material injury or annoyance to his neighbours opposite, above or below him, who have an equal right to the use of the water and an equal duty towards him (*i*).

Rights of  
other owners.

(ii.) *Abstraction.*

**841.** Every riparian owner has the right to take water from a natural stream for all ordinary purposes, namely, *ad lavandum et ad potandum*, or for domestic purposes, such as drinking and culinary purposes, cleansing, and washing, feeding, and supplying the ordinary quantity of cattle on his land etc. (*k*). If, in the exercise of his ordinary rights, a riparian owner exhausts the water altogether, the lower riparian owners cannot complain (*l*).

Ordinary  
purposes.

459; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655.

(*g*) *Embrey v. Owen* (1851), 6 Exch. 353; *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282.

(*h*) *Chasemore v. Richards*, *supra*; *Embrey v. Owen*, *supra*; *Bealey v. Shaw* (1805), 6 East, 208; *Saunders v. Newman* (1818), 1 B. & Ald. 258; *Williams v. Morland* (1824), 2 B. & C. 910.

(*i*) *Embrey v. Owen*, *supra*; *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47. Where a stream to a mill was let down by a mine-owner, but the banks were raised so that there was no actual damage in the supply of water to the mill, the mill-owner, though entitled to protection, was refused an injunction on the mine-owner undertaking not to do further damage (*Elwell v. Crowther* (1862), 8 Jur. (N. S.) 1004). When there is a probability that the upper proprietor who is obstructing a stream will take means to pass on the right amount of water, an injunction need not be granted (*Edleston v. Crossley & Sons, Ltd.* (1868), 18 L. T. 15).

(*k*) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697, 704; *Owen v. Davies*, [1874] W. N. 175.

(*l*) *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301, overruling *Sandwich (Earl) v. Great Northern Rail. Co.* (1878), 10 Ch. D. 707; *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131. But it is a nuisance to withdraw the water from a navigable river to such an extent as to affect the right of navigation (*Hind v. Manfield* (1614), Noy, 103; and see *Medway Navigation Co. v. Romney (Earl)* (1861), 9 C. B. (N. S.) 575,

SECT. 1.  
Water  
Flowing in  
a Known  
Channel.

Effect of  
non-user.

Extra-  
ordinary  
purposes.

Reasonable  
enjoyment.

Irrigation.

Interception  
at source.

If a riparian owner does not require the water for these purposes, he may not appropriate to other purposes the amount which he would be entitled to take for domestic purposes (*m*).

He has also the right to use the water power caused by gravitation by weirs or other contrivances erected in the bed (*n*).

**842.** A riparian owner is not bound to use the rights that his riparian ownership gives him, but he may begin to do so whenever he likes, and he can maintain an action against any other riparian owner for any act which may infringe his rights, though he has never used them (*o*).

**843.** Besides the ordinary use of water mentioned above, a riparian owner has the right to use the water for any other purposes (which may be deemed an extraordinary use of water), provided that by so doing he does not interfere with the rights of other riparian owners above or below him (*p*).

**844.** He is entitled to the reasonable enjoyment of water as it passes his land as a natural incident of the ownership of the land (*q*).

**845.** A riparian owner may use the water for the irrigation of his land if he returns it into the river opposite his land with no other diminution than that caused by absorption or evaporation attendant on the irrigation, but what amount of water for irrigation he may take depends on the circumstances of each case and on the rule that he must work no material injury to the riparian owners on the river below him (*r*).

**846.** In the case of streams issuing from the earth and flowing in a natural channel to a stream, the owner of the ground from which the stream issues may not monopolise the water at its source so as to prevent it reaching the lands of riparian owners lower down the channel (*s*), but if, before it reaches a natural channel, it squanders itself over the land, and flows not in a defined channel,

where the navigation was not in fact impeded, but more water was drawn off than was consistent with the purposes of the usual riparian user).

(*m*) *A.-G. v. Great Eastern Rail. Co.* (1870), 18 W. R. 1187; affirmed (1871), 6 Ch. App. 572.

(*n*) *Hamelin v. Bannerman*, [1895] A. C. 237, P. C.; *Belfast Ropeworks Co. v. Boyd* (1888), 21 L. R. Ir. 560, C. A.

(*o*) *Sampson v. Hoddinott* (1857), 1 C. B. (N. S.) 590.

(*p*) *Ibid.*; *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131; *Sharp v. Wilson, Rotheray & Co.* (1905), 93 L. T. 155.

(*q*) *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121, P. C.

(*r*) *Embrey v. Owen* (1851), 6 Exch. 353. For a person to detain the water on his land so that it reaches his neighbour's land too late to be fully used by him is an injury of which the neighbour may complain (*Sampson v. Hoddinott, supra*). Where there is a right to irrigate it is immaterial what means are taken to turn the water on to the land, provided that not more than the lawful quantity of water is diverted (*Green-slade v. Halliday* (1830), 6 Bing. 379).

(*s*) *Dudden v. Clutton Union Guardians* (1857), 1 H. & N. 627; compare *French Hoek Commissioners v. Hugo* (1885), 10 App. Cas. 336, P. C., approving *Miner v. Gilmour, supra*, and *Van Breda v. Silberbauer* (1869), L. R. 3 P. C. 84.



or flows through an artificial channel, the owner of such land may appropriate it to his own use or divert it (*t*). Building a well round the place where the stream issues from the earth to improve its mode of issue therefrom, thus making it flow in an artificial channel for a short distance, does not destroy the natural character of the stream so as to entitle the owner of the land on which the spring is to appropriate the water to his own use (*u*). If the stream reaches the place where it issues from the earth by percolation, the owner of the ground may intercept the percolating water and use it as he pleases (*a*).

SECT. 1.  
Water  
Flowing in  
a Known  
Channel.

**847.** Where a person has acquired the right to abstract water from a natural channel for a particular purpose, he cannot use it for other purposes (*b*), or increase the amount he takes. Thus, if he has acquired the right to have a pond replenished from a river, he may cleanse the pond, but he must not enlarge it, so that thereby a greater quantity of water be taken from the river (*c*). Similarly, if he has the right to take water by a channel of a certain size, he may not enlarge it so as to divert more water to the prejudice of another proprietor (*d*). Limited user.

**848.** A riparian owner may grant to the owner of land not abutting on the stream a right to abstract water therefrom, or may supply him with water, provided that he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbours (*e*); but the owner of the back land does not thereby acquire any rights as against other riparian owners, unless his grantor has appropriated the water to a beneficial use before delivering it to the back landowner (*f*). Grant of  
water.

**849.** The abstracting of water for the purpose of supplying a town is not only an extraordinary use of water, but is not a right which pertains to riparian ownership at all, and if by this means the common law rights of a riparian owner are injuriously affected, the abstraction may be stopped without proof of sensible injury having been done (*g*). Supply to  
town.

(*t*) *Broadbent v. Ramsbotham* (1856), 11 Exch. 602, approved in *Chase-more v. Richards* (1859), 7 H. L. Cas. 349; *Ennor v. Barwell* (1860), 2 Giff. 410. An upper riparian owner cannot restrain the sale of water by a lower owner (*Bunting v. Hicks* (1894), 70 L. T. 455, C. A.).

(*u*) *Mostyn v. Atherton*, [1899] 2 Ch. 360 (St. Winifred's Well). As to the powers of a local authority to divert the waters of a private well, see *ibid*.

(*a*) See p. 430, *post*.

(*b*) *A.-G. v. Great Eastern Rail. Co.* (1871), 6 Ch. App. 572, affirming *S. C.* (1870), 18 W. R. 1187.

(*c*) *Brown v. Best* (1747), 1 Wils. 174; see also *Holker v. Porritt* (1875), L. R. 10 Exch. 59, Ex. Ch.

(*d*) *Bealey v. Shaw* (1805), 6 East, 208.

(*e*) *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Norbury (Lord) v. Kitchen* (1863), 9 Jur. (N. S.) 132 (one-fortieth of the bulk of the stream taken); *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155, C. A. (the water may be supplied by means of pumping machinery).

(*f*) *Holker v. Porritt*, *supra*.

(*g*) *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697; *Roberts v. Gwyrfa District Council*, [1899] 2 Ch. 608, C. A.; *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301.

## SECT. 1.

Water  
Flowing in  
a Known  
Channel.Passage of  
fish.Working of  
mines.Manufac-  
turing pur-  
poses.How far  
diversion  
permissible.

**850.** An upper riparian owner, though he sustains no injury in respect of the quantity of water which flows from his land by the abstraction of a lower owner, may yet complain thereof, if the abstraction has the effect of preventing fish from ascending to his waters (*h*).

A lower riparian owner may not do anything to obstruct the passage of fish which is not essentially necessary to enable him to exercise his right of catching fish in their passage up the river (*i*).

**851.** In the ordinary course of mining a mine-owner may draw the subterranean percolating water from his neighbour's land, but he must not so work his mines as to drain off the water flowing in a defined channel on his neighbour's land (*k*).

**852.** In the course of using water for manufacturing purposes it often happens that an appreciable quantity is lost, with the result that the lower riparian owner does not receive the quantity of water to which he as such owner is entitled. If, to obviate this, the manufacturer turns into the stream before it leaves his land water obtained from other sources to compensate for the water lost by the manufacturing process, thus giving the lower riparian owner the quantity he is entitled to, this is no defence to an action by such owner, for he is entitled to have the natural water of the stream, and is not bound to receive foreign water, since he cannot object to a stoppage or obstruction of the foreign supply of water (*l*).

(iii.) *Diversion.*

**853.** Every riparian owner may divert the water of a stream for purposes in connexion with his land, or for other purposes (*m*); but he is bound to return the water which he has diverted into the stream again before it leaves his land substantially undiminished

(*h*) *Pirie (Alex.) & Sons, Ltd. v. Kintore (Earl)*, [1906] A. C. 478 (injunction to restrain abstraction of water so as to impede the passage of salmon); *Weld v. Hornby* (1806), 7 East, 195 (altering weir with similar result); and see *Briscoe v. Drought* (1860), 11 I. C. L. R. 250.

(*i*) *Hamilton v. Donegall (Marquis)* (1795), 3 Ridg. Parl. Rep. 267.

(*k*) *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483; *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. (h); *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; *Blackrod Urban District Council v. Crankshaw (John) Co., Ltd.* (1913), 136 L. T. Jo. 239; compare *London and North-Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, C. A., approved in *Clippens Oil Co. v. Edinburgh and District Water Trustees*, [1904] A. C. 64; and see p. 455, *post*; and titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 321; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 590, 591.

(*l*) *Young (John) & Co. v. Bankier Distillery Co.*, [1893] A. C. 691; *Sharp v. Wilson, Rotheray & Co.* (1905), 93 L. T. 155; *Roberts v. Gwyrfaei District Council*, [1899] 2 Ch. 608, C. A.; *Brymbo Water Co. v. Lesters Lime Co.* (1894), 8 R. 329. Where an upper riparian owner alleges that he has increased the flow of a spring by artificial means, the water from which ought to flow to a lower owner, the burden of proof of the increased flow is on the upper owner (*Borough of Portsmouth Waterworks Co. v. London, Brighton and South Coast Rail. Co.* (1909), 73 J. P. (Journal) 624).

(*m*) *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131; *Nuttall v. Bracewell* (1866), L. R. 2 Exch. 1 (grant to a non-riparian owner of a flow of water to his mill; such grantee can recover damages against an upper riparian owner who has interfered with the flow); *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, C. A. (water used to cool condensers and returned to stream).

in volume and unaltered in character (*n*); for a lower riparian owner, subject to the rights of an upper owner, is entitled to have the water flowing in the natural bed of the stream come to him unaltered in quality and quantity, and to come to his land in its ordinary and accustomed channel (*o*).

An upper riparian owner must not enlarge the channel so as to prejudice a lower owner (*p*).

**854.** A riparian owner who diverts water altogether from a stream can be restrained without proof of actual damage, because his acts if continued long enough would crystallise into a right (*q*), and it is no defence that in place of the diverted water he has substituted an equal quantity of water from another source (*r*).

SECT. 1.  
Water  
Flowing in  
a Known  
Channel.

Restraining  
diversion.

(iv.) *Obstruction.*

**855.** Every riparian owner may build an erection on his land though covered with water, provided that it does not interfere with the rights of navigation, or the rights of other riparian owners (*s*).

Extent of  
right.

In this respect it is not necessary for the other riparian owner to prove actual or prospective damage; the mere fact that his common law rights are infringed is sufficient to entitle him to have the obstruction removed (*t*); for the bed of a stream must be preserved from all obstructions which can by reasonable possibility produce injury to any of the riparian owners (*a*).

**856.** Subject to this condition of non-interference with the rights of upper or lower riparian owners, a riparian owner may even dam up the stream for the purposes of his mill (*b*), for he has

Dams.

(*n*) *McCartney v. Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301, 307.

(*o*) *Kensit v. Great Eastern Rail. Co.* (1884), 27 Ch. D. 122, C. A.; *Sharp v. Wilson, Rotheray & Co.* (1905), 93 L. T. 155; *Young (John) & Co. v. Bankier Distillery Co.*, [1893] A. C. 691; *Shears v. Wood* (1822), 7 Moore (C. P.), 345; *Frankum v. Falmouth (Earl)* (1834), 6 C. & P. 529.

(*p*) *Bealey v. Shaw* (1805), 6 East, 208.

(*q*) *Harrop v. Hirst* (1868), L. R. 4 Exch. 43; *Norbury (Earl) v. Kitchin* (1866), 15 L. T. 501.

(*r*) *Young (John) & Co. v. Bankier Distillery Co.*, *supra*; *Sharp v. Wilson, Rotheray & Co.*, *supra*; and see p. 428, *ante*.

(*s*) *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839. As to obstructing the passage of fish, see p. 428, *ante*.

(*t*) *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47; *Roberts v. Gwyrfaï District Council*, [1899] 2 Ch. 608, C. A.; *M'Glone v. Smith* (1888), 22 L. R. Ir. 559, overruling on this point *Williams v. Morland* (1824), 2 B. & C. 910; *Embrey v. Owen* (1851), 6 Exch. 353; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282, 300; *Sampson v. Hoddinott* (1857), 1 C. B. (N. S.) 590. If there are two ways of abating an obstruction the less mischievous must be chosen; if one of these ways would cause injury to an innocent third party or to the public, it cannot be justified at all (*Roberts v. Rose* (1865), L. R. 1 Exch. 82, Ex. Ch.; *Hill v. Cock* (1872), 26 L. T. 185).

(*a*) *Palmer v. Perse* (1877), 11 I. R. Eq. 616; compare *Hanley v. Edinburgh Corporation*, [1913] A. C. 488.

(*b*) *White (John) & Sons v. White (J. and M.)*, [1906] A. C. 72, 80; *Miner v. Gilmour* (1858), 12 Moo. P. C. C. 131. The right to have a dam across a river may be acquired in private waters by grant from other riparian owners or by enjoyment, in short, by any means by which such rights may be constituted (*Rolle v. Whyte* (1868), L. R. 3 Q. B. 286, *per* COCKBURN, C.J., at p. 302). A licence to erect a dam at one spot will



SECT. 1.  
Water  
Flowing in  
a Known  
Channel.

an interest in the power which is to be derived from flowing water (*c*); but he must not thereby raise the level of the water as it flows past riparian lands above (*d*). The conversion by a riparian owner of a stream into a pond by placing a dam across it does not give him as owner of the dam an exclusive right to use the whole of the water, for he is bound to pass the water on to the lower riparian owners (*e*).

Injury to  
upper owner.

**857.** Obstructions must not be erected in a stream so as to throw back the water on to the lands of an upper riparian owner and thereby flood his lands or injure his mill, for each owner is entitled to have the water go from his lands in the ordinary course of nature (*f*); but a right to do this may be acquired as an easement (*g*).

Natural  
obstruction.

**858.** When an obstruction is a natural one, or formed by long natural accumulation, it must not be removed, if by so doing an injury would be inflicted on a lower riparian owner (*h*).

SECT. 2.—*Water Flowing in an Unknown Channel.*

Channel  
known and  
defined.

**859.** Water flowing underground in a known and defined channel is subject to the same rules of law as water flowing on the surface in a known channel (*i*).

Percolating  
water.

**860.** Where the underground water flows in a defined but unknown channel (*k*), or merely percolates or flows through the soil, the law as to the rights of riparian owners does not apply. The owner of land containing underground water which percolates or flows by unknown channels to a neighbour's land may divert or appropriate it as he pleases, so that his neighbour may have no underground water in his land, or so that the stream that he owns may be diminished in consequence of the underground water which

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not authorise its erection at another spot, so as to prevent the licensor from treating it as an obstruction (*Mason v. Hill* (1833), 5 B. & Ad. 1).

(*c*) *Hamelin v. Bannerman*, [1895] A. C. 237, P. C.; and such interest he can sell so as to bind himself (*ibid.*).

(*d*) *M'Glone v. Smith* (1888), 22 L. R. Ir. 559, overruling *Williams v. Morlands* (1824), 2 B. & C. 910; *Menzies v. Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414, H. L.; *Norbury (Earl) v. Kitchin* (1866), 15 L. T. 501; *Belfast Ropeworks Co. v. Boyd* (1888), 21 L. R. Ir. 560, C. A.; *Bickett v. Morris* (1866), L. R. 1 Sc. & Div. 47.

(*e*) *White (John) & Sons v. White (J. & M.)*, [1906] A. C. 72.

(*f*) *Saunders v. Newman* (1818), 1 B. & Ald. 258; *Wright v. Howard* (1823), 1 Sim. & St. 190; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *M'Glone v. Smith*, *supra*; compare *Hanley v. Edinburgh Corporation*, [1913] A. C. 488.

(*g*) Where such a right has been acquired the miller may keep his mill wheels in repair, and so continue the easement (*Alder v. Savill* (1814), 5 Taunt. 454).

(*h*) *Withers v. Purchase* (1889), 60 L. T. 819; *Fear v. Vickers* (1911), 27 T. L. R. 558, C. A.

(*i*) *Black v. Ballymena Township Commissioners* (1886), 17 L. R. Ir. 459; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; see pp. 425 *et seq.*, *ante*. As to pollution, see p. 432, *post*.

(*k*) *Ewart v. Belfast Poor-Law Guardians* (1881), 9 L. R. Ir. 172, C. A.; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655.

has been so appropriated not coming into his stream (*l*). This right of diversion, or appropriation, may be exercised whatever the motive may be, and it matters not how long his neighbour has enjoyed the use of the percolating (*a*) water, for the neighbour thereby acquires no rights in law, because water in an unknown channel or percolating water cannot be the subject of prescription or grant (*b*). Consequently any person may by drainage or other works on his own land drain his neighbour's well, for this is a case of *damnum absque injuriâ* (*c*).

Similarly, if in the course of draining the water from under his neighbour's land he dissolves salt rock or other soluble matter therein, so that the water comes to the surface impregnated therewith, he commits no actionable wrong (*d*).

On the other hand, the owner of land under which there is subterranean water not in a defined or known channel has no right at common law to the support of such water (*e*), and his neighbour may draw off such water as and when he pleases (*f*), but he must take care that in so doing he does not draw off his neighbour's land the waters flowing there in a known channel (*g*) or any insoluble substance forming a support to the surface (*h*).

**861.** Where the underground water flows in a defined channel, but the course of the channel is not known and cannot be ascertained except by excavation, it is in the same position as water percolating through the soil, and may be abstracted by the owner of the soil or by his neighbours (*i*).

 Channel  
 unknown.

(*l*) *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Dickinson v. Grand Junction Canal Co.* 1852), 7 Exch. 282; *Ewart v. Belfast Poor-Law Guardians* (1881), 9 L. R. Ir. 172, C. A.; *Black v. Ballymena Township Commissioners* (1886), 17 L. R. Ir. 459, 474, where CHATTERTON, V.-C., said that the law of riparian rights cannot exist for the plain reason that *riparæ* can exist only in the case of a watercourse or channel: compare *Blackrod Urban District Council v. Crankshaw (John) Co., Ltd.* (1913), 136 L. T. Jo. 239.

(*a*) *Chasemore v. Richards*, *supra*; *Bradford Corporation v. Pickles*, [1895] A. C. 587 (diverting water to compel neighbours to purchase).

(*b*) *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *Briscoe v. Drought* (1860), 11 I. C. L. R. 250; *Roberts v. Fellowes* (1906), 94 L. T. 279.

(*c*) *Acton v. Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Hammond v. Hall* (1840), 10 Sim. 551.

(*d*) *Salt Union, Ltd. v. Brunner, Mond & Co.*, [1906] 2 K. B. 822.

(*e*) *Popplewell v. Hodkinson* (1869), L. R. 4 Exch. 248.

(*f*) *Acton v. Blundell*, *supra*; *Chasemore v. Richards*, *supra*.

(*g*) *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483 (more fully reported 24 L. T. 402); *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; *R. v. Metropolitan Board of Works* (1850), 3 B. & S. 710 (sewer draining springs supplying a pond); compare p. 455, *post*; and see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 321; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 589 *et seq.*

(*h*) *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A.; *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594, P. C.; *Broadbent v. Ramsbotham* (1856), 11 Exch. 602; *Mostyn v. Atherton*, [1899] 2 Ch. 360; *New River Co. v. Johnson* (1860), 6 Jur. (N. S.) 374.

(*i*) *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655. This rule does not apply to rivers like the Mole, which disappears under the ground and reappears again; for in such cases there is a *terminus a quo* and a

SECT. 2.  
Water  
Flowing  
in an  
Unknown  
Channel.

**862.** The owner of land has an unqualified right to appropriate or drain mere casual surface water, not flowing in a regular or definite course, for agricultural purposes (*k*), and a neighbour cannot complain that it does not come to his land (*l*).

SECT. 3.—*Purity and Pollution.*

SUB-SECT. 1.—*In General.*

Surface  
water. *i*

Meaning of  
"pollution."

**863.** By pollution is meant the addition of something which changes the natural qualities of the water (*m*).

It makes no difference in law whether the polluted water flows in a known or unknown channel, or trickles over the surface of the land, or percolates through the soil (*n*), or flows through an artificial channel of a permanent character (*o*).

Percolating  
water.

**864.** Water flowing in an unknown channel or percolating through the ground must not be polluted, and no right to do so can be acquired by prescription, for the principle of law *sic utere tuo ut alienum non lēdas* applies, and a landowner who puts poisonous matter on his land must take care that it does not escape so as to injure the water of a person who is entitled to use it (*p*).

terminus *ad quem*, and the owners of land between the two and their riparian neighbours can fairly be presumed to know the existence and course of the stream (*Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655, 665; *Dickinson v. Grand Junction Canal Co.* (1852), 7 Exch. 282, 300); compare *Blackrod Urban District Council v. Crankshaw (John) Co., Ltd.* (1913), 136 L. T. Jo. 239.

(*k*) *Rawstron v. Taylor* (1855), 11 Exch. 369.

(*l*) *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *Briscoe v. Drought* (1860), 11 I. C. L. R. 250; *Roberts v. Fellowes* (1906), 94 L. T. 279.

(*m*) *Young (John) v. Bankier Distillery Co.*, [1893] A. C. 691 (adding hard water to a soft water stream); *Tipping v. Eckersley* (1855), 2 K. & J. 264 (raising the temperature of the water); *Ballard v. Tomlinson* (1885), 29 Ch. D. 115, C. A.; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478 (discharging sewage and refuse from manufactories); *River Ribble Joint Committee v. Halliwell, Same v. Shorrocks*, [1899] 2 Q. B. 385, C. A. (putrescent sludge from settling tanks). Discharging sewage and pure effluent in such quantities as to make the stream as a whole purer amounts to pollution if at the place where the sewage enters the stream there is in fact pollution (*A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1908] 2 Ch. 551, varied without affecting this point, [1912] A. C. 788); so does the addition of two substances each in themselves harmless, but when in conjunction causing pollution (*Blair and Sumner v. Deakin* (1887), 57 L. T. 522, 525).

(*n*) See the text, *infra*.

(*o*) *Sutcliffe v. Booth* (1863), 9 Jur. (N. S.) 1037 (artificial channel made in such circumstances as to give the owners on its banks riparian rights). Whether the owners of land abutting on an artificial channel of a temporary nature can object to pollution is doubtful; compare *Wood v. Waud* (1849), 3 Exch. 748; *Laing v. Whaley* (1850), 3 H. & N. 675, Ex. Ch.; *Wood v. Sutcliffe* (1851), 2 Sim. (N. S.) 163; and see titles SEWERS AND DRAINS, Vol. XXV., p. 781; WATER SUPPLY, pp. 297 *et seq.*, *ante*.

(*p*) *Ballard v. Tomlinson*, *supra*; *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; *Turner v. Mirfield* (1865), 34 Beav. 390; *Womersley v. Church* (1867), 17 L. T. 190 (fouling a well by percolation from a cesspool); compare *Millington v. Griffiths* (1874), 30 L. T. 65; *Hipkins v. Birmingham and Staffordshire Gas Light Co.* (1860), 5 H. & N. 74, affirmed 6 H. & N. 250, Ex. Ch.



SUB-SECT. 2.—*Extent of General Rights.*(i.) *As Regards the Public.*

**865.** The pollution of water to the danger of the health or lives of the public is an indictable nuisance (*q*), and one against which the public may be protected by proceedings by or in the name of the Attorney-General (*r*).

Where the Attorney-General proceeds he need not prove actual injury to the public (*s*).

He may proceed on the relation of any person, whether residing near the nuisance or not, or whether or not he is interested in any property affected (*t*).

**866.** Where a statute prohibits the discharge of sewage or polluted water into a stream so as to prejudicially affect the purity of the stream, it is no defence to allege that besides such discharge the defendants at another point have discharged other effluents of a pure character, so that in the aggregate the quality of the water in the stream as a whole is improved (*u*), though it is a defence to prove that the discharge does not make the stream fouler than it was before (*a*).

SECT. 3.  
Purity and  
Pollution.  
Pollution.

Statutory  
prohibition.

(*q*) *R. v. Medley* (1834), 6 C. & P. 292 (chairman, deputy chairman, and other directors of a gas company convicted for fouling, by their officers and managers, the water of the Thames); *R. v. Bradford Navigation Co.* (1865), 6 B. & S. 631 (where in the purported exercise of statutory powers the defendants continued to supply their canal from a stream which had become polluted). On any indictment or other proceeding for a nuisance to a public river or on any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, the defendant and the wife or husband of a defendant are admissible witnesses and compellable to give evidence (Evidence Act, 1877 (40 & 41 Vict. c. 14), s. 1).

(*r*) *A.-G. v. Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; *A.-G. v. Kingston-on-Thames Corporation* (1865), 13 W. R. 888; *A.-G. v. Halifax Corporation* (1870), 39 L. J. (CH.) 129; *A.-G. v. Leeds Corporation* (1870), 5 Ch. App. 583; *A.-G. v. Cockermouth Local Board* (1874), L. R. 18 Eq. 172; *A.-G. v. Barnsley Corporation*, [1874] W. N. 37; *A.-G. v. Hackney Local Board* (1875), L. R. 20 Eq. 626; *A.-G. v. Tunstall Local Board of Health*, [1875] W. N. 66; *A.-G. and Domes v. Basingstoke Corporation* (1876), 24 W. R. 817; *A.-G. v. Birmingham, Tame, and Rea Drainage Board* (1881), 17 Ch. D. 685, C. A.; *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1908] 2 Ch. 551, varied without affecting this point, [1912] A. C. 788 (all cases of pollution by sewage); *A.-G. v. Gee* (1870), L. R. 10 Eq. 131 (pollution by sewage, but injunction refused on the ground that the injury was trifling); *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221 (injunction granted to restrain future connexions with sewers discharging into a stream; see, further, title SEWERS AND DRAINS, Vol. XXV., p. 762); *A.-G. v. Dorchester Corporation* (1905), 69 J. P. 363 (injunction against nuisance from sewage works which were directed by order of the Local Government Board).

(*s*) *A.-G. v. Cockermouth Local Board*, *supra*.

(*t*) *A.-G. v. Basingstoke Corporation*, *supra*.

(*u*) *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, *supra*; and see *A.-G. v. Cockermouth Local Board*, *supra*. As to meaning of stream, see the cases cited in note (*u*), p. 438, *post*.

(*a*) *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A., varied without affecting this point, [1912] A. C. 788; compare note (*g*), p. 443, *post*.

## SECT. 3.

Purity and  
Pollution.Rights of  
riparian  
owners.(ii.) *As Regards Private Owners.*

**867.** A person has at common law no right to pollute water so that in a polluted state it passes to the land of another person who has the right to receive the water (*b*), or passes into tidal water (*c*); for it is a natural right of property to have water flow to one's property undefiled and in its natural state (*d*), and a landowner may not use his land so as to be a nuisance to his neighbour (*e*). This right is in no way connected with the ownership of the bed of natural watercourses, but is a right attaching to the riparian land (*f*).

How far  
pollution  
permissible.

**868.** A person may pollute water on his own land so long as it is freed from pollution when it leaves his land (*g*), or only flows to the land of a person who has no right in law to complain of the pollution (*h*). Similarly, a person who stores polluting matter on his land or in his sewer must see that it does not escape to the injury of others, and mere neglect of this duty gives a good cause of action to any person injured (*i*).

The right to pollute water may be gained by grant, prescription, or Act of Parliament (*k*).

(*b*) *Magor v. Chadwick* (1840), 11 Ad. & El. 571. When water from an artificial channel for draining mines has been enjoyed in a pure state for twenty years, the mining cannot be resumed so as to pollute the channel (*Cawkwell v. Russell* (1856), 26 L. J. (EX.) 34).

(*c*) Neither at common law nor under the Public Health Acts, 1848 (11 & 12 Vict. c. 63) and 1875 (38 & 39 Vict. c. 55), can sewage be discharged into the sea so as to cause a nuisance to another (*Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, 665, C. A.; *Hobart v. Southend-on-Sea Corporation* (1906), 75 L. J. (K. B.) 305; *Owen v. Faversham Corporation* (1908), 73 J. P. 33, C. A.). As to the statutory prohibition of pollution of the sea, see also pp. 438, note (*u*), 442, 446, 447, *post*.

(*d*) Not only in quality, but also in temperature (*Tipping v. Eckersley* (1855), 2 K. & J. 264).

(*e*) *Stockport Waterworks Co. v. Potter* (1864), 3 H. & N. 300; *Hipkins v. Birmingham and Staffordshire Gas Light Co.* (1860), 6 H. & N. 250, Ex. Ch.; *St. Helen's Smelting Co. v. Tipping* (1865), 11 H. L. Cas. 642; *Wood v. Waud* (1849), 3 Exch. 748.

(*f*) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393.

(*g*) *Elmhirst v. Spencer* (1849), 2 Mac. & G. 45.

(*h*) *Stockport Waterworks Co. v. Potter*, *supra*; *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155, C. A.; such as, for instance, a non-riparian owner who has only acquired a right to take the water by leave of the riparian owner (*Fergusson v. Malvern Urban District Council* (1908), 72 J. P. 101), or a householder who uses a supply of water to which he has no proprietary right or lease or licence; compare *Laing v. Whaley* (1850), 3 H. & N. 675, Ex. Ch.

(*i*) *Jones v. Llanrwst Urban Council*, *supra*, applying *Fletcher v. Rylands* (1868), L. R. 3 H. L. 330. The same principle also applies to the neglect of a local authority to prevent sewage escaping from their sewers, though the inhabitants of the district have a statutory right to send their sewage into the sewer (*Jones v. Llanrwst Urban Council*, *supra*).

(*k*) *Wright v. Williams* (1836), 1 M. & W. 77; *Gaved v. Martyn* (1865), 19 C. B. (N. S.) 732; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256 *et seq.*; p. 452, *post*. As to the commencement of prescriptive right, compare *Murgatroyd v. Robinson* (1857), 7 E. & B. 391. A riparian owner who has acquired a prescriptive right to pollute has no right to increase the pollution (*McIntyre Brothers v. McGavin*, [1893] A. C. 268).

SUB-SECT. 3.—*Remedies for Pollution.*(i.) *Damages and Injunction.*

## SECT. 3.

Purity and  
Pollution.Cause of  
action.

**869.** When water is polluted it is not necessary that the person who has the right to complain of the pollution should prove that he has suffered actual damage before the courts will interfere to protect him. It is sufficient to prove that his right to have the water flow to him in its natural state has been infringed (*l*).

**870.** The party (*m*) whose right is infringed can bring an action for an injunction and damages (*n*) except where the pollution is caused by the nonfeasance of certain local authorities (*o*). Remedies.

When actual damage is caused the court either assesses the amount thereof or else orders an inquiry as to damages (*p*).

**871.** It is no defence to an action for polluting water that the water is also fouled by other persons (*q*), or that the plaintiff is Conduct of plaintiff.

(*l*) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch 393. A riparian owner has no right of action against another who by legitimate exercise of his rights of drainage prevents him from making a particular use of the stream, as, for instance, for growing watercress (*Weeks v. Heward* (1862), 10 W. R. 557).

(*m*) This includes an owner in fee or in reversion or a lessee (*Jones v. Llanrwst Urban Council, supra*; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.; *Wood v. High and Low Harrogate Improvement Commissioners* (1874), 22 W. R. 763).

(*n*) *A.-G. v. Hackney Local Board* (1875), L. R. 20 Eq. 626; *A.-G. v. Basingstoke Corporation* (1876), 24 W. R. 817. An injunction is not granted where no injury is shown (*Elmhirst v. Spencer* (1849), 2 Mac. & G. 45; *A.-G. v. Gee* (1870), L. R. 10 Eq. 131), nor where the nuisance is trifling and does not justify it (*A.-G. v. Cockermouth Local Board* (1874), L. R. 18 Eq. 172; *Staffordshire County Council v. Seisdon Rural District Council* (1907), 71 J. P. 185; *Taylor v. Bennett* (1836), 7 C. & P. 329). But it is not necessary to prove actual damage (*Jones v. Llanrwst Urban Council, supra*; and see *Oldaker v. Hunt* (1855), 6 De G. M. & G. 376, C. A.; *Spokes v. Banbury Local Board of Health* (1865), L. R. 1 Eq. 42; *Lilly-white v. Trimmer* (1867), 36 L. J. (CH.) 525; *Kirk v. Todd* (1882), 21 Ch. D. 484, C. A.; *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221; *Charles v. Finchley Local Board* (1883), 23 Ch. D. 767; *Fitzgerald v. Firbank, supra*; and title INJUNCTION, Vol. XVII., pp. 206 *et seq.*). In the order for injunction it is proper to insert the words "to the injury of the plaintiff" (*Lingwood v. Stowmarket Co.* (1865), L. R. 1 Eq. 77). As to breach of an undertaking not to allow any further pollution till after trial of the action, see *Marsden (Charles) & Sons, Ltd. v. Old Silkstone Collieries, Ltd.* (1914), 78 J. P. (Journal) 220.

(*o*) Namely, authorities which obtained control of their sewers under the Public Health Act, 1875 (38 & 39 Vict. c. 55). As to nonfeasance of a local authority, see *Jones v. Llanrwst Urban District Council, supra*; and titles NUISANCE, Vol. XXI., p. 547; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 316, 317.

(*p*) *Pennington v. Brinsop Hall Coal Co., supra*, where the measure of damages was the expense to which the plaintiff had been put by the pollution of the stream; *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205 (where a local authority continues for a length of time to pollute, and proceedings are taken against the authority within the time allowed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), the plaintiff is entitled to the benefit of the Limitation Act, 1623 (21 Jac. 1, c. 16), and to recover damages in respect of the preceding six years; see also title LIMITATION OF ACTIONS, Vol. XIX., p. 178).

(*q*) *A.-G. v. Leeds Corporation* (1870), 5 Ch. App. 583; *Pennington v. Brinsop Hall Coal Co., supra*; *A.-G. v. Birmingham Borough Council*



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Purity and  
Pollution.

not in fact making use of the water and had bought the riparian land knowing the water was polluted (*r*), or that he has stood by and allowed money to be expended on works which may cause pollution if they are not properly constructed as required by statute, since the mere prospect of injury does not give any right to relief, as it is assumed that the statute will be complied with (*s*).

Prospective  
injury.

**872.** Although prospective injury may not be ground for an injunction, yet if there is some pollution in fact the court takes into account its probable continuance and increase (*t*).

When  
injunction  
granted.

**873.** Whether damage is caused or not, the court grants an injunction for any infringement of the natural right to water by pollution, for to grant damages in lieu of an injunction would only be to compensate for past injuries, and as new modes of enjoyment of the water may arise, which it is impossible to foresee, it is equally impossible to estimate the compensation for any damage thereto (*a*).

It is no answer to a claim for an injunction that, if granted, a large body of workmen will be thrown out of employment (*b*), or that a large body of the public will be inconvenienced thereby (*c*), or that the effect of the injunction will be to deprive entirely the wrongdoers of some rights to pollute which they have acquired by prescription (*d*), or that the defendant does not in fact cause the pollution, but only contributes to the water something which, when mingled with something put into the water by another person, causes the pollution (*e*).

Pollution  
from sewer.

**874.** When the pollution is caused by the outflow from a sewer vested in a local authority by Parliament into which persons have a right to drain, the court only restrains the authority from

(1858), 4 K. & J. 528: *Wood v. Waud* (1849), 3 Exch. 748; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Blair and Sumner v. Deakin* (1887), 57 L. T. 522; *Ridge v. Midland Rail. Co.* (1888), 53 J. P. 55; compare *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (varied without affecting this point, [1912] A. C. 788), where it was held that this might be a defence to proceedings under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17. See also *A.-G. v. Bradford Canal (Proprietors)* (1866), L. R. 2 Eq. 71, where it was held that a canal company is not entitled to pump water polluted by other persons into their canal so as to make it a nuisance.

(*r*) *Crossley & Sons, Ltd. v. Lightowler*, *supra*, at p. 483 (where the plaintiffs, for the purpose of founding an action, bought the riparian land from the persons who were polluting the water).

(*s*) *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; *A.-G. v. Leeds Corporation* (1870), 5 Ch. App. 583.

(*t*) *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *Murgatroyd v. Robinson* (1857), 7 E. & B. 391; *A.-G. v. Birmingham Borough Council*, *supra*.

(*a*) *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 760; *Crossley & Sons, Ltd. v. Lightowler*, *supra*; *Young (John) & Co. v. Bankier Distillery Co.*, [1893] A. C. 691.

(*b*) *Pennington v. Brinsop Hall Coal Co.*, *supra*.

(*c*) *A.-G. v. Leeds Corporation*, *supra*; *A.-G. v. Birmingham Borough Council*, *supra*.

(*d*) *Blackburne v. Somers* (1879), 5 L. R. Ir. 1.

(*e*) *Blair and Sumner v. Deakin*, *supra*, per KAY, J., at p. 525.

authorising and directing sewage to flow and not from permitting it to flow from the sewer (*f*).

The court will not grant an injunction against a local authority where persons have a right to discharge into the sewers and that authority is taking steps to remedy the nuisance (*g*), but the court will grant an injunction if it appears that the effect of the injunction will not cause any interference with such rights of drainage (*h*).

In granting injunctions to restrain pollution by sewage it is the practice to restrain immediately any new connexions and to suspend the operation of the order for a time to enable the defendant to alter the works so as to comply with the order of the court (*i*). If, however, the removal of the injury is physically impossible the court will not grant an injunction, but will leave the plaintiff to his remedy in damages (*k*).

**875.** When the defendant after an injunction has been obtained against him has taken the necessary steps to remedy the prohibited nuisance so that the plaintiff no longer suffers damage, the court may dissolve the injunction (*l*).

SECT. 3.  
Purity and  
Pollution.

When  
injunction  
dissolved.

(ii.) *Other Remedies.*

**876.** If the pollution is by sewage from the sewer of a local authority, which has only been given a limited ownership of the sewer by statute, through their neglect of duty and not by their misfeasance, a person injured thereby has no remedy except by mandamus (*m*), though if due to misfeasance, then he has a remedy by injunction or damages, according to the circumstances of the

Mandamus.

(*f*) *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221; *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *Ainley v. Kirkheaton Local Board* (1891), 55 J. P. 230 (a householder has an absolute right under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21, to connect his drains with a sewer). But it is doubtful whether these cases would now be followed; see *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393.

(*g*) *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; but see *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1908] 2 Ch. 551 (varied without affecting this point, [1912] A. C. 788), where the defendants pleaded that they had expended £250,488 and were making further improvements; see also *Jones v. Llanrwst Urban Council*, *supra*.

(*h*) *Hobart v. Southend-on-Sea Corporation* (1906), 75 L. J. (K. B.) 305.

(*i*) *A.-G. v. Leeds Corporation* (1870), 5 Ch. App. 583; *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *A.-G. v. Lewes Corporation*, [1911] 2 Ch. 495.

(*k*) *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146, 154.

(*l*) *Elmhirst v. Spencer* (1849), 2 Mac. & G. 45; *A.-G. v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A.

(*m*) *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; but see *Jones v. Llanrwst Urban Council*, *supra*, where these cases are commented upon, and where PARKER, J., granted an injunction against a local authority which neglected to prevent sewage escaping from their sewers, into which the inhabitants of the district had a statutory right to send their sewage.

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Pollution.

case (*n*). When the pollution amounts to a public nuisance, the remedy is the same as that for other public nuisances (*o*).

SUB-SECT. 4.—*Statutory Prohibition of Pollution.*

(i.) *Pollution of Rivers.*

Refuse.

**877.** To prevent the pollution (*p*) of rivers, and in particular to prevent the establishment of new sources of pollution (*q*), the Rivers Pollution Prevention Act, 1876 (*r*), made it an offence for any person (*s*) to put, cause to be put or to fall, or knowingly permit (*t*) to be put or to fall, or to be carried into any stream (*u*), the solid

(*n*) *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.

(*o*) See title NUISANCE, Vol. XXI., pp. 550 *et seq.*

(*p*) This does not include innocuous discoloration (*Rivers Pollution Prevention Act*, 1876 (39 & 40 Vict. c. 75), s. 20).

(*q*) *Ibid.*, preamble. The Act does not apply to or affect the lawful exercise of any rights of impounding or diverting water (*ibid.*, s. 17; *River Ribble Joint Committee v. Halliwell, Same v. Shorrocks*, [1899] 2 Q. B. 385, C. A.). Though the Act did not prejudice or affect any other rights or powers then existing or vested in any person by Act of Parliament, law or custom (*Rivers Pollution Prevention Act*, 1876 (39 & 40 Vict. c. 75), s. 16), the right to continue to pollute is not preserved, nor the right to abate a nuisance destroyed (*Midlothian County Council v. Pumpherston Oil Co.* (1904), 6 F. (Ct. of Sess.) 387). The obvious policy and the obvious effect of the Act is to stop the pouring of foul water into a stream except in particular circumstances (*Airdrie Magistrates v. Lanark County Council, Coatbridge Magistrates v. Lanark County Council*, [1910] A. C. 286, per Lord LOREBURN, L.C., at p. 290). The *Rivers Pollution Prevention Act*, 1876 (39 & 40 Vict. c. 75), and the *Rivers Pollution Prevention Act*, 1893 (56 & 57 Vict. c. 31), may (*ibid.*, s. 2) be cited together as the *Rivers Pollution Prevention Acts*, 1876 and 1893.

(*r*) 39 & 40 Vict. c. 75, s. 2.

(*s*) This includes a corporation, and, therefore, a sanitary authority (*ibid.*, s. 20).

(*t*) As to the meaning of "knowingly permits," compare *Rivers Pollution Prevention Act*, 1893 (56 & 57 Vict. c. 31), s. 1; *Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority*, [1894] 2 Q. B. 842, C. A.

(*u*) This includes such part of the sea and tidal water as may be determined by the Local Government Board, by Order in the *London Gazette*, and, save as aforesaid, includes rivers, streams, canals, lakes and watercourses, other than those mainly used as sewers on the 15th August, 1876, and emptying into the part of the sea or tidal waters not determined by the Local Government Board to be streams (*Rivers Pollution Prevention Act*, 1876 (39 & 40 Vict. c. 75), s. 20). Whether a particular channel is a sewer or stream is a question of evidence; see *West Riding of Yorkshire Rivers Board v. Preston & Sons* (1904), 69 J. P. 1; *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet and Colour Dyers, Ltd.* (1902), 67 J. P. 80; *West Riding of Yorkshire Rivers Board v. Gaunt & Sons* (1902), 67 J. P. 183; *Airdrie Magistrates v. Lanark County Council, Coatbridge Magistrates v. Lanark County Council*, *supra*, where certain "burns" were held to be "streams," and not "watercourses mainly used as sewers." As to the distinction between "streams" and "percolating water," see *M'Nab v. Robertson*, [1897] A. C. 129. "Tidal water" includes waters where there is a vertical rise and fall caused by the ordinary tides (*West Riding of Yorkshire Rivers Board v. Tadcaster Rural District Council* (1907), 97 L. T. 436, Div. Ct.; *Calcraft v. Guest* (1897), cited in Stuart Moore, *History and Law of Fisheries*, p. 102). As to pollution of fisheries, and the Thames, see pp. 446 *et seq.*, 448 *et seq.*, *post*.



refuse of any manufactory, manufacturing process, or quarry, or any rubbish or cinders, or any other waste, or any putrid solid matter (*a*), so as either singly or in combination with other similar acts of the same or any other person to interfere with the due flow of the stream or to pollute its waters (*b*).

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Pollution.

**878.** It is also an offence to cause to fall or flow, or knowingly to permit to fall or flow, or to be carried (*c*) into any stream, any solid or liquid sewage, except when this is by means of a channel used, constructed, or in process of construction on the 15th August, 1876 (*d*), for the purpose of conveying sewage matter, and the person carrying and knowingly permitting the sewage so to fall or flow or be carried proves that he is using the best practicable and available means (*e*) to render the sewage harmless, or in the case of a person other than a sanitary authority that he is sending the sewage along a drain communicating with a sewer (*f*) belonging to or under the control of a sanitary authority and with the sanction of the authority (*g*).

Sewage.

When the sewage gets into a stream after passing along a channel vested in a sanitary authority, the authority is deemed knowingly to permit the sewage so to fall, flow or be carried into the stream within the meaning of the statutory provision (*h*).

(*a*) Putrid solid matter does not include particles of matter in suspension in water (Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 20). Thus, putrid solid matter or sludge deposited by settlement in a pond or settling tank when washed into a river with a large volume of water is not solid matter, but matter suspended in water (*River Ribble Joint Committee v. Halliwell, Same v. Shorrock*, [1899] 2 Q. B. 385, C. A.; *West Riding of Yorkshire Rivers Board v. Rawsons* (1903), 67 J. P. 407).

(*b*) In proving interference or pollution, evidence may be given of repeated acts which together cause such interference or pollution, though each act by itself be not sufficient for the purpose (Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 2). In ascertaining whether pollution has occurred the amount of pollution already in the water is not considered, but if the minimum of which the law will not take notice is exceeded an offence has been committed (*Staffordshire County Council v. Seisdon Rural District Council* (1907), 71 J. P. 185).

(*c*) *Butterworth v. West Riding of Yorkshire Rivers Board*, [1909] A. C. 45, *per* Lord LOREBURN, L.C., at p. 49. This refers not merely to a direct discharge, but also to a discharge through some intermediate conduit, whether that is or is not a sewer under the control of a sanitary authority.

(*d*) This exception does not apply to a new channel constructed in substitution for an old one, and having its outfall at the same spot (Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), ss. 3, 4).

(*e*) Local Government Board inspectors can grant certificates that the means used are the best or only practicable or available means. These are conclusive of the fact, are of force for two years, and may be renewed (*ibid.*, s. 12).

(*f*) A stream from which water has been cut off may be a sewer, but the mere fact that for many years it has been polluted is not sufficient to turn it into a sewer (*West Riding of Yorkshire Rivers Board v. Gaunt & Sons* (1902), 67 J. P. 183; *West Riding of Yorkshire Rivers Board v. Preston & Sons* (1904), 69 J. P. 1; *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet and Colour Dyers, Ltd.* (1902), 67 J. P. 88; see *Airdrie Magistrates v. Lanark County Council, Coatbridge Magistrates v. Lanark County Council*, [1910] A. C. 286, where Lord HALSBURY, at p. 291, said that *West Riding of Yorkshire Rivers Board v. Gaunt & Sons*, *supra*, appeared to him to have been perfectly rightly decided).

(*g*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3.

(*h*) *Ibid.*; Rivers Pollution Prevention Act, 1893 (56 & 57 Vict. c. 31),

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Purity and  
Pollution.Manufacturing  
pollution.

**879.** It is an offence to cause to fall or flow, or knowingly to permit to fall or flow, or to be carried into any stream, any poisonous, noxious, or polluting liquid from any factory or manufacturing process, unless the liquid is carried into a stream along a channel used, constructed or in course of construction on the 15th August, 1876, or in a new channel constructed in substitution therefor, and having its outfall at the same spot, and the best practicable and reasonably available means to render the liquid harmless are used (i).

Mining  
pollution.

**880.** Similarly, it is an offence to cause to fall or flow, or knowingly permit to fall or flow, or to be carried into a stream solid matter in such quantities as prejudicially to interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter from a mine other than water in the same condition as that in which it has been drained or raised from the mine, unless in the case of poisonous, noxious or polluting matter the best practicable and reasonably available means to render that matter harmless are used (j).

Proceedings.

**881.** Proceedings may be taken by any person aggrieved (k) except in respect of manufacturing and mining pollution, which may only be taken by a sanitary authority (l) with the consent or on the direction of the Local Government Board. In giving or withholding consent the Board must have regard to the industrial interest involved and to the circumstances and requirements of the

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s. 1; *Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority*, [1894] 2 Q. B. 842, C. A. (the fact that the authority has not materially altered the nature of the sewers, and has done nothing to increase the flow of sewage into the stream, is no defence); compare *Rochford Rural Council v. Port of London Authority*, [1914] 2 K. B. 916.

(i) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 4. The discharge of manufacturing effluent into a sewer communicating with a river without the consent of the sanitary authority is an offence within this provision, and it is doubtful whether such consent would be a defence (*West Riding Rivers Board v. Butterworth and Roberts* (1907), 71 J. P. 516). Proof of a prescriptive right to pollute at the passing of the Act is no defence (*Butterworth v. West Riding of Yorkshire Rivers Board*, [1909] A. C. 45; *Kirkheaton District Local Board v. Ainley, Sons & Co.*, [1892] 2 Q. B. 274, C. A.).

(j) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 5; see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 592.

(k) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 8. Within the area of the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), the authority to take proceedings is the Lee Conservancy Board (Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 9).

(l) This includes a county council. On the application of county councils the Local Government Board may, by provisional order, constitute a joint committee or other body representing the administrative counties through which a river runs, and confer on the body the powers of a sanitary authority (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 14). The following local Acts conferring these powers have been passed: Mersey and Irwell Joint Committee Act, 1892 (55 & 56 Vict. c. exci.); West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.); Rivers Pollution Prevention (Border Councils) Act, 1898 (61 & 62 Vict. c. 34). The proceedings must be against the person whose factory or manufacturing process is producing the liquid and not the sanitary authority through whose sewers the liquid flows (*West Riding of Yorkshire Rivers Board v. Linthwaite Urban Council*, [1914] 2 K. B. 13).



locality, and may not consent when the district is the seat of a manufacturing industry unless satisfied after due inquiry that means for rendering harmless the liquids are reasonably practicable and available in all the circumstances of the case, and that no material injury will be inflicted on the interests of such industry (*m*).

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Purity and  
Pollution.

**882.** Every sanitary or other local authority having sewers under its control must give facilities to manufacturers to carry the liquids proceeding from their factories or manufacturing processes into the sewers so long as such liquid would not prejudicially affect the sewers or the disposal by sale, application to land, or otherwise of the sewage in such sewers, or from its temperature or otherwise be injurious from a sanitary point of view (*n*); but the sanitary authority need not give such facilities when its sewers and the works for purifying the sewage are only sufficient for the requirements of its district, or where such facilities would interfere with any order of a court respecting the sewage of the authority. A local authority or any urban or rural sanitary authority empowered or required by Parliament to carry sewage into the sea or tidal water may do so without offending against the statutory provisions (*o*).

Duties of  
sanitary  
authorities.

**883.** Offences against the Rivers Pollution Prevention Acts, 1876 and 1893 (*p*), may be stopped by a summary order of the county court, and if the order is not obeyed the offender is liable to a penalty not exceeding £50 a day for every day he is in default, and, if the default continues for a longer period than a month or such less period as the court may order, to the expenses of any person appointed by the court to abate the nuisance (*q*).

Powers of  
county court.

(*m*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 6. The sanitary authority must give two months' notice of intention to take proceedings (*ibid.*, s. 13). The notice cannot be given till after the consent of the Local Government Board is obtained (*West Riding of Yorkshire Rivers Board v. Robinson Brothers*, [1907] 1 K. B. 431, C. A., overruling *West Riding of Yorkshire Rivers Board v. Scarr End Mill Co.* (1901), 65 J. P. 776, and following *Midlothian County Council v. Oakbank Oil Co., Ltd.* (1903), 5 F. (Ct. of Sess.) 700). It is not necessary to give notice of intention to take proceedings to enforce penalties for non-compliance with the order of a county court (*West Riding of Yorkshire Rivers Board v. Heckmondwike Urban District Council*, [1914] W. N. 147). A person against whom proceedings are proposed to be taken may object before the sanitary authority, and must be given an opportunity of being heard by that authority before proceedings are taken against him (Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 6).

(*n*) *Ibid.*, s. 7; *Brook v. Meltham Urban Council*, [1909] A. C. 438. A sanitary authority must not cut off a drain from a factory unless it can show that any of the above exceptions apply (*Eastwood Brothers, Ltd. v. Honley Urban Council*, [1901] 1 Ch. 645, C. A.).

(*o*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 19.

(*p*) 39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31.

(*q*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 10. Proceedings may be removed from the county court to the High Court on points of law or on the merits (*ibid.*, s. 11); *West Riding of Yorkshire Rivers Board v. Ravensthorpe Urban District Council* (1907), 71 J. P. 209). The proceedings are not criminal or penal, and interrogatories may be administered (*Re Derbyshire County Council and Derby Corporation*, [1896] 2 Q. B.



## SECT. 3.

Purity and  
Pollution.Pollution  
from vessels.Pollution  
from shore.(ii.) *Pollution of Harbours.*

**884.** It is an offence to cast or unlade filth out of any vessel in a haven, road, channel or river flowing or running into a port town or city, borough or town except on the land above full sea mark (*r*); similar provisions are contained in the Harbours Act, 1745 (*s*).

**885.** The Harbours Act, 1814 (*t*), though passed ostensibly for the protection of navigation, does, if enforced, indirectly prevent pollution, as it forbids the introduction of filth into harbours or tidal navigable rivers, or the placing of filth in any position where it may be liable to be washed into the sea or into any harbour or tidal navigable river either by ordinary or high tides or by storms or land floods (*a*).

(iii.) *Pollution by Gas.*Waterworks  
Clauses Acts,  
1847 and  
1863.

**886.** Every person making or supplying gas within the statutory district of a water company to which the Waterworks Clauses Acts, 1847 and 1863 (*b*), apply, who causes or suffers to be brought or to flow into any water of the water company or into any drain communicating therewith any washing or other substance produced in making or supplying gas, or who wilfully does any act connected with the making or supplying of gas whereby such water is fouled, is liable to forfeit to the water company the sum of £200 with full costs (*c*).

297, C. A.). When a sanitary authority is itself the offender and seeking to avoid its duties under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the county court judge may exercise his discretion and may refuse to make any order against a defendant who is also an offender against this Act (*Kirkheaton District Local Board v. Ainley, Sons & Co.*, [1892] 2 Q. B. 274, C. A.); but the court should not refrain from making an order on the ground that the stream is already so polluted that the pollution from the sewer is hardly appreciated (*Staffordshire County Council v. Seisdon Rural District Council* (1907), 71 J. P. 185).

(*r*) Stat. (1542–3) 34 & 35 Hen. 8, c. 9. The penalty for each offence is £5 (*ibid.*).

(*s*) 19 Geo. 2, c. 22. It is an offence under this Act to unload filth into a hopper barge with intent to deposit it in the sea and not on land (*Brucklesbank v. Smith* (1758), 2 Burr. 656).

(*t*) 54 Geo. 3, c. 159, ss. 11, 12, 13. This Act does not apply to materials used for repairing wharves, sea banks etc., or to any material for repairing a highway (*ibid.*, s. 11).

(*a*) The penalty is a sum not exceeding £10 over and besides all expenses incurred in removing to a proper place filth deposited contrary to the Act (*ibid.*, s. 11). It is an offence under this Act to discharge solid matter in suspension through a drain into a tidal brook, so that it flows into a navigable river and is there deposited (*United Alkali Co. v. Simpson*, [1894] 2 Q. B. 116).

(*b*) 10 & 11 Vict. c. 17; 26 & 27 Vict. c. 93; see title WATER SUPPLY, pp. 274 *et seq.*, *ante*; as to the similar provisions against pollution by gas contained in the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 48–54, and in the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), ss. 21–29, see title GAS, Vol. XV., pp. 329, 360 *et seq.* As to the protection of a water supply against fouling generally, see title WATER SUPPLY, pp. 297 *et seq.*, *ante*.

(*c*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 62. The penalty must be sued for in the High Court and during continuance of the offence, or within six months after it has ceased (*ibid.*, s. 63).

If the water supplied by the company is fouled by gas, the person making or supplying the gas is liable to forfeit to the water company a sum not exceeding £20, and a further sum not exceeding £10 for every day the offence continues after twenty-four hours after he has received notice of the offence (*d*).

SECT. 3.  
Purity and  
Pollution.

(iv.) *Pollution in Sanitary Districts.*

**887.** A local authority to which the Public Health Act, 1875 (*e*), applies (*f*), though endowed by this Act with powers for the acquisition, maintenance, and making of sewers, is not empowered to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water (*g*), and if the authority does so, it is liable to be enjoined at the suit of any person having a right of property in respect of such water (*h*).

Pollution by  
sewage.

**888.** It is the duty of a local authority, with the sanction of the Attorney-General, either in its own name or in the name of any

Pollution of  
watercourses.

(*d*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 64. For the purpose of ascertaining if water is fouled by gas, the water company may dig up the ground and examine the gas pipes, and if it appears that the water is so fouled the offender must bear the expense of this investigation (*ibid.*, ss. 65—67).

(*e*) 38 & 39 Vict. c. 55.

(*f*) For these authorities, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 372. As to the Metropolis, see pp. 445, 446, *post*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17. It is no offence to pour such sewage into a stream already polluted unless the result is to make it fouler than before (*A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A., varied without affecting this point, [1912] A. C. 788). But it is a breach of this provision if at the point where the sewage enters the stream or watercourse its purity and quality are deteriorated, even though it be already polluted, and to discharge pure effluent into the stream at another spot whereby the purity and quality of the water as a whole are improved is no defence to an application for an injunction (*A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1908] 2 Ch. 551, varied without affecting this point, [1912] A. C. 788). Where in such a case the defendants have ceased to commit a breach of this section and intend to use their best endeavours to prevent any future breach, the court may discharge the injunction (*A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A., varied without affecting this point, [1912] A. C. 788). As to the form of order in such cases, see S. C., [1912] A. C. 788. A ditch made for the sole purpose of draining surface water from land is not vested in the local authority (*Sykes v. Sowerby Urban Council*, [1900] 1 Q. B. 584, C. A.; *Phillimore v. Watford Rural Council*, [1913] 2 Ch. 434).

(*h*) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393, distinguishing *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, and *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; compare *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A., where a local authority was restrained from turning sewage into the sea to the injury of the owner of oyster beds; *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205; *A.-G. v. Lewes Corporation*, [1911] 2 Ch. 495. Though the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17, forbids the discharge of sewage or filthy water, it does not prevent the discharge of surface water charged with sand and silt (*Durrant v. Branksome Urban*

SECT. 3.  
Purity and  
Pollution.

other person consenting thereto, to take such proceedings as the authority may deem advisable for the purpose of protecting any watercourse within its jurisdiction from pollution from sewage either within or without its district (*a*). Whenever water belonging to or under the control of the authority is fouled by gas, or contains any washing or other substance produced in the making of gas, the authority may take proceedings to recover from the person engaged in the manufacture of the gas the sum of £200 for every such offence, and a further sum of £20 for every day the offence continues (*b*).

When the water fouled is not the property of the local authority, but belongs to some other person, in default of his proceeding to recover the above penalties, the authority may, after notice to him of its intention to proceed, take the necessary steps to recover the penalties (*c*).

Pollution of  
wells etc.

**889.** When within the district of a local authority it is represented by any person that the water in any well, tank, or cistern, public (*d*) or private, or supplied from any public pump, and used, or likely to be used, for drinking or domestic purposes, or for manufacturing drinks for the use of man, is so polluted as to be injurious to health, the authority may apply to a court of summary jurisdiction for an order to remedy the same (*e*). The court has power to summon the owner or occupier of the premises to which the well, tank, or cistern belongs, if it is private, or in the case of a public well, tank, cistern, or pump, any person alleged in the application to be interested in the same, and to order the well, tank, cistern, or pump to be permanently or temporarily closed, or the water to be used for certain purposes only, or to make such order as the court may think requisite to prevent injury to the health of persons drinking the water. If the person on whom the order is made fails to comply with it, the court may authorise the local authority to carry out the order at the expense of the delinquent (*f*).

Throwing  
rubbish.

**890.** When a local authority has adopted the Public Health

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*Council*, [1897] 2 Ch. 291, C. A.); see also title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 408, 611, 612.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 69.

(*b*) *Ibid.*, s. 68. Such proceedings must be taken while the offence continues or within six months after it has ceased (*ibid.*). On recovering the penalty the local authority is entitled to full costs of suit (*ibid.*). A gas company is liable for an escape of gas washings through a crack in the floor of a tank due solely to subsidence of which the company had no knowledge (*Hipkins v. Birmingham and Staffordshire Gas Light Co.* (1860), 5 H. & N. 74, affirmed 6 H. & N. 250, Ex. Ch.).

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 68.

(*d*) As to the meaning of "public well," compare *Smith v. Archibald* (1880), 5 App. Cas. 489; *Dungarvan Guardians v. Mansfield*, [1897] 1 I. R. 420; *Holmfirth Local Board v. Shore* (1895), 59 J. P. 344.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 70.

(*f*) *Ibid.* The court may order the water to be analysed at the cost of the local authority (*ibid.*). Expenses incurred by the local authority may be recovered in a summary manner from the delinquent, and where not so recoverable are treated as special expenses (*ibid.*). As to special expenses generally, see title LOCAL GOVERNMENT, Vol. XIX., p. 335.



Acts Amendment Act, 1890 (*g*), Part III., it is an offence for any person to throw or place or suffer to be thrown or placed within any river, stream, or watercourse within the district of the local authority any cinders, ashes, bricks, stone, rubbish, dust, filth, or other matter which is liable to cause annoyance (*h*).

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Purity and  
Pollution.

(v.) *Pollution in the Metropolis.*

**891.** Provisions similar to those mentioned above (*i*), relating to the fouling of water by gas and its manufacture and the pollution of wells, are in force in the administrative county of London (*k*), and are enforceable by the sanitary authority (*l*). The sanitary authority has also power to make bye-laws for securing the cleanliness and freedom from pollution of tanks, cisterns (*m*) and other receptacles used for storing of water used or likely to be used by man for drinking or domestic purposes or for manufacturing drink for the use of man (*n*).

Powers in  
Metropolis.

**892.** Any person other than those engaged in the manufacture of gas who does any act whereby any fountain or pump is wilfully or maliciously damaged or who is guilty of any act or neglect whereby the water of any well, pump, or fountain used or likely to be used by man for drinking or domestic purposes or for manufacturing drink for the use of man, is polluted or fouled, is liable to a penalty not exceeding £5 for each offence and a further penalty not exceeding 20s. for every day the offence continues after notice is served on him by the sanitary authority in relation thereto (*o*).

Pollution of  
wells etc.

**893.** Any person supplied with water in the Metropolis by the Metropolitan Water Board (*p*) who wilfully or negligently causes or suffers any fittings (*q*) used in connexion with the water supply to be out of repair or to be so used or contrived that the water supplied is or is likely to be contaminated, or so as to occasion or allow the return of foul air or other noisome or impure matter into any pipe belonging to or connected with the pipes of the Board, is liable to a penalty not exceeding £5. In addition he is liable to

Non-repair  
of fittings.

(*g*) 53 & 54 Vict. c. 59; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363.

(*h*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 47. The penalty for each offence is not exceeding 40s. (*ibid.*).

(*i*) See pp. 442 *et seq.*, *ante*.

(*k*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 52, 54. In the case of polluted wells the court to make the order is the petty sessional court (*ibid.*, s. 54). As to the administrative county of London, see title METROPOLIS, Vol. XX., pp. 393 *et seq.* As to pollution of the Thames, see pp. 448 *et seq.*, *post*.

(*l*) As to sanitary authorities in the Metropolis, see title METROPOLIS, Vol. XX., p. 408.

(*m*) "Cistern" includes water-butt (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141).

(*n*) *Ibid.*, s. 50. As to the publication of bye-laws and enforcement of penalties, see *ibid.*, ss. 114—126, Sched. I.

(*o*) *Ibid.*, s. 53.

(*p*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41); see, generally, title WATER SUPPLY, pp. 330 *et seq.*, *ante*.

(*q*) Such fittings are those prescribed by the Board by regulations and published from time to time (Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 17—25).

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Purity and  
Pollution.

Contamina-  
tion by gas.

have the supply of water cut off so long as the cause of injury remains or is not remedied (*r*).

**894.** Whenever water supplied by the Metropolitan Water Board within the Metropolis (*s*) is contaminated or affected in any way whatsoever by the gas of a gas company, the gas company must within twenty-four hours after notice given by the secretary of the Water Board or by any person using the water, take effectual steps to prevent the gas from contaminating or affecting the water, and if within forty-eight hours after such notice, the gas company fails to use all reasonable means effectually to remove the cause of complaint and prevent all such contamination, it is liable to forfeit to the use of the Water Board a sum not exceeding £10 for each day during which the water is so affected (*t*).

When there is doubt whether such water is contaminated by the gas of a gas company the Water Board may, after giving twenty-four hours' notice to the gas company, open the ground and examine its gas mains, pipes and apparatus, and if it then appears that there has been an escape of gas whereby the water was contaminated, then the gas company must bear the cost of this investigation, otherwise the Water Board must do so and make good to the gas company any damage done to its property (*a*).

(vi.) *Pollution of Fisheries.*

Protection of  
salmon.

**895.** The statutes relating to fisheries have created various offences which, though aimed at the protection of fish, at the same time prevent pollution (*b*). Thus, it is forbidden to cause or knowingly permit to flow, or to put, or knowingly permit to be put, into any waters (*c*) containing salmon or into any tributaries (*d*) thereof, any liquid or solid matter to such an extent as to cause the water to poison or kill fish (*e*), unless the

(*r*) Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 32; Metropolis Water Act, 1852 (15 & 16 Vict. c. 84), ss. 23, 25.

(*s*) For the area of the Metropolis for this purpose, see title METROPOLIS, Vol. XX., p. 416.

(*t*) Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 51.

(*a*) *Ibid.*, s. 52. The amount of the damage is ascertained by a justice and may be recovered as a penalty by summary proceedings (*ibid.*).

(*b*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109); Malicious Damage Act, 1861 (24 & 25 Vict. c. 97); Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45); Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11); Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54); see, generally, title FISHERIES, Vol. XIV., pp. 618, 628. The owner or lessee of a fishery whose right of fishing is damaged by pollution apart from these statutes is entitled to protection by injunction (*Fitzgerald v. Firbank*, [1897] 2 Ch. 96, C. A.).

(*c*) Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 5. This does not include the river Tweed (*ibid.*, s. 2); but, presumably, it includes all tidal waters on the sea coast which are declared to be salmon rivers; see Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 3. As to river pollution, see, generally, pp. 438 *et seq.*, *ante*.

(*d*) As to what waters may be described as tributaries, see *Merricks v. Cadwallader* (1881), 51 L. J. (M. C.) 20; *Hall v. Reid* (1882), 10 Q. B. D. 134, n.; *Harbottle v. Terry* (1882), 10 Q. B. D. 131; *George v. Carpenter*, [1893] 1 Q. B. 505; *Evans v. Owens*, [1895] 1 Q. B. 237; *Stead v. Nicholas*, [1901] 2 K. B. 163; *Moses v. Iggo*, [1906] 1 K. B. 516; *Cook v. Clareborough* (1903), 70 J. P. 252.

(*e*) Presumably this means all sorts of fish, and not only salmon.

person who does so has acted in the exercise of a right to which he is by law entitled and proves to the satisfaction of the court before whom he is tried that he has used the best practicable means within a reasonable cost (*f*) to render such liquid or solid matter harmless (*g*).

These provisions are not to prevent anyone from acquiring a legal right in cases where he could have acquired it if they had not been enacted, or to exempt anyone from any punishment to which he would otherwise be subject, or to legalise any act or default that would but for these provisions be deemed to be a nuisance or contrary to law (*g*).

**896.** It is a misdemeanour (*h*) unlawfully and maliciously to put any lime or other noxious material into any fish-pond or water which is private property or in which there is any private right of fishery, or into any salmon river (*i*), with intent thereby to destroy any of the fish there, or that may thereafter be put there.

Similarly (*k*), poison, lime, or noxious material may not be put into any water frequented by freshwater fish (*l*) with intent to destroy any of the fish there or that may thereafter be put there. Where there is a private oyster bed or any oyster or mussel bed within the limits of a several oyster or mussel fishery created

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Purity and  
Pollution.

Protection  
of fish  
generally.

(*f*) Whether an offender has used the best practicable means within a reasonable cost may, if he desires, be ascertained by a jury in the High Court, provided that he satisfies the justices before whom he is summoned that the expense of permanently preventing the matter complained of would, exclusive of cost, exceed £100, and gives security for his appeal (Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 6). The verdict of the jury is conclusive in all subsequent proceedings for penalties (*ibid.*, s. 7).

(*g*) *Ibid.*, s. 5. The penalty for a breach of these provisions is: on a first conviction, not exceeding £5; on a second conviction, not less than £2 10s. and not exceeding £10, and a further penalty, not exceeding £2, for every day during which the offence is continued, but the justices need not inflict a greater penalty in the whole than £2 10s.; on a third conviction, not less than £5, and not exceeding £20 a day for every day during which such offence is continued, commencing from the date of the third conviction, but the justices need not inflict a greater penalty than £5 in the whole; on a fourth or subsequent conviction, not exceeding £20 a day for every day the offence has continued, dating from the date of the third conviction (*ibid.*; Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 57; Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18 (5)).

(*h*) Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32. This offence is punishable by penal servitude not exceeding seven years, or imprisonment, and, if a male under sixteen, with or without whipping (*ibid.*).

(*i*) The application of this offence to salmon rivers is made by the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 13; see *R. v. Vasey*, [1905] 2 K. B. 748, C. C. R. As to the definition of a salmon river, see title FISHERIES, Vol. XIV., p. 594.

(*k*) Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 7. The penalty is not exceeding £20 or imprisonment, with or without hard labour, for not exceeding two months (*ibid.*). The offender may, so long as he is not punished twice, be punished under any other Act, such as, for example, under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 32; Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65), s. 2; Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 12.

(*l*) "Freshwater fish" means any fish living permanently or temporarily in fresh water exclusive of salmon (Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11), s. 6).



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under the Sea Fisheries Act, 1868 (*m*), and sufficiently marked out and known as such, it is an offence for anyone other than the owner or grantees, their agents, servants, and workmen, to deposit any ballast, rubbish, or other substance or to disturb or injure in any manner, except for a lawful purpose of navigation or anchorage, such oysters or mussels or the beds or fishery (*n*).

Bye-laws.

**897.** Local sea fisheries committees (*o*) have power by bye-law (*p*) to prohibit or regulate the deposit or discharge of any solid or liquid substance detrimental to sea fish (*q*) or sea fishing, but any such bye-law must not affect any power of a sanitary or other local authority to discharge sewage in pursuance of any power given by a general or local Act of Parliament or provisional order, or prejudicially affect any right on, to or over any portion of the seashore enjoyed by any person under any local or special Act of Parliament, or any royal charter, letters patent, prescription, or immemorial usage, without his consent (*r*).

(vii.) *Pollution of the Thames.*

Duties of  
Thames  
Conservancy.

**898.** It is the duty of the Thames Conservancy to preserve and maintain the purity of the water of the Thames and its tributaries down to the western boundary of the County of London, and to cause these waters to be effectually scavenged of substances liable to putrefaction (*s*).

(*m*) 31 & 32 Vict. c. 45.

(*n*) *Ibid.*, ss. 53, 54. The penalty is: for a first offence, not exceeding £2; for a second offence, not exceeding £5; for a third or subsequent offence, not exceeding £10; and the offender is liable to make full compensation to the owner or grantees respectively for any damage sustained (*ibid.*, s. 53). This may be recovered from him in any court of competent jurisdiction, but not in a summary manner (*ibid.*). Instead of prosecuting under this Act, other proceedings may be taken (*ibid.*, s. 65); compare *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *The Bien*, [1911] P. 40.

(*o*) As to the constitution and powers of local sea fisheries committees, see title FISHERIES, Vol. XIV., pp. 621 *et seq.*

(*p*) Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 2 (2). The penalty may be not exceeding £20, and for a continuing offence the additional sum of £10 for every day during which the offence continues. Penalties may be recovered and enforced on summary conviction (*ibid.*, s. 3).

(*q*) This does not include salmon, but includes all other fish found in the sea, including lobsters, crabs, shrimps, prawns, oysters, mussels, cockles, and other kinds of crustaceans and shell fish (*ibid.*, s. 14).

(*r*) *Ibid.*, s. 13.

(*s*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 91. "Tributaries" means the whole and every part of any river, stream, water-course, cut, dock, canal, channel and water within the counties of Gloucester, Wilts, Oxon, Bucks, Berks, Hants, Surrey, Middlesex, Herts, Essex and Kent, and the administrative county of London, and being within the catchment area of the Thames and communicating either directly or indirectly with the Thames, except (i.) so much of such waters which first communicate either directly or indirectly with the Thames to the eastward of the western boundary of the county of London as is more than three miles from the Thames; (ii.) so much of the river Lee as is above the southern boundary stone mentioned in the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.); (iii.) all waters within the catchment area of that part of the river Lee; and (iv.) every cut, dock, and canal belonging to any dock

All proceedings under the Thames Conservancy Act, 1894 (*t*), relating to the pollution of the water of the Thames must be taken by the Conservancy and not by any other person (*u*).

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Pollution.

**899.** If the Thames Conservancy fails to perform its duties with regard to the purity of the Thames or its tributaries, the Port of London Authority, the Metropolitan Water Board, the London County Council, the Corporation of London, or any local authority or water company which appears to the Local Government Board to be interested, may complain to that Board, which can then call upon the conservators for an explanation; if this is not forthcoming, or the complaint is not remedied, the Board can make such order as the circumstances require, which is binding on the conservators (*v*).

Enforcement  
of duties.

**900.** It is the duty of the London County Council, as successors to the Metropolitan Board of Works, to see that the sewers constructed under the Metropolis Management Amendment Act, 1858 (*w*), so far as practicable do not pass sewage into the Thames within the Metropolis. To enforce this a Secretary of State may direct such proceedings as he thinks fit (*a*).

Duty of  
London  
County  
Council.

**901.** No person without lawful excuse may (1) unload, throw, or put, or cause or suffer to fall, any gravel, ballast, or any stones, earth, mud, ashes, dirt, soil, or rubbish, or any refuse from gasworks or other manufactories, into the Thames or on the shore thereof, or into any tributary at any point within three miles of the Thames, so that the same will or may be carried into the Thames (*b*); or (2) knowingly put the same in any place where it is likely to be carried by floods or extraordinary tides into the Thames, or wilfully cause or suffer (*c*) any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or liquid,

Throwing  
rubbish etc.  
into the  
Thames.

or other company established under the authority of Parliament at the port of London (Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 90).

(*t*) 57 & 58 Vict. c. clxxxvii.

(*u*) *Ibid.*, s. 103. This part of this Act does not legalise or permit any nuisance or take away or prejudice or affect any remedy or right which a person would or might have had or exercised against any person polluting the water (*ibid.*, s. 104). For carrying this part of the Act into effect, the conservators and their officers, except within the limits of the jurisdiction of the Port of London Sanitary Authority, may enter any land or premises and inspect and lay open the same. If they find no offence they must make good the damage done (*ibid.*, s. 98). To the eastward of a line drawn across the river from the boundary line between the parishes of Teddington and Twickenham, the powers and duties of the Thames Conservancy have been transferred to the Port of London Authority (Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7, Sched. V.) see p. 405, *ante*.

(*v*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 8 (7).

(*w*) 21 & 22 Vict. c. 104, s. 2.

(*a*) *Ibid.*, s. 31.

(*b*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 92 (1), (2). As to arrest, see note (*d*), p. 450, *post*.

(*c*) "Wilfully suffer" does not include omitting to do something which might have mitigated the nuisance (*High Wycombe Corporation v. River Thames Conservators* (1898), 78 L. T. 463; *Smith v. Barnham* (1876), 34 L. T. 774).

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Purity and  
Pollution.

to flow into the Thames, or into any tributary (*d*); or (3) put or allow to remain for more than forty-eight hours any heap or collection of manure, ashes, or other offensive matter, whether solid or liquid, near to or upon any bank of the Thames, so that the same will or is likely to drain, blow, or pass into the Thames or such tributary (*e*).

Sewage.

**902.** No person may open into the Thames or into any tributary any sewer, drain, pipe or channel whereby sewage or any other offensive or injurious matter, whether solid or liquid, shall or is likely to flow or pass therein, or wilfully cause or without lawful excuse suffer any sewage or matter as aforesaid to flow or pass therein, through any drain, pipe or channel not at the passing of the Act lawfully used for that purpose (*f*).

Whenever sewage or other matter as aforesaid flows or passes into the Thames, the conservators must give to the persons causing or suffering (*g*) the same to flow or pass notice (*h*) to discontinue the flow and passage within such time after three months as the notice may specify.

The recipient of the notice may, if he considers the time specified to be insufficient, demand of the conservators an extension, and if they refuse he may appeal to the Board of Trade, but failure to comply with the notice by discontinuing (*i*) the flow or passage to which the notice refer renders him liable on summary conviction

(*d*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 92 (3), (4). A constable may, for offences under *ibid.*, s. 92 (1)—(4), arrest without warrant (*ibid.*, s. 92). *Ibid.*, s. 92 (4), does not apply to vessels of the port sanitary authority when within the port of London (*ibid.*).

(*e*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 92 (5). The penalty for any of the above offences is not exceeding £20 and a daily penalty not exceeding £10 (*ibid.*). These statutory provisions do not apply to places to the east of the eastern boundary of the Thames, even though the offensive matter might be washed by a flood tide into the river (*Fuller v. Payne* (1887), 3 T. L. R. 729).

(*f*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 93. The penalty is not exceeding £100 and a daily penalty not exceeding £50 (*ibid.*).

(*g*) A local authority in which sewers which it has not constructed are vested, and into which other persons have a right to drain, cannot be convicted of causing or suffering sewage to pass, though it can be in respect of sewage from its municipal buildings connected with such sewers (*Thames Conservators v. Gravesend Corporation*, [1910] 1 K. B. 442; *Waltham Holy Cross Urban District Council v. Lee Conservancy Board* (1910), 103 L. T. 192; *R. v. Staines Local Board* (1888), 60 L. T. 261; compare *Southall Norwood Urban District Council v. Middlesex County Council* (1901), 83 L. T. 742, where under an Act in similar terms (Middlesex County Council Act, 1898 (61 & 62 Vict. c. ccl.), s. 13) the defendants, as owners of a sewage farm, were held liable for an escape of sewage due to a breach of agreement by a third person by which he was permitted to send sewage to the farm).

(*h*) The notice must specify the sewers etc. in respect of which the complaint is made (*Thames Conservators v. Chertsey Rural Sanitary Authority* (1885), 1 T. L. R. 535).

(*i*) When an order has been made to discontinue and has been complied with, an isolated act of pollution is not necessarily an offence against this provision; compare *Lee Conservancy Board v. Leyton Urban District Council* (1906), 70 J. P. 318.



or indictment to a penalty not exceeding £100 and a daily penalty not exceeding £50 (*k*).

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The notice continues in force notwithstanding any temporary or partial suspension of the flow or passage, and notwithstanding any change in ownership or occupation (*l*).

**903.** Persons cutting or employing others to cut weeds, grass or other vegetation in the Thames or in any tributary must remove them at once, so as to prevent their remaining in and decaying and contaminating the water, and no person may throw or sweep any weeds, grass, or vegetation into the Thames (*m*).

Cutting  
weeds etc.

**904.** Vessels in the Thames above Teddington Lock must be fitted with sanitary conveniences so constructed that sewage or other offensive or injurious matter, whether solid or liquid, cannot pass into the Thames, and for this purpose the conservators may make bye-laws and may enter any such vessel and inspect the sanitary arrangements (*n*).

Sanitary  
conveniences  
on houseboats  
etc.

(viii.) *Miscellaneous Provisions.*

**905.** By the Cemeteries Clauses Act, 1847 (*o*), cemetery companies are forbidden to cause or suffer to be brought or to flow into any stream, canal, reservoir, aqueduct, pond or watering place any offensive matter from the cemetery whereby such water is fouled (*p*).

Cemeteries  
Clauses Act,  
1847.

**906.** By the Land Drainage Act, 1861 (*q*), no person who has not a legal right to pollute may, without the consent of the Commissioners of Sewers or Drainage Board, cause any filthy or unwholesome water or washings of manufactories or mines, or any other foul or poisonous liquid, to flow into any watercourse within the jurisdiction of such Commissioners or Board (*r*).

Land  
Drainage  
Act, 1861.

(*k*) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 94.

(*l*) Except where the notice was in respect of an offence from lands or premises used for manufacturing purposes and not situate in a town, and for three years no proceedings have been taken by the conservators, then before proceeding they must give a renewal or copy of such notice (*ibid.*, s. 96). On a conviction the conservators may, with the sanction of the court which tried the case, stop up the outlet of any sewer, drain, pipe or channel in respect of which the offence was committed at the expense of the delinquent, except where the sewer drains into the Thames below Teddington Lock, and is vested in a local authority which has taken or are taking all practicable means to procure the conviction of the actual offenders (*ibid.*, s. 100).

(*m*) *Ibid.*, s. 102. The penalty is not exceeding £5 (*ibid.*).

(*n*) *Ibid.*, ss. 101, 191.

(*o*) 10 & 11 Vict. c. 65; see title BURIAL AND CREMATION, Vol. III., pp. 514 *et seq.* This Act is incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55); see Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), s. 3.

(*p*) Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), ss. 20—22. The penalty is £50 for each offence and a daily continuing penalty of £10 (*ibid.*, s. 22); see title BURIAL AND CREMATION, Vol. III., pp. 508, 517.

(*q*) 24 & 25 Vict. c. 133; see title LAND IMPROVEMENT, Vol. XVIII., pp. 301 *et seq.*

(*r*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 58. The penalty is not exceeding £5 and 40s. a day for every day the offence continues (*ibid.*); see title SEWERS AND DRAINS, Vol. XXV., p. 781.

## SECT. 3.

Purity and  
Pollution.

Alkali, etc.  
Works Regu-  
lation Act,  
1906.

**907.** Every work in which acid is produced or used must be carried on in such a way that the acid does not come into contact with alkali waste or with drainage therefrom so as to cause a nuisance, and a sanitary authority, at the request of the owner of such works and at his expense, may (s) make a drain to carry off the acid to the sea or into any river or watercourse into which such acid may be carried without contravening the Rivers Pollution Prevention Act, 1876 (t).

Diseases of  
Animals Act,  
1894.

**908.** It is an offence to throw, place, cause or suffer to be thrown or placed, into or in any river, stream, canal, navigation or other water, or into the sea within three miles of the shore, the carcase of an animal which has died of disease or been slaughtered as diseased or suspected (u).

SUB-SECT. 5.—*Acquisition of Right to Pollute.*

Modes of  
acquisition.

**909.** A right to pollute water flowing to another's property may be acquired (w) by grant from the person who is entitled to the water in its natural state, or by Act of Parliament, or by sufficient user under the Prescription Act, 1832 (x).

The right when acquired by prescription must be restricted to the limits of it when the period of prescription commenced, and any substantial increase in the amount of pollution after that time is unlawful, and the wrongdoer may be restrained by injunction even though it may cause a total prohibition of the pollution (a).

Where the right has been acquired in respect of the manufacture of a particular article or class of goods, it includes the right to use any proper materials for the manufacture of such goods so long as

(s) Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), s. 3. The penalty on a first offence is £50; on a subsequent offence, £100, and not exceeding £5 for every day during which the subsequent offence continues (*ibid.*); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 408.

(t) 39 & 40 Vict. c. 75.

(u) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 51, 52. The penalty is not exceeding £20, or in certain events imprisonment not exceeding one month, with or without hard labour (*ibid.*, s. 51); see, further, title ANIMALS, Vol. I., pp. 421 *et seq.*

(w) *Wood v. Waud* (1849), 3 Exch. 748; *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393. As to the statutory restrictions on pollution, see *A.-G. v. Birmingham Borough Council* (1858), 4 K. & J. 528; *Wright v. Williams* (1836), 1 M. & W. 77; *Carlyon v. Lovering* (1857), 1 H. & N. 784, 797; *Spokes v. Banbury Local Board of Health* (1865), L. R. 1 Eq. 42; *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Glossop v. Heston and Isleworth Local Board* (1879), 10 Ch. D. 102, C. A.; and see *Holt v. Rochdale Corporation* (1870), L. R. 10 Eq. 354; *Lea Conservancy Board v. Hertford Corporation* (1884), 48 J. P. 628; and p. 439, *ante*. As to pollution creating a public nuisance, see *Blackburne v. Somers* (1879), 5 L. R. Ir. 1; and p. 454, *post*; as to percolating water, see p. 434, *ante*.

(x) 2 & 3 Will. 4, c. 71; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI. pp. 268 *et seq.*; p. 434, *ante*.

(a) *Blackburne v. Somers*, *supra*; *Crossley & Sons, Ltd. v. Lightowler*, *supra*; compare *McIntyre Brothers v. McGavin*, [1893] A. C. 268. and see *Somersetshire Drainage Commissioners v. Bridgewater Corporation* (1899), 81 L. T. 729, H. L., where, under a local Act forbidding pollution except by persons having a legal right to pollute at the passing of the Act, it was held that such persons might continue to do so at an increased rate.

that does not increase the pollution (*b*), but it does not give the right of substituting the manufacture of articles or goods different from that in respect of which the right was acquired (*c*).

SECT. 3.  
Purity and  
Pollution.

**910.** A person may pour matter into water which by itself may not cause pollution, and other persons may do likewise, yet, if the combined effect is to cause pollution, each may be restrained by injunction (*d*), and it is no defence to an action to restrain pollution that others also foul the water (*e*).

Pollution by  
combined  
acts.

**911.** No person can acquire a right by prescription to pollute water so as to cause injury to public health, or to any public right, such as fishery in tidal waters (*f*).

Interference  
with public  
right.

**912.** A prescriptive right to pollute, when acquired, cannot be lost by any subsequent act not amounting to a surrender, though it may be abandoned; mere non-user is in itself not sufficient to prove an intention to abandon, intention to abandon being a question of fact in each case (*g*).

Non-user.

**913.** Where a riparian owner has acquired a right to pollute, if he sells any part of his riparian land he is liable to be restrained by his purchaser from polluting the water, unless he reserved in his grant a right to do so, for the right to pollute is not an easement of necessity (*h*).

Pollution  
after sale.

#### SECT. 4.—*Escape and Overflow.*

**914.** When water escapes or overflows from land the owner of that land is not liable for the consequences, if this happens in the ordinary use of the land without any wilful act or negligence on his part (*i*). If, however, for his own convenience he collects water on

Liability of  
landowner.

(*b*) *Baxendale v. McMurray* (1867), 2 Ch. App. 790 (vegetable fibre substituted for rags in manufacture of paper); see *McIntyre Brothers v. McGavin*, [1893] A. C. 268.

(*c*) *Clarke v. Somersetshire Drainage Commissioners* (1888), 57 L. J. (M. C.) 96 (changing business from fellmonger to leather board manufacturer).

(*d*) *Blair and Sumner v. Deakin* (1887), 57 L. T. 522, 525.

(*e*) *Crossley & Sons, Ltd. v. Lightowler* (1867), 2 Ch. App. 478.

(*f*) *Blackburne v. Somers* (1879), 5 L. R. Ir. 1; *Hobart v. Southend-on-Sea Corporation* (1906), 75 L. J. (K. B.) 305; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Owen v. Faversham Corporation* (1908), 73 J. P. 33, C. A.; *R. v. Medley* (1834), 6 C. & P. 292; *R. v. Cross* (1812), 3 Camp. 224 (no length of time will legitimate a public nuisance); *A.-G. v. Cocker-mouth Local Board* (1874), L. R. 18 Eq. 172; *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A., varied without affecting this point, [1912] A. C. 788; *A.-G. v. Burridge* (1822), 10 Price, 350 (even the Crown cannot authorise a public nuisance); *A.-G. v. Barnsley Corporation*, [1874] W. N. 37, C. A.; *Traill v. McAllister* (1890), 25 L. R. Ir. 524; and see *A.-G. v. Richmond* (1866), L. R. 2 Eq. 306, 311.

(*g*) *French Hoek Commissioners v. Hugo* (1885), 10 App. Cas. 336, P. C.; *Crossley & Sons, Ltd. v. Lightowler*, *supra* (evidence that works from which pollution originated had not been used for over twenty years and had become ruins held sufficient).

(*h*) *Crossley & Sons, Ltd. v. Lightowler*, *supra*.

(*i*) *Wilson v. Waddell* (1876), 2 App. Cas. 95; *Fletcher v. Smith* (1876), 2 App. Cas. 781; *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A.; see titles ACTION, Vol. I., p. 10; NEGLIGENCE, Vol. XXI., pp. 382, 401; NUISANCE, Vol. XXI., pp. 525 *et seq.* The owner of a watercourse is not at common law liable to his neighbours



SECT. 4.  
**Escape  
 and  
 Overflow.**

his land which would not naturally have come there (*k*), or diverts or interferes with the course of a stream on his own land (*l*), he is liable for the direct and proximate damages resulting from any escape or overflow (*m*), unless he can satisfy the court that the water was collected and impounded on his land by some third person for the purpose of such person (*n*), or by circumstances beyond his control (*o*), or by *vis major* (*p*), or act of God (*q*), or that the water was stored for the benefit of himself and the injured party, or that there was no negligence on his part and the injured party consented to what had been done (*r*). His liability in this

for overflow caused by the natural and gradual silting up of the bed and the growing of weeds (*Hodgson v. York Corporation* (1873), 28 L. T. 836; *Cracknell v. Thetford Corporation* (1869), L. R. 4 C. P. 629; *Normile v. Ruddle* (1912), 47 I. L. T. 179).

(*k*) *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; 1 Smith, L. C., 11th ed., p. 810 (defective reservoir for water); *Fletcher v. Smith* (1877), 2 App. Cas. 781; *Snow v. Whitehead* (1884), 27 Ch. D. 588 (draining water to a cellar and allowing it to percolate to neighbour's house); *Evans v. Manchester, Sheffield and Lincolnshire Railway* (1887), 36 Ch. D. 626 (percolation from a canal through its being let down by a mine-owner); compare titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 318, 319; NEGLIGENCE, Vol. XXI., pp. 395, 401 *et seq.*; NUISANCE, Vol. XXI., pp. 528, 529; TRESPASS, Vol. XXVII., p. 849. As to the right of constructing fish-ponds, see title FISHERIES, Vol. XIV., p. 581. As to the liability of statutory undertakers, see p. 456, *post*; titles NEGLIGENCE, Vol. XXI., pp. 464 *et seq.*; NUISANCE, Vol. XXI., pp. 516 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 312 *et seq.*; TORT, Vol. XXVII., pp. 496, 497; WATER SUPPLY, pp. 278, 280, 288, *ante*.

(*l*) *Fletcher v. Smith*, *supra*. When altering the course of a stream, the new course must be made sufficient to prevent mischief from overflow even when occasioned mainly by act of nature (*ibid.*); compare *Hanley v. Edinburgh Corporation*, [1913] A. C. 488.

(*m*) *Cattle v. Stockton Waterworks* (1875), L. R. 10 Q. B. 453; *Lumley v. Gye* (1853), 2 E. & B. 216, 252; *Sharpe v. Powell* (1872), L. R. 7 C. P. 253; see title NUISANCE, Vol. XXI., p. 528.

(*n*) *Saxby v. Manchester and Sheffield Rail. Co.* (1869), L. R. 4 C. P. 198; *Whitmores (Edenbridge), Ltd. v. Stanford*, [1909] 1 Ch. 427; *Cracknell v. Thetford Corporation* (1869), L. R. 4 C. P. 269 (canal constructed on another's land); see title NUISANCE, Vol. XXI., p. 564.

(*o*) *Nield v. London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4 (sudden overflow of adjoining stream); *Box v. Jubb* (1878), 4 Ex. D. 76 (bursting of reservoir of third party).

(*p*) *Carstairs v. Taylor* (1871), L. R. 6 Exch. 217 (hole made by a rat); *Harrison v. Great Northern Rail. Co.* (1864), 10 L. T. 621 (a heavy rain-storm, but not of so extraordinary a character that defendant is not bound to anticipate it, is no defence); see titles NUISANCE, Vol. XXI., p. 564; TORT, Vol. XXVII., p. 493, note (*a*).

(*q*) *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1877), 9 Ch. D. 503, C. A. It is not necessary that an extraordinary natural event should never have happened before for it to be an act of God (*ibid.*). It is sufficient that it could not have been reasonably expected, and on its occurrence a second time it does not cease to be an act of God if there was nothing to indicate that it might occur again, *e.g.*, an extraordinary high tide (*ibid.*); but act of God is no defence if there is a duty to maintain an embankment and that duty is neglected (*Nichols v. Marsland* (1876), 2 Ex. D. 1, C. A.). Persons are not liable for extraordinary rainfall that could not reasonably have been anticipated, although if it had been anticipated the result might have been prevented (*ibid.*); see, further, titles NEGLIGENCE, Vol. XXI., pp. 467 *et seq.*; NUISANCE, Vol. XXI., p. 564; TORT, Vol. XXVII., pp. 493 *et seq.*

(*r*) *Gill v. Edouin* (1895), 72 L. T. 579, C. A.; compare *Madras Rail. Co. v. Carvetinagarum (Zemindar)* (1874), L. R. 1 Ind. App. 364.

respect is not diminished because he has granted to a neighbour a right to use the water so collected and to regulate the flow of the water (s). The principle is the same, whether the water is on the surface or underground (t).

SECT. 4.  
**Escape  
and  
Overflow.**

**915.** Injuries caused by the escape of water due to the effect of gravitation or percolation in the proper and ordinary use and working of the land give no cause for damages (u), though the pumping of water to another's land, even when done without negligence and in the due working of a mine, renders the owner liable (a), unless he can show that his operations do not throw any burden on the land which it had not been subjected to before (b).

Percolation.

**916.** When water is collected and brought into houses let out in tenements, and then escapes or overflows, the person who has the possession and control of the water or the space from which the water escapes is liable for the consequences if he or his servants be guilty of negligence (c). Where water is stored in a cistern for the common benefit of several persons and its escape is not due to negligence but arises from natural causes, the owner of the cistern is not liable to any injury to the property by one of such persons (d).

Escape from  
cisterns etc.

(s) *Buckley (R. H.) & Sons, Ltd. v. Buckley (N.) & Sons*, [1898] 2 Q. B. 60, C. A. (neglect by grantee to repair shuttle to artificial watercourse whereby neighbour's land was flooded).

(t) *Humphries v. Cousins* (1877), 2 C. P. D. 239 (damage from a defective drain the existence and non-repair of which was unknown to defendant).

(u) *Wilson v. Waddell* (1876), 2 App. Cas. 95; *Smith v. Kenrick* (1849), 7 C. B. 515, 546 (water percolating to a mine), distinguished in *Crompton v. Lea* (1874), L. R. 19 Eq. 115; see, further, title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 590 *et seq.* To make an artificial mound which collects water which percolates to a neighbour's house and does damage is actionable, and the occupier of the premises is liable for allowing the percolation to continue (*Broder v. Saillard* (1876), 2 Ch. D. 692; *Hurdman v. North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A.); see also *Cooper v. Barber* (1810), 3 Taunt. 99; *Snow v. Whitehead* (1884), 27 Ch. D. 588 (percolation from cellar).

(a) *Baird v. Williamson* (1863), 15 C. B. (N. S.) 376; see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 591.

(b) *West Cumberland Iron and Steel Co. v. Kenyon* (1879), 11 Ch. D. 782, C. A. (where defendants, who had expedited the passage of percolating water to old mine workings on their land, from which it percolated to the plaintiffs' land in the same way as it would have done if they had not acted, were held not liable for the consequential damage); see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 591; compare title NUISANCE, Vol. XXI., p. 527.

(c) *Ross v. Fedden* (1872), L. R. 7 Q. B. 661 (overflow of defective water-closet); *Stevens v. Woodward* (1881), 6 Q. B. D. 318 (lavatory tap left running by clerk when not acting within the scope of his authority); *Ruddiman & Co. v. Smith* (1889), 60 L. T. 708 (tap left on by clerk when acting as incident to his employment); *Carstairs v. Taylor* (1870), L. R. 6 Exch. 217 (hole made by rats); *Blake v. Woolf*, [1898] 2 Q. B. 426 (negligence of plumber); *Hargroves, Aronson & Co. v. Hartopp*, [1905] 1 K. B. 472 (neglect to clean gutter after notice of stoppage); *Rickards v. Lothian*, [1913] A. C. 263, P. C.; see titles LANDLORD AND TENANT, Vol. XVIII., p. 501; NEGLIGENCE, Vol. XXI., p. 402.

(d) *Anderson v. Oppenheimer* (1880), 5 Q. B. D. 602, C. A.; see title LANDLORD AND TENANT, Vol. XVIII., p. 501, note (r).

## SECT. 4.

Escape  
and  
Overflow.

Flood-water.

**917.** Where flood-water finds its way on to a person's land the owner of the land is not entitled to send the water on to his neighbour's land, though his doing so is solely for the purpose of protecting his own property (*e*), but if he so acts to ward off a common danger, and to prevent the water getting on to his land, he is not liable (*f*).

Statutory  
authority.

**918.** Where Parliament has authorised the storing of water there is no liability for damage done by its escape unless negligence can be proved (*g*), or the works authorised were subject to a proviso that a nuisance was not to be created thereby (*h*).

Repairs.

**919.** A person who is responsible for the safe keeping of water is entitled to enter on land to do the necessary works to keep the water within bounds (*i*); and where water escapes by non-repair of the watercourse the person on to whose land it flows cannot insist on its continuance (*k*). The person who is entitled to the watercourse can go on his neighbour's land to repair it when necessary, and can restrain him from building over the site of it, if thereby his access is materially interfered with or the repairs rendered more expensive (*l*).

Raising of  
banks.

**920.** A riparian owner is entitled to raise his banks from time to time as it becomes necessary, so as to confine the flood water within the banks and to prevent it overflowing his lands, provided that by so doing he does not occasion any injury to the lands or property of other persons (*m*).

(*e*) *Whalley v. Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A. (cutting a railway embankment liable to injury by flood); compare *Menzies v. Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414, H. L.; *Nield v. London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4 (there is no duty on the owners of a canal analogous to that on the owner of a natural watercourse not to impede the flow of water down it, though a neighbour's lands are thereby flooded).

(*f*) *Thomas v. Birmingham Canal Navigation's Proprietors Co.* (1879), 43 L. T. 435; *Whalley v. Lancashire and Yorkshire Rail. Co.*, *supra*; *Masey Drainage Board v. Great Northern Rail. Co.* (1912), 106 L. T. 429; compare *Greyvensteyn v. Hattingh*, [1911] A. C. 355, P. C.; and see title NUISANCE, Vol. XXI., p. 563. A right to discharge flood water on to a neighbour's land, or to do acts on a neighbour's land to prevent a person's own land being flooded, may be acquired as an easement (*Simpson v. Godmanchester Corporation*, [1897] A. C. 696).

(*g*) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; see title NEGLIGENCE, Vol. XXI., p. 502; note (*k*), p. 454, *ante*.

(*h*) *Price's Patent Candle Co., Ltd. v. London County Council*, [1908] 2 Ch. 526, C. A.; *Charing Cross, West End and City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442; (1914), 30 T. L. R. 441, C. A., following *Midwood v. Manchester Corporation*, [1905] 2 K. B. 597. Where the statute authorising the undertaking sets up a special tribunal for assessing damages occasioned by the undertaking, and the tribunal is in abeyance, the damages may be assessed by the court; see *Bentley v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891] 3 Ch. 222, C. A.; *Walker v. Canal Co.* (1913), 2 L. J. (County Courts Reporter) 112.

(*i*) *M'Swincey v. Haynes* (1839), 1 I. Eq. R. 322.

(*k*) *Brymbo Water Co. v. Lesters Lime Co.* (1894), 8 R. 329.

(*l*) *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Bell v. Twentyman* (1841), 1 Q. B. 766; *Liford's Case* (1614), 11 Co. Rep. 46 b, 52 a.

(*m*) *Trafford v. R.* (1832), 8 Bing. 204, Ex. Ch.; *Ridge v. Midland Rail.*



**921.** A provision in an Act of Parliament which requires a navigation company to maintain and keep the banks of a water-course in good and sufficient repair, and from time to time to strengthen and support the same for containing the water, so that the adjacent lands are not to be overflowed or damaged by water except in case of flood and during the continuance thereof, imposes an absolute obligation on the company to keep the adjoining land from injury (*n*).

SECT. 4.  
Escape  
and  
Overflow.

Statutory  
duty.

**922.** It is an actionable nuisance for a person to allow the water from his eaves or gutters to fall on his neighbour's land or house (*o*), but a right to do so, being an easement, may be acquired in the same way as any other easements are acquired.

Acquisition  
of right.

Such a right is not lost by increasing the height of the structure from which the water drops if the burden of the servient tenement is not thereby increased (*p*), nor is it lost by unity of possession of the servient and dominant tenements, if it is an easement of absolute necessity (*q*).

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*Co.* (1888), 53 J. P. 55; *Menzies v. Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414, H. L. (where an injunction was granted against a proprietor who built banks which in times of ordinary floods would cause a neighbour's land to be overflowed; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 318). As to the duty of a riparian owner to maintain his banks, see *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1877), 9 Ch. D. 503, C. A.; and title SEWERS AND DRAINS, Vol. XXV., p. 783.

(*n*) *Vyner v. North Eastern Rail. Co.* (1898), 14 T. L. R. 554, H. L. Such a company is not liable to keep up flood-banks not constructed for keeping the water within the *alveus* of the river, but erected away from the banks for the purpose of preventing the overflow of land in times of flood (*Vyner v. North-Eastern Rail. Co.* (1904), 20 T. L. R. 192, C. A.); compare *Trafford v. R.* (1832), 8 Bing. 204, Ex. Ch., overruling *R. v. Trafford* (1831), 1 B. & Ad. 874; see also *Collins v. Middle Level Commissioners* (1867), L. R. 4 C. P. 279 (commissioners having a duty to construct sluices to prevent flooding are liable for negligent construction of such sluices).

(*o*) *Anon.* (1344), Y. B. 18 Edw. 3, 22 b; *Tucker v. Newman* (1839), 11 Ad. & El. 40. The owner of the land on which the water drops may sue, though he is not in actual possession of the land, in respect of damage to his reversion (*Tucker v. Newman, supra*). Action may be taken before rain has fallen, for the court takes judicial notice that rain falls (*Fay v. Prentice* (1845), 1 C. B. 828).

(*p*) *Thomas v. Thomas* (1835), 2 Cr. M. & R. 34; *Harvey v. Walters* (1873), L. R. 8 C. P. 162; compare *Greatrex v. Hayward* (1853), 8 Exch. 291.

(*q*) *Pheysey v. Vicary* (1847), 16 M. & W. 484; *Holland v. Deakin* (1829), 7 L. J. (O. S.) (K. B.) 145. As to the creation and extinguishment of easements, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 243 *et seq.*

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## WATERWORKS.

See WATER SUPPLY.

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## WAY-GOING CROPS.

*See* AGRICULTURE.

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## WAYLEAVE.

*See* MINES, MINERALS, AND QUARRIES ; TELEGRAPHS AND  
TELEPHONES.

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## WAYS.

*See* EASEMENTS AND PROFITS À PRENDRE ; HIGHWAYS, STREETS, AND  
BRIDGES ; MINES, MINERALS, AND QUARRIES.

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## Part I.—Introductory.

### SECT. 1.—Statutory Regulation of Weights and Measures.

Statutory  
uniformity.

**923.** Uniformity in the use of weights and measures has been the subject of many laws since the time of Magna Charta, and the regulations now in force are comprised in the statutes noted below (a).

(a) The statutes regulating weights and measures at present in force comprise:—(1) Acts specially relating to weights and measures—namely, Weights and Measures Act, 1878 (41 & 42 Vict. c. 49) (repealing, *inter alia*, stats. (1795) 35 Geo. 4, c. 102, (1797) 37 Geo. 3, c. 143, (1815) 55 Geo. 3, c. 43, (1824) 5 Geo. 4, c. 74, (1835) 5 & 6 Will. 4, c. 63, (1852) 16 & 17 Vict. c. 29, and (1854) 18 & 19 Vict. c. 72, and establishing imperial standards for the purposes of verification by comparison with local weights and measures throughout the kingdom); Weights and Measures Act, 1889 (52 & 53 Vict. c. 21) (providing for the verification of weighing instruments by qualified inspectors and regulating the sale of coal); Weights and Measures (Purchase) Act, 1892 (55 & 56 Vict. c. 18) (authorising the purchase of franchises of weights and measures by county and borough councils); Weights and Measures Act, 1893 (56 & 57 Vict. c. 19) (relieving certain boroughs from contributing to county expenses in connexion with weights and measures); Weights and Measures (Metric System) Act, 1897 (60 & 61 Vict. c. 46) (legalising the use of metric weights and measures in trade and establishing metric standards); Weights and Measures Act, 1904 (4 Edw. 7, c. 28) (empowering the Board of Trade to make regulations with respect to the verification and stamping of weights and measures and the tests for ascertaining their accuracy and efficiency, the grant of certificates of suitability for use of appliances, and the examination of inspectors). The foregoing Acts may (*ibid.*, s. 2) be

SECT. 2.—*Definition of Terms Used in Measurement.*SECT. 2.  
Definition  
of Terms  
Used in  
Measure-  
ment.

924. The following are some examples of terms used in measurement (*b*) of length, space, distance and capacity:—

“About,” “thereabouts,” “say about,” “be the same more or less,” are words of general import and of great obscurity (*c*). Delivery of 127 tons has been held to be in accord with a contract for “100 tons more or less” (*d*). On the other hand, very small margins (less than 3 per cent.) have been questioned in other cases (*e*), and between these limits there are numerous decisions (*f*). No evidence is admissible to explain the general meaning of the word “about”; that is a question of construction for the judge, but evidence is admissible to prove that, by the custom of a particular market or trade or locality, the word “about” has a special meaning (*g*).

“About”  
etc.;

cited as the Weights and Measures Acts, 1878—1904, and are so referred to in this title. (2) Acts and portions of Acts regulating the use of weights and measures in certain trades—namely, Bread Acts (London), 1822 (3 Geo. 4, c. cvi.), 1836 (6 & 7 Will. 4, c. 37) (sale of bread in London); Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 15 (payment of wages in mines); London Coal Act, 1831 (1 & 2 Will. 4, c. lxxvi.) (sale of coal in London); Mills Act, 1796 (36 Geo. 3, c. 85) (sale of corn); Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 117 (weights and measures in factories); Sale of Gas Act, 1859 (22 & 23 Vict. c. 66) (sale of gas); Hay and Straw Act, 1796 (36 Geo. 3, c. 88) (sale of hay and straw in London); Hop Trade Acts, 1800 (39 & 40 Geo. 3, c. 81), s. 3 and 1814 (54 Geo. 3, c. 123), s. 1; Hop (Prevention of Frauds) Act, 1866 (29 & 30 Vict. c. 37), ss. 4, 5, 18 (sale of hops); Spirits Act, 1880 (43 & 44 Vict. c. 24), ss. 3, 98, 99; Finance Act, 1907 (7 Edw. 7, c. 13), s. 4; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 69 (sale of liquors); Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 21—28; Markets and Fairs (Weighing of Cattle) Acts, 1887 (50 & 51 Vict. c. 27) and 1891 (54 & 55 Vict. c. 70) (weights used in markets). The phrase “the Weights and Measures Acts,” without further definition, means the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49), 1889 (52 & 53 Vict. c. 21), and 1904 (4 Edw. 7, c. 28) (*ibid.*, s. 3), and is so used in this title.

(*b*) As to the construction of expressions limiting time, see title TIME, Vol. XXVII., pp. 456, 457.

(*c*) *Cross v. Eglin* (1831), 2 B. & Ad. 106, 110, 111; see, further, title SALE OF GOODS, Vol. XXV., p. 213, note (*s*).

(*d*) *Cockerell v. Aucompte* (1857), 2 C. B. (N. S.) 440.

(*e*) *Morris v. Levison* (1876), 1 C. P. D. 155; *Miller v. Borner & Co.*, [1900] 1 Q. B. 691; *The Resolven* (1892), 9 T. L. R. 75. Five per cent. is the custom of the Newcastle coal trade; see *Société Anonyme L'Industrielle Russo-Belge v. Scholefield* (1902), 7 Com. Cas. 114, C. A.; titles CUSTOM AND USAGES, Vol. X., p. 276; SALE OF GOODS, Vol. XXV., p. 214, note (*j*).

(*f*) See, for instance, *Winch v. Winchester* (1812), 1 Ves. & B. 375; *Portman v. Mill* (1839), 8 L. J. (CH.) 161; *Macdonald v. Longbottom* (1859), 1 E. & E. 977. Where a maximum and minimum are fixed, “say from — to —,” the delivery must be of a quantity between the two limits (*Tamvaco v. Lucas* (1859), 1 E. & E. 581; see *Gwillim v. Daniell* (1835), 2 Cr. M. & R. 61); for numerous other illustrations, see title SALE OF GOODS, Vol. XXV., p. 214, notes (*e*)—(*i*).

(*g*) *Société Anonyme L'Industrielle Russo-Belge v. Scholefield*, *supra*, per VAUGHAN WILLIAMS, L.J., at pp. 116, 117. As to the application of such qualifying words to the whole quantity of goods or to the amount of instalments of such quantity, see title SALE OF GOODS, Vol. XXV., p. 216.

## SECT. 2.

Definition  
of Terms  
Used in  
Measure-  
ment.

The term "adjoining" means "absolutely contiguous, without anything between" (*h*), but the fact that two pieces of ground are separated by a highway does not prevent their being "adjoining" (*i*). The word "adjacent" has a more vague meaning (*j*) than "adjoining," and has been held not to include a distance of four miles (*k*), and in another case to include a distance of six miles (*l*).

"adjoining"; The expression "in or near" is equivalent to the Latin *in sive*  
"adjacent"; *juxta* often used in old charters (*m*).

"in or near"; The word "near" in a penal statute does not necessarily mean  
"near"; "next" or "nearest," but there must be reasonable vicinity, of which the court is to judge (*n*). This has no precise meaning (*o*). As regards distance, six, ten or even thirty-three or forty-two miles may satisfy the term if there is nothing nearer (*p*). But a thing which is the "nearest" is, in general, the "next," as these two words are synonymous (*q*).

"as the crow  
flies";

Formerly distance between two places was measured by the nearest practicable road or way. Subsequently it was held that the

(*h*) *R. v. Hodges* (1829), Mood. & M. 341, *per* PARKE, J., at p. 343; *Vale v. Moorgate Street and Broad Street Buildings, Ltd.* (1899), 80 L. T. 487; *Ind, Coope & Co. v. Hamblin* (1900), 84 L. T. 168; *White v. Harrow* (1902), 86 L. T. 4; as to the words in a will, see *Josh v. Josh* (1858), 5 C. B. (N. S.) 454. As to the shops in a row owned by the same person being "adjoining" to each other within the meaning of a covenant, see *Cave v. Horsell*, [1912] 3 K. B. 533, C. A.; *London and South Western Rail. Co. v. Blackmore* (1870), L. R. 4 H. L. 610; title SALE OF LAND, Vol. XXV., p. 456, note (*v*).

(*i*) *Re Bateman (Baroness) and Parker's Contract*, [1899] 1 Ch. 599; see *Cave v. Horsell*, *supra*; *Rockleys, Ltd. v. Pritchard* (1909), 101 L. T. 575, where a hoarding nearly eleven feet back from the footway of a street was held to come within the words "in or abuts on or adjoins any street" in the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 32 (1), as to which see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 401; *Anderson v. Lockgelly Iron and Coal Co.* (1904), 7 F. (Ct. of Sess.) 187, where a fatal accident which arose out of and in the course of employment 800 yards from a mine was held to have taken place "on, in or about" the mine within the meaning of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), now repealed, as to which see title MASTER AND SERVANT, Vol. XX., p. 154, note (*f*).

(*j*) *Wellington Corporation v. Lower Hutt Corporation*, [1904] A. C. 773, P. C.; *Birmingham Corporation v. Allen* (1877), 6 Ch. D. 284, C. A.

(*k*) *Kimberley Waterworks Co. v. De Beers Consolidated Mines*, [1897] A. C. 515, 518, P. C. (South Africa).

(*l*) *Wellington Corporation v. Lower Hutt Corporation*, *supra* (New Zealand); and see *Anderson v. Lockgelly Iron and Coal Co.*, *supra*.

(*m*) *A.-G. v. Horner*, *supra*, at p. 230.

(*n*) *R. v. Harvey* (1747), 1 Wils. 164; as to the construction of penal statutes, see title STATUTES, Vol. XXVII., p. 177. In *A.-G. v. Horner* (1885), 54 L. J. (Q. B.) 227, BRETT, M.R., at p. 2307, expressed the opinion that there is no distinction between "near" and "next."

(*o*) *Chamberlaine v. Chester and Birkenhead Rail. Co.* (1848), 1 Exch. 870, *per* POLLOCK, C.B., at p. 878.

(*p*) *R. v. Harvey*, *supra*; *Tyne Keelmen v. Davison* (1864), 16 C. B. (N. S.) 612.

(*q*) As to "next" of kin, see, however, *Smith v. Campbell* (1815), 19 Ves. 400, where on the construction of a will a gift to "nearest" relations was held to exclude certain persons who would have benefited had the gift been to statutory "next of kin." As to how the distance in a direction not to come "nearer to" a house "than 100 yards" is to be measured, see *Russel v. Gillespie* (1868), 6 Macph. (Ct. of Sess.) 925).



distance, unless the contrary appeared, must be measured in a straight line on a horizontal plane, that is, in popular language, “as the crow flies” (*r*). This view has been confirmed by statute(s), which enacts that, for the purposes of any Act passed after the 1st January, 1890, distance shall, unless a contrary intention appears, be measured in a straight line on a horizontal plane (*t*).

“Say not less than” fixes a minimum; thus, if a contract says “say not less than 100 packs,” 100 packs at least must be delivered (*u*).

The term “square mile” does not necessarily mean a piece of land geometrically square, so long as it contains 640 acres (*a*).

SECT. 2.  
Definition  
of Terms  
Used in  
Measure-  
ment.

“say not less  
than”;

“square  
mile.”

## Part II.—Standards of Measure and Weight.

### SECT. 1.—Imperial Standards.

**925.** There are two imperial standards of measure and weight, namely:—(1) the imperial standard yard for the United Kingdom, which is the only unit or standard measure of extension, from which all other measures of extension, whether lineal, superficial or solid, are ascertained (*b*); (2) the imperial standard pound for the United Kingdom, which is the only unit or standard of weight and of measure having reference to weight, from which all other weights and all measures having reference to weight are ascertained (*c*).

Standards of  
measure and  
weight.

(*r*) *Lake v. Butler* (1855), 5 E. & B. 92, 99; see *Hares v. Curtin*, [1913] 2 K. B. 328.

(*s*) Interpretation Act, 1889 (52 & 53 Vict. c. 63).

(*t*) *Ibid.*, s. 34; and see title STATUTES, Vol. XXVII., p. 130.

(*u*) *Leeming v. Snaith* (1851), 16 Q. B. 275; see, further, title SALE OF GOODS, Vol. XXV., pp. 214, 215. As to the meaning of “cargo,” see *ibid.*, p. 215; and compare *Miller v. Borner & Co.*, [1900] 1 Q. B. 691.

(*a*) *Robertson v. Day* (1879), 5 App. Cas. 63, P. C.

(*b*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 4, 10, Sched. I., Part I. The instrument for determining the imperial standard yard is a solid square bar of bronze or gun metal, at each end of which is a gold plug or pin about one-tenth of an inch in diameter. Upon the surface of these pins are cut three fine lines at intervals of about one hundredth part of an inch transverse to the axis of the bar, and two lines at nearly the same interval parallel to the axis of the bar. The measure of the length of the imperial standard yard is given by the interval between the middle transversal line at one end and the middle transversal line at the other end, the point of each line which is employed being the point midway between the longitudinal lines (*ibid.*, Sched. I., Part I.). The Board of Trade obtained a new standard of imperial measure in 1897, when it was enacted by the Weights and Measures (Metric System) Act, 1897 (60 & 61 Vict. c. 46), s. 2, that “the standards which may be made under s. 8 of the Weights and Measures Act, 1878, shall include metric standards derived from the iridio-platinum linear standard metre and the iridio-platinum standard kilogram deposited with the Board of Trade and numbered 16 and 18 respectively.”

(*c*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 4, 13,

## SECT. 2.

Parliamentary  
Copies of  
Imperial  
Standards.

Number of  
copies.

SECT. 2.—*Parliamentary Copies of Imperial Standards.*

**926.** Four copies of the imperial standard of measure and four copies of the imperial standard of weight, which were constructed at the same time as the imperial standards, are denominated parliamentary copies of the imperial standards (*d*). The Board of Trade may, in addition, cause accurate copies of the two standards to be made, which, when approved by His Majesty in Council, are of the same effect as the parliamentary copies and are included under that denomination (*e*). If at any time either of the imperial standards of measure and weight is lost, or in any manner destroyed, defaced, or otherwise injured, the Board may cause it to be restored by reference to or adoption of any of the parliamentary copies of that standard (*f*); and in case of the loss, destruction, defacement, or injury of any of the parliamentary copies, the Board may cause it to be restored by reference either to the corresponding imperial standard or to one of the parliamentary copies of that standard (*g*).

SECT. 3.—*Board of Trade Standards.*

Secondary  
standards.

**927.** The secondary standards of measure and weight, derived from the imperial standards and in use under the direction of the Board of Trade on the 1st January, 1879, which are specifically described in the Second Schedule of the Weights and Measures Act, 1878 (*h*), are the only secondary standards, and are called Board of Trade standards; and if any of such standards is at any time lost, or in any manner destroyed, defaced, or otherwise injured, the Board may cause it to be restored by reference either to one of the imperial standards or to one of the parliamentary copies of those standards (*i*).

Additional  
standards.

The Board must from time to time cause to be made and duly verified such new denominations of standards, either equivalent to or multiples or aliquot parts of the imperial weights and measures, or equivalent to or multiples of each coin of the realm for the time being, as appear to the Board to be required in addition to the Board of Trade standards. These new denominations of standards when approved by an Order in Council, which must be published in the *London, Edinburgh, and Dublin Gazettes* and laid before Parliament (*k*), must be accepted as Board of Trade standards, as if they

Sched. I., Part I. The instrument for determining the imperial standard pound is a cylinder of platinum, 1·35 inches in height and 1·15 inches in diameter, with a groove or channel round it, the middle of which is about 0·34 inch below the top of the cylinder, for the insertion of the points of an ivory fork by which it is lifted. The weight *in vacuo* of this cylinder is the legal standard measure of weight and of measure having reference to weight (Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), Sched. I., Part I.).

(*d*) As to the description of the four parliamentary standards, see *ibid.*, Sched. I., Part II.; as to their custody, see p. 465, *post*.

(*e*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 5.

(*f*) *Ibid.*, s. 6.

(*g*) *Ibid.*, s. 7.

(*h*) 41 & 42 Vict. c. 49.

(*i*) *Ibid.*, ss. 8, 64, Sched. II.

(*k*) *Ibid.*, s. 63. A "cental or new hundredweight" was approved by an

were mentioned in the Second Schedule to the Weights and Measures Act, 1878 (*l*); and a Board of Trade standard, whether mentioned in the schedule or approved by Order in Council, may also be declared by Order in Council to cease to be such a standard (*m*).

Such Board of Trade standards as are equivalent to or multiples of any coin of the realm for the time being are standard weights for determining the justness of the weight and for weighing such coin (*n*).

SECT. 3.  
Board of  
Trade  
Standards.

Standard  
weights for  
coins.

#### SECT. 4.—*Local Standards.*

**928.** The standards of measure and weight which were legally in use by inspectors of weights and measures for the purposes of verification or inspection on the 1st January, 1879, and all copies of the Board of Trade standards which since that date have been compared with those standards and verified by the Board for the purpose of being used by inspectors for the verification and inspection of weights and measures, are denominated local standards (*o*).

Local  
standards.

#### SECT. 5.—*Custody and Verification of Standards.*

**929.** The Board of Trade is entrusted with the custody of the imperial standards of weights and measures, the Board of Trade standards, and all balances, apparatus, books, documents and things used in connexion therewith or relating thereto, which were deposited in the Standard Department, or any other office of the Board, on the 8th August, 1878 (*p*).

Imperial and  
Board of  
Trade  
standards.

The parliamentary copies of the imperial standards are respectively deposited at the Royal Mint, the Royal Society of London, the Royal Observatory at Greenwich, and the New Palace at Westminster (*q*).

Parlia-  
mentary  
copies.

Order in Council of the 4th February, 1879, as a new denomination or standard weight being 100 lbs., whereas the hundredweight under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 14, is 112 lbs.; and the following new denominations of standards have since been authorised:—14th August, 1878 (apothecaries weights and measures); 26th February, 1880 (four-bushel measure); 28th April, 1880 (five-gallon measure); 18th May, 1881 (additional denominations of standards of weight, capacity and length); 26th August, 1881 (Whitworth's external and internal cylindrical gauges and external plane gauges); 13th August, 1883 (wire gauge); 28th November, 1889 (measure of six to thirteen gallons inclusive); 22nd November, 1890 (three-gallon measure); 19th May, 1898 (metric standards and metric equivalents); 9th October, 1903 (half-cental or 50 lbs. weight); 12th December, 1904 (measure of twenty metres); 11th May, 1906 (twenty, ten, and five pounds weights); 16th November, 1906 (measures of length of 50 feet, 33 feet or 50 links; 20 feet, 9 feet, 8 feet, 7 feet or 10 links; 66 inches, 54 inches, 42 inches, 30 inches); 10th January, 1910 (legal denominations of standards for measurement of electricity); 14th October, 1913 (denomination of standards of metric carat weight); 16th July, 1914, in force from 1st November, 1914 (Birmingham gauge); see Stat. R. & O. Rev., Vol. XIII., Weights and Measures, pp. 8—27; Stat. R. & O., 1904, p. 656; Stat. R. & O., 1906, pp. 863, 865; Stat. R. & O., 1910, p. 845; Stat. R. & O., 1913, No. 1118; Stat. R. & O., 1914, No. 1095.

(*l*) 41 & 42 Vict. c. 49.

(*m*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 8, Sched. II.

(*n*) *Ibid.*

(*o*) *Ibid.*, s. 9.

(*p*) *Ibid.*, s. 34.

(*q*) *Ibid.*, s. 35, Sched. II., Part II. The New Palace at Westminster is commonly known as the Houses of Parliament.



## SECT. 5.

Custody  
and Verifica-  
tion of  
Standards.Duties of  
Board of  
Trade.**930.** The Board of Trade must :—

(1) cause the parliamentary copies, except that deposited at the New Palace at Westminster, to be compared once in every ten years with each other, and once in every twenty years with the imperial standards (*r*);

(2) cause the Board of Trade standards for the time being to be compared once at least in every five years with the parliamentary copies of the imperial standards and with each other, and to be adjusted or renewed if requisite (*s*);

(3) cause all copies of any standards submitted for the purpose by any local authority, and used or intended to be used as local standards, to be compared with the Board of Trade standards, and verified in such places as the Board may in each case direct, and, if the Board finds such local standards fit for the purpose of being used by inspectors as standards for the verification of weights and measures, cause them to be stamped as verified or reverified in such manner as to show the date of verification or of reverification; every such verification must be evidenced by an indenture and every reverification by an indorsement upon the original indenture of verification, or by a new indenture of verification; and indentures or indorsements purporting to be signed by an officer of the Board are evidence of the verification or reverification of the weights and measures referred to (*t*); and

(4) keep an account of all local standards verified or reverified (*u*).

The Board is also empowered to make general regulations with respect to the verification and stamping of weights and measures and measuring instruments and for the guidance of local authorities (*w*).

Duties of  
local  
authorities.

**931.** It is the duty of the local authority of every county and borough (*a*) to provide from time to time such local standards of measure and weight as the authority deems requisite for the purpose of comparison by way of verification or inspection of all weights and measures in use in its county or borough; to fix the places at

(*r*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 35.

(*s*) *Ibid.*, s. 36.

(*t*) *Ibid.*, s. 37. Such indentures are not liable to stamp duty, and no fee is payable on the verification or reverification of any local standard (*ibid.*). As to the verification of coin weights and regulations with respect to the trial of the pyx (the chest in which sample coins are deposited for purposes of trial), see, further, title CONSTITUTIONAL LAW, Vol. VI., p. 469.

(*u*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 37.

(*w*) Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 5 (1); see pp. 478, 479, *post*.

(*a*) The authorities, as regards England, are the county councils, including the London County Council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40), and borough councils; as regards Scotland, the county and borough councils established under the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50); and as regards Ireland, the county councils, the town councils of boroughs, and, in Dublin, the Metropolitan Police Commissioners (Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), Sched. IV.). As to Scotland, compare Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), ss. 277, 416—431; as to Ireland, compare Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).

which such standards shall be deposited ; and to provide from time to time proper means for verifying weights and measures by comparison with the local standards, and for stamping the weights and measures so verified (*b*).

**932.** Neither a local standard of weight nor a local standard of measure can be deemed legal or be used unless they have respectively been verified or reverified, in the case of a standard of weight within five and in the case of a standard of measure within ten years before the time at which they are respectively used (*c*). Local standards of weight or measure which have become defective in consequence of any wear or accident or have been mended cannot be accepted as legal until they have been reverified by the Board of Trade (*d*). Except in these cases, a local standard may be reverified by local comparison if on such local comparison it is found correct, but otherwise it must, and in any case may, be reverified by the Board of Trade (*e*).

A local comparison of a local standard must be made by an inspector of weights and measures for the county or borough in which such standard is used by comparing it in the presence of a justice of the peace with some other local standard, which has been verified or reverified by the Board of Trade, in the case of a weight within the previous five years and in the case of a measure within the previous ten years (*f*). Where, upon a local comparison, the local standard is found correct, the justice must sign an indorsement upon the indenture of verification of that standard, stating the local comparison and verification, and the error (*g*), if any, found therein. The indorsement so signed must be transmitted to the Board of Trade to be recorded in the account of the verification of local standards ; when so recorded, it is evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the Board, is evidence of its having been so recorded (*h*).

The local standards must be produced by the person entrusted with their custody, upon reasonable notice and upon payment by the person requiring such production of the reasonable charges for producing the same, at such reasonable time and place within the county, borough, or place for which they have been provided as any person by writing under his hand requires (*i*).

SECT. 5.  
Custody  
and Verifica-  
tion of  
Standards.

Verification  
of local  
standards.

Local com-  
parison.

Production  
of local  
standards.

(*b*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 40.

(*c*) *Ibid.*, s. 41.

(*d*) *Ibid.*

(*e*) *Ibid.* ; as to local comparison, see *ibid.*, ss. 43—49 ; and pp. 473, 474, *post*.

(*f*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 41.

(*g*) The Crown may define from time to time by Order in Council the amount of error to be tolerated in local standards (*ibid.*) No error in deficiency is allowed in local standard weights, but a certain amount in excess or in deficiency is tolerated in local standard measures ; see Orders in Council of 4th February, 1879, 29th June, 1882, and 18th March, 1893, and the Tables of Errors permissible given in Tables XIII.—XVII. of the Weights and Measures Regulations, 1907 (Stat. R. & O., 1907, p. 1075).

(*h*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 41.

(*i*) *Ibid.*, s. 42.

## Part III.—Measures in Use.

### SECT. 1.

#### Measures of Length and Area.

Measures of  
length.

Measures of  
area.

Measures of  
weight.

Measures of  
capacity.

### SECT. 1.—*Measures of Length and Area.*

**933.** All measures, whether lineal, superficial, or solid, are ascertained from the imperial standard yard (*k*).

A foot is one third of the standard yard, and an inch is one twelfth part of a foot.

A rod, pole, or perch in length contains five and a half standard yards.

A chain contains twenty-two standard yards.

A mile contains one thousand seven hundred and sixty standard yards (*l*).

A rood of land contains one thousand two hundred and ten square yards according to the imperial standard yard, and an acre four thousand eight hundred and forty such square yards, being one hundred and sixty square rods, poles, or perches (*m*).

### SECT. 2.—*Measures of Weight.*

**934.** All measures having reference to weight are ascertained from the imperial standard pound (*n*).

An ounce is one sixteenth part of the imperial standard pound, one-sixteenth part of such ounce is a dram, and one seven thousandth part of such pound is a grain.

A stone consists of fourteen imperial standard pounds, a hundred-weight of eight such stones (*o*), and a ton of twenty such hundred-weights.

Four hundred and eighty grains are an ounce troy (*p*).

### SECT. 3.—*Measures of Capacity.*

**935.** The unit standard measure of capacity, from which all

(*k*) Compare note (*b*), p. 463, *ante*. The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 10, provides that the straight line or distance between the two gold pins at the extremities of the bronze bar are to be measured when the bar is at a temperature of 62° Fahrenheit and is supported on bronze rollers placed under it in such a manner as best to avoid flexure of the bar, and to facilitate its free expansion and contraction from variations of temperature.

(*l*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 11.

(*m*) *Ibid.*, s. 12. In *O'Donnell v. O'Donnell* (1878), 1 L. R. Ir. 284, it was held that where "forty-five acres of the lands of Dromquin, known as the house division," were devised to A., and "fifty acres of the same lands to B.," extrinsic evidence was not admissible to show that the testator meant Irish and not statute acres; and that the statutory definition of "acre" in stat. (1824) 5 Geo. 4, c. 74, s. 2, has given a legal signification to the word which must be attributed to it, whether used in a will or other voluntary instrument, or in a contract. As to the mode of measuring distance, see also pp. 462, 463, *ante*.

(*n*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 13; compare note (*c*), p. 463, *ante*.

(*o*) Compare note (*i*), p. 464, *ante*.

(*p*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 14. All the above weights, except the ounce troy, are to be deemed avoirdupois weights (*ibid.*). As to the necessity of using imperial weights and measures in contracts, see pp. 469, 470, *post*. As to the use of troy weight, see p. 470, *post*.



other measures of capacity, as well for liquids as for dry goods, are derived, is the gallon, containing ten imperial standard pounds weight of distilled water weighed in air against brass weights, with the water and the air at the temperature of 62° Fahrenheit and with the barometer at 30 in. (*q*).

The quart is one fourth part and the pint is one eighth part of the gallon. A peck contains two gallons, a bushel eight gallons, and a quarter contains eight and a chaldron thirty-six bushels (*r*).

An imperial measure of capacity must not be heaped when used, but either stricken with a round stick or roller, straight and of the same diameter from end to end, or, if the article sold cannot from its size or shape be conveniently stricken, must be filled in all parts as nearly to the level of the brim as the size and shape of the article will admit (*s*).

SECT. 3.  
Measures  
of Capacity.

Mode of using  
measure.

#### SECT. 4.—Compulsory Use of Imperial Measures.

**936.** Every contract, bargain, sale, or dealing made or had in the United Kingdom for any work, goods, wares, or merchandise, or other thing which has been or is to be done, sold, delivered, carried, or agreed for by weight or measure, is to be deemed to be made and had according to one of the imperial weights or measures or to some multiple (*t*) or part thereof, and if not so made or had is void (*a*); and all tolls and duties charged or collected according to weight and measure must be charged and collected according to one of the imperial weights or measures or to some multiple or part thereof (*b*).

Contracts.

Tolls and  
duties.

(*q*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 15.

(*r*) *Ibid.* A bushel without any other explanation means a bushel by statute measure (*Hockin v. Cooke* (1791), 4 Term Rep. 314).

(*s*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 17.

(*t*) A person may sell not only by imperial measures but by multiples or parts of those measures (*Bellamy v. Pow* (1896), 60 J. P. 712).

(*a*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 19. As to the validity of a sale by ton "long weight," see *Giles v. Jones* (1855), 11 Exch. 393, Ex. Ch. A quarter of corn means a legal quarter of eight gallons (*St. Cross Hospital (Master, etc.) v. Howard de Walden (Lord)* (1795), 6 Term Rep. 338). In *Lang v. Cameron* (1894), 21 R. (Ct. of Sess.) 337, a contract to deliver stones of hay of twenty-four imperial pounds was held, under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 14, 19, not to be void as a transaction by imperial weight of the pound; compare *North Eastern Breweries, Ltd. v. Gibson* (1904), 91 L. T. 78 (false trade description under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, of a "kilderkin" (a barrel containing less than eighteen gallons)). If goods are to be sold in a foreign country by the weights and measures of that country the contract may be made in terms of such weights and measures in the United Kingdom (*Rosseter v. Cahlmann* (1853), 8 Exch. 361). As to the sale of intoxicating liquors, see pp. 492, 493, *post*. For precedents of covenants by mining lessees relating to weighing the minerals gotten, see *Encyclopædia of Forms and Precedents*, Vol. VIII., pp. 266, 319, 356, 357, 368, 413, 420, 428. For precedent of a clause making provision for weighing quantities of mineral supplied by instalments, see *Encyclopædia of Forms and Precedents*, Vol. XI., p. 589.

(*b*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 19, which enacts that all the contracts, bargains, sale and dealings, and the collection of tolls and duties aforesaid, are comprised under the term "trade": see *Crick v. Theobald* (1895), 64 L. J. (M. C.) 216; *Harris v. London County Council*, [1895] 1 Q. B. 240.

SECT. 4.  
Compulsory  
Use of  
Imperial  
Measures.

Customary  
measures.

Metric  
system.

Avoirdupois,  
troy, and  
apothecaries  
weight.

**937.** The use of local and customary measures and of the heaped measure is illegal; and any person selling by any denomination of weight or measure other than the imperial weights or measures or some multiple or part thereof is liable to a fine not exceeding 40s. for every offence (c).

**938.** Metric weights and measures may be lawfully used in trade (d). The Crown may, by Order in Council, make tables setting forth the equivalents of imperial weights and measures in terms of the metric system; and the validity of a contract or dealing is not impaired by any reference to such weights and measures, or by the use of decimal subdivisions of imperial weights and measures, whether metric or otherwise (e).

**939.** All articles sold by weight must be sold by avoirdupois weight (f), except (1) gold, silver, and articles made thereof, including gold and silver thread, platinum, diamonds, and other precious metals, all of which may be sold by the ounce troy or any decimal parts thereof; and (2) drugs when sold by retail, which may be sold by apothecaries weight (g).

Every person who acts in contravention of this provision is liable to a fine not exceeding £5 (h); but this liability does not extend to the sale of articles in vessels not purporting to contain an imperial measure, nor to the possession of vessels not used nor intended to be used as measures (i).

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(c) *Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 19; but see p. 492, *post*. If, however, a local measure consists of so many imperial pounds a sale is not illegal though a local measure is used (*Hughes v. Humphreys* (1854), 3 E. & B. 954; *Jones v. Giles* (1854), 18 J. P. 472; *Lang v. Cameron* (1894), 21 R. (Ct. of Sess.) 337). As to earthen vessels as measures, see *R. v. Aulton* (1861), 3 E. & E. 568; as to churns used in conveyance of milk, see *Harris v. London County Council*, [1895] 1 Q. B. 240; *Bellamy v. Great Western Dairies* (1908), 98 L. T. 757. The contents of measures can only be proved by production in court (*Chenier v. Watson* (1797), Peake, Add. Cas. 123).

(d) *Weights and Measures (Metric System) Act, 1897* (60 & 61 Vict. c. 46), s. 2 (2), which repeals an analogous provision in the *Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 18. A table setting forth the standard of the metric system in accordance with this provision was made by Order in Council of the 20th May, 1898; for the metric measures of length and capacity and metric cubic measures and metric weights, see also *Weights and Measures Regulations, 1907*, Tables IX.—XII.

(e) *Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 21.

(f) For the definition of avoirdupois weight, see note (p), p. 468, *ante*.

(g) *Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 20.

(h) *Ibid.*

(i) *Ibid.*, s. 22. As to the sale of intoxicating liquors in marked measures, see *Addy v. Blake* (1887), 19 Q. B. D. 478; *Payne v. Thomas* (1890), 60 L. J. (M. C.) 3. The *Licensing (Consolidation) Act, 1910* (10 Edw. 7 & 1 Geo. 5, c. 24), s. 69, enacts that every such sale of a quantity "not in cask or bottle" and not "less than half a pint" must be "in measures marked according to the imperial standards." Beer barrels have been held to be measures (*Spencer v. Till* (1897), Allwood, Appeal Cases under the *Weights and Measures Acts*, 357). The *Weights and Measures Act, 1878* (41 & 42 Vict. c. 49), s. 24, provides a penalty on the unauthorised use of weights and measures, and under this provision consignees have been convicted for using unjust weights to check deliveries (*Horder v. Roberts & Co.* (1880), 44 J. P. 256).

**940.** Any person who prints, and any clerk of a market or other person who makes any return, price list, price current, or any journal or other paper containing any price list or price current, in which the denominations of weights and measures quoted or referred to denotes or implies a greater or less weight or measure than is denoted or implied by such denomination, is liable to a fine not exceeding 10s. for every copy of the return, price list, price current, journal or other paper published by him (*k*).

SECT. 4.  
Compulsory  
Use of  
Imperial  
Measures.

Price lists.

**941.** Every person using or having in his possession for use for trade any unjust (*l*) weight, measure, scale, balance, steelyard, or weighing machine (*m*), or wilfully committing any fraud in the use of any weight, measure, scale, balance, steelyard or weighing instrument, and every person party thereto, is liable to a fine not exceeding £5, or, in the case of a second or subsequent offence, £20, and the weight, measure, scale, balance, steelyard or weighing instrument is liable to be forfeited (*n*). Any person wilfully or knowingly making or selling or causing to be made or sold any false or unjust measure, scale, balance, steelyard or weighing machine is liable to a fine not exceeding £50 (*a*).

Use of unjust  
measure.

(*k*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 23.

(*l*) Unjustness is a question of fact, and where justices have found that fact, the conviction must be affirmed (*R. v. Baxendale* (1880), 44 J. P. 763; *Harris v. Allwood* (1892), 57 J. P. 7). A loaded removable ball has been held to be no part of the scales (*Carr v. Stringer* (1868), L. R. 3 Q. B. 433). Earthen vessels used as measures are liable to seizure if unjust (*Washington v. Young* (1850), 5 Exch. 403). An employer cannot be convicted if a servant uses an unjust measure for his own purposes (*Anglo-American Oil Co., Ltd. v. Manning*, [1908] 1 K. B. 536).

(*m*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 3; compare p. 494, *post*. In *Lane v. Rendall*, [1899] 2 Q. B. 673, scales were held to be unjust where a wrapper was placed beneath the scoop in the scale in order to facilitate the weighing out of a number of parcels of a given gross weight which was to include the weight of the wrapper; compare *London and North Western Rail. Co. v. Richards* (1862), 26 J. P. 181; *Great Western Rail. Co. v. Bailie* (1864), 29 J. P. 229; *Booth v. Shadgett* (1873), L. R. 8 Q. B. 352; *R. v. Baxendale, supra*; *Henton v. Radford* (1881), 45 J. P. 224; *Stone v. Tyler* (1904), 21 T. L. R. 33; *London County Council v. Payne & Co.*, [1904] 1 K. B. 194; *London County Council v. Payne & Co.* (No. 2), [1905] 1 K. B. 410. In *Bellamy v. Great Western and Metropolitan Dairies, Ltd.* (1908), 98 L. T. 757, churns used for the conveyance of milk by railway to London, and out of which the milk was sold to customers, were held to be used for conveyance and not for trade.

(*n*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 3; compare p. 473, *post*. As to the sale of liquors in defective measures, see *Miles v. Dell* (1821), 3 Stark. 23; *Frend v. Butterfield* (1840), 11 Ad. & El. 828.

(*a*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 27; see *R. v. Baxendale, supra*, where a spring balance, which indicated correctly when the article weighed was in the centre of the pan but incorrectly when it was away from it, was held to be unjust.



## Part IV.—Stamping and Verification of Weights and Measures.

### SECT. 1.

#### Stamping with Denomination.

Where stamp is to be placed.

Verification stamp.

### SECT. 1.—Stamping with Denomination.

**942.** The denomination of every weight, except where the small size renders it impracticable, must be stamped on the top outside, and that of every measure of length or capacity outside in legible figures and letters; and no weight or measure not in conformity with these requirements may be stamped with the stamp of verification hereinafter mentioned (*b*).

**943.** Every measure and weight whatsoever, and every weighing instrument used for trade (*c*), must be verified and stamped by an inspector of weights and measures with a stamp of verification (*d*). Every person using, or having in his possession for use, for trade any measure or weight or weighing machine not so stamped (*e*) is liable to a fine not exceeding £5, or in the case of a second offence £10, and to forfeit such measure, weight, or weighing machine; and any contract, bargain, or sale, or dealing made by such measure, weight, or weighing machine is void (*f*).

### Penalties.

**944.** Any person forging or counterfeiting any stamp used under the Weights and Measures Act, 1878 (*g*), or under any enactment repealed thereby, for stamping any measure or weight, or wilfully increasing or diminishing a weight so stamped, or removing a stamp

(*b*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 28; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 13.

(*c*) Compare note (*b*), p. 469, *ante*. "Weighing instrument" is defined by the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 35, to include "scales with the weights belonging thereto, scale beams, balances, springing balances, steelyards, weighing machines and other instruments for weighing."

(*d*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 28; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 1 (1).

(*e*) See *Starr v. Stringer* (1872), L. R. 7 C. P. 383, where the stamp had become obliterated, but it was held that the fact that the weight had been stamped and was just was a good defence. It is no defence to a prosecution under this provision that the local authority has not made any provision for stamping measures of a particular capacity (*Hayley v. Taylor* (1900), 82 L. T. 803).

(*f*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 29; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 1 (2); *Robinson v. Golding* (1910), 103 L. T. 248 (a milk carrier left on the doorstep of a purchaser who had ordered it an ordinary can with a lid used for delivering milk, which he had filled from the tap of a churn, and stated in reply to an inspector that he had delivered to the purchaser "a pint of milk"; the can was of the correct capacity—one pint—when the lid was closed, but was not stamped as a measure, and it was not completely filled when the inspector measured the milk, with the result that the quantity sold as a pint was deficient by half an ounce; it was held that the can was being used as a measure for trade within the meaning of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 29, and that as it was unstamped the milk carrier was liable to the penalty). As to the verification of coin weights, see title CONSTITUTIONAL LAW, Vol. VI., p. 469; and compare p. 465, *ante*.

(*g*) 41 & 42 Vict. c. 49.

from any weight or measure or weighing or measuring instrument, is liable to a fine not exceeding £50 (*h*) ; and any person knowingly using, selling, uttering, disposing of or exposing for sale any measure or weight with a forged or counterfeited stamp, or a weight so increased or diminished, is liable to a fine not exceeding £10, and all measures and weights with a forged or counterfeit stamp are forfeited (*i*).

SECT. 1.  
Stamping  
with  
Denomina-  
tion.

SECT. 2.—*Verification.*

**945.** Every weight and measure and every weighing machine used for trade must be stamped by an inspector of weights and measures appointed by the local authority, which must from time to time fix the times and places within its jurisdiction at which each inspector so appointed must attend for the purpose (*k*).

Inspector of  
weights and  
measures.

The inspector must attend with the local standards in his custody at such time and place as is fixed, and examine every measure or weight which is of the same denomination as one of the standards brought to him for the purpose of verification and compare it with that standard. If he finds it correct he must stamp it with a stamp of verification in such manner as best to prevent fraud, and must also stamp on measures or weights of a quarter of a pound or upwards a name, number, or mark distinguishing the district for which he acts. He must also enter in a book kept by him minutes of every such verification, and give, if required, a certificate under his hand of every such stamping (*l*).

Procedure.

**946.** An inspector appointed by the local authority for a county may enter a place within the district of an inspector appointed by any other local authority and there verify and stamp the weights and measures of any person residing within his own district ; but if he knowingly stamps a weight or measure of any person residing in the district of an inspector legally appointed by another local authority he is liable to a fine not exceeding 20s. for every weight or measure which he so stamps (*m*).

Inspector  
acting outside  
district.

**947.** A weight or measure duly stamped by an inspector is a legal weight or measure throughout the United Kingdom, unless found to be false or unjust, and is not liable to be restamped because used in any place other than that in which it was originally stamped (*a*).

Effect of  
verification

**948.** The Board of Trade may, if it thinks fit, at the expense of the local authority, deposit with any inspector of weights and measures copies of any of the metric standards in the custody of

Copies of  
metric  
standards.

(*h*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 32 ; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 10.

(*i*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 32 ; see *Anglo-American Oil Co., Ltd. v. Manning*, [1908] 1 K. B. 536 ; note (*a*), p. 469, *ante*.

(*k*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 44 ; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 1 (1).

(*l*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 44 ; compare *E. v. Skelton* (1859), 1 E. & E. 816.

(*m*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 44.

(*a*) *Ibid.*, s. 45.

SECT. 2. the Board, and cause to be verified with any copy so deposited any  
 Verification. metric weight and measure which can, under the Weights and Measures Act, 1878 (*b*), s. 88, be compared with the metric standards in the custody of the Board (*c*).

SECT. 3.—*Qualifications and Appointment of Inspectors.*

Appointment  
of inspectors.

**949.** Every local authority must from time to time appoint a sufficient number of inspectors of weights and measures for safely keeping the local standards provided by such authority, and for the discharge of the other duties of inspectors under the Weights and Measures Acts (*d*), and may suspend or dismiss any inspector appointed by it, or appoint additional inspectors as occasion may require. The authority must give reasonable remuneration to each inspector for his duties, and may, if it thinks fit, appoint different persons to be inspectors for the verification and for the inspection respectively of weights and measures (*e*).

Examination  
of applicants.

**950.** The Board of Trade provides for the holding of examinations for the purpose of ascertaining whether applicants for the post of inspector under a local authority nominated by that authority possess sufficient practical knowledge for the proper performance of the duties of an inspector of weights and measures, and for the grant of certificates to persons who satisfactorily pass such examinations; no person may be appointed as an inspector unless he has obtained such a certificate (*f*).

The Board may, with the consent of the Treasury, from time to time fix the fees to be charged in respect of such examinations. Such fees must be applied in such manner and to such extent as the Treasury may from time to time direct in aid of money provided by Parliament for the expenses of the Board under the Weights and Measures Acts (*d*), and if and as far as not so applied must be paid into the Exchequer (*g*).

(*b*) 41 & 42 Vict. c. 49.

(*c*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 2.

(*d*) As to these Acts, see note (*a*) p. 460, *ante*.

(*e*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 43; as to the validity of appointments under an earlier Act, see *R. v. Jarvis* (1854), 3 E. & B. 640; *R. v. Hull (Recorder)* (1838), 8 Ad. & El. 638; *Duly v. Sharwood* (1856), 6 E. & B. 830; *R. v. Devon Justices* (1818), 1 B. & Ald. 588.

(*f*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 3; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 8 (1), (2). The provisions in the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 11 (1), (2), regulating the appointment of inspectors made after the 1st January, 1890, were extended by the Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 8, which repeals the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 11 (1), (2). Inspectors of weights and measures must make themselves acquainted with the provisions of the Weights and Measures Acts (see note (*a*) p. 460, *ante*) and various other enactments, such as the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58); Factory and Workshop Act, 1901 (1 Edw. 7, c. 22); Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); Markets and Fairs (Weighing of Cattle) Acts, 1887 (50 & 51 Vict. c. 27), 1891 (54 & 55 Vict. c. 70), incidentally connected with the subject; see Weights and Measures Regulations, 1907, Schedule (Instructions to Inspectors), instruction 3; and compare *ibid.*, instruction 5.

(*g*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 11; Weights



**951.** An inspector must forthwith on his appointment enter into a recognisance to the Crown, to be sued for in a court of record, for the sum of £200 for the due performance of the duties of his office, and for the due payment at the times fixed by the local authority appointing him of all fees received by him under the Weights and Measures Acts (*h*), and for the safety of the local standards, stamps, and appliances for verification committed to his charge, and for their surrender immediately on his removal or other cessation from office to the person appointed by the local authority to receive them (*i*).

SECT. 3.  
Qualifica-  
tions and  
Appoint-  
ment of  
Inspectors.

Recognisance.

**952.** An inspector may not, during the time he holds office, derive any profit from or be employed in the making, adjusting, or selling of weights, measures, or measuring or weighing instruments. Where, however, it appears desirable in any district, on the representation of the local authority, for an inspector to be allowed to adjust weights and measures and measuring and weighing machines, the Board of Trade may, if it thinks fit, authorise an inspector appointed by the local authority for that purpose, who may make such charges for any adjustment as the local authority approves, and must account for and pay any money received by him in respect of such charges as the local authority direct (*k*).

Prohibition  
against  
private profit.

**953.** Any person, not being an inspector duly appointed under the Weights and Measures Acts (*h*), who acts as an inspector without having obtained a certificate under those Acts is liable to a fine not exceeding £10, or in the case of a second or subsequent offence not exceeding £20 (*l*).

Acting  
without  
certificate.

#### SECT. 4.—Powers and Duties of Inspectors.

**954.** Every inspector (*m*) authorised in writing (*n*) under the hand of a justice of the peace, and every justice of the peace may, at all reasonable times, inspect all weights, measures, scales, balances, steelyards and weighing machines within his jurisdiction used by or in the possession (*o*) of any person, or on

Inspection of  
weights and  
measures.

and Measures Act, 1904 (4 Edw. 7, c. 28), s. 8 (4). An Order of the Board of Trade of the 28th December, 1904, fixes the fee chargeable in respect of persons nominated by a local authority for the post of inspector at £1 10s.

(*h*) As to these Acts, see note (*a*). p. 460, *ante*.

(*i*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 43.

(*k*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 12; compare Weights and Measures Regulations, 1907, Schedule (Instructions to Inspectors), instruction 37.

(*l*) Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 8 (3).

(*m*) As to the special duties of inspectors with reference to the sale of coal and other commodities, see pp. 480 *et seq.*, *post*.

(*n*) A general warrant from a justice of the peace is sufficient authority for an inspector to enter any premises without his obtaining a special warrant for the purpose, but he must, if called upon to do so, produce his warrant before he can compel the production of weights and measures or instruments (*Hutchins v. Reeve* (1842), 6 J. P. 313; *Kershaw v. Johnson* (1844), 1 Car. & Kir. 329). He is not authorised to seize scales and keep them forfeit (*Thomas v. Stephenson* (1853), 2 E. & B. 108).

(*o*) See *Smith v. Webb* (1896), 60 J. P. 517, where it was held that a man is not necessarily in possession of the weights and measures and instruments in a shop if he has been merely left in charge of such shop during the temporary absence of his master.

SECT. 4.  
Powers and  
Duties of  
Inspectors.

any premises for use for trade, and compare them with the local standards, and seize and detain any of them which are liable to be forfeited in pursuance of the Weights and Measures Acts (*p*). For the purpose of such inspection he may enter any place, whether a building or in the open air, whether open or enclosed, where he has reasonable cause to believe that there is any weight, measure, scale, balance, steelyard, or weighing machine which he is authorised by those Acts to inspect. Any person neglecting or refusing to produce for inspection all weights, measures, scales, balances, steelyards and weighing machines in his possession or on his premises, or refusing to permit the justice or inspector to examine them, or any of them, or otherwise obstructing or hindering such justice or inspector, is liable to a fine not exceeding £5, or, in the case of a second offence, £10 (*q*).

Stamping of  
weights.

**955.** Any inspector who stamps a weight or measure in contravention of any of the provisions of the Weights and Measures Acts (*p*), or without duly verifying the same by comparison with a local standard, or is guilty of a breach of any duty imposed on him by those Acts, or otherwise misconducts himself in the execution of his office, is liable to a fine not exceeding £5 for each offence (*r*).

Fees.

**956.** An inspector of weights and measures may take, in respect of the verification and stamping of weights and measures and weighing instruments, such fees as may be specified by His Majesty by Order in Council and no others, and any Order in Council made for this purpose may be varied and revoked by a subsequent Order in Council (*s*).

Use of tools or  
machinery.

**957.** No discount, commission, or rebate of any kind may be given nor any allowance made by an inspector or by the local authority for the use of tools, premises, machinery, or instruments, or assistance rendered for the purpose of verification of stamping, except where they take place on the premises of a glass or earthenware manufactory, in which case such adequate and reasonable allowance may be made as may be agreed upon by the local authority, with the consent of the Board of Trade (*t*).

Prosecution of  
offenders.

**958.** An inspector of weights and measures may, with the con-

(*p*) As to these Acts, see note (*a*), p. 460, *ante*.

(*q*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 48.

(*r*) *Ibid.*, s. 49. An inspector has been held to be not guilty of misconduct for only defacing weights and a weighing machine found to be unjust instead of retaining them and instituting proceedings under this provision (*Wedderburn v. Smith* (1905), 92 L. T. 853).

(*s*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 13, Sched. I.; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 9. The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), Sched. I., specifying the scale of fees payable under *ibid.*, s. 13, was repealed by the Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 9, which empowers His Majesty to specify new fees by Order in Council; the fees now in force were prescribed by an Order in Council of the 21st December, 1907 (Stat. R. & O., 1907, p. 1140). The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 13, is obligatory and imposes the duty of taking fees in all cases.

(*t*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 13; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 13 (5).

sent of the local authority, prosecute before a court of summary jurisdiction or justices any information, plaint, or proceeding arising under the Weights and Measures Acts (*a*), or in the discharge of his duties as inspector (*b*).

SECT. 4.  
Powers and  
Duties of  
Inspectors.

## Part V.—Powers of the Board of Trade.

### SECT. 1.—*In General.*

**959.** The Board of Trade (*c*) has all the powers and performs all the duties relative to standards of weight and measure, and to weighing and measuring instruments by any Act or otherwise vested in or imposed on the Treasury, or the Comptroller-General of the Exchequer, or the Warden of the Standards; and all things done by the Board or any of its officers or at its office in relation to standards of weight and measure in pursuance of the Weights and Measures Acts (*a*) are as valid and have the same effect and consequences as if they had been done by the Treasury or the Comptroller-General, or other officer of the Exchequer, or by the Warden of the Standards, or at the office of the Exchequer (*d*).

General  
powers.

The Board must conduct all such comparisons, verifications, and other operations with reference to standards of weight and measure, in aid of scientific research or otherwise, as it may from time to time think expedient, and to report to Parliament on its proceedings and business under the Acts (*e*).

**960.** The Board of Trade must (*f*) examine and test, with reference to the material of which and the principle on which they are constructed, all patterns of weights and measures, and weighing or measuring instruments for use for trade submitted to the Board by local authorities or manufacturers of or dealers in weights, measures, or weighing or measuring instruments; and if upon examination any pattern is found not to be such as to facilitate the perpetration of fraud they must give a certificate to that effect and cause the pattern to be stamped with an appropriate mark. From and after the granting of a certificate no inspector may refuse to verify or stamp any weight or measure or weighing or measuring instrument made in accordance with the pattern on the ground that the

Examination  
of patterns.

(*a*) As to these Acts, see note (*a*), p. 460, *ante*.

(*b*) Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 14. A similar power is vested by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 120, in inspectors under the Factory Acts. As to the books to be kept by inspectors, the custody of standards and equipment, and their duties as regards inspection, verification and stamping, see Weights and Measures Regulations, 1907, Schedule (Instructions to Inspectors), instructions 5—63.

(*c*) As to the power of the Board of Trade with respect to standards and the custody and verification thereof, see pp. 465, 466, *ante*.

(*d*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 33.

(*e*) *Ibid.* As to these Acts, see note (*a*), p. 460, *ante*.

(*f*) This duty is apparently enforceable by mandamus (*R. v. Joint Stock Companies (Registrar)* (1888), 21 Q. B. D. 131).



SECT. 1. material or principle is such as to facilitate the perpetration of fraud; but if upon examination the Board declines to give a certificate, no weight or measure or weighing or measuring instrument made in accordance with the pattern is to be deemed legal, and no inspector may verify or stamp any such weight, measure, or instrument (*g*).

Fees.

**961.** The Board of Trade may, on such examination and testing with reference to the material and principle of construction of patterns of weights, measures, and weighing or measuring instruments submitted to them, and also on the examination or testing of weighing or measuring instruments, and on the comparison and verification of weights and measures (not being standards for the use of a local authority, and not being coin weights), take such fees as may from time to time be approved by the Treasury; such fees must be applied in such manner and to such an extent as the Treasury may from time to time direct in aid of money provided by Parliament for the expenses of the Board under the Weights and Measures Acts (*h*), and if and as far as not so applied are to be paid into the Exchequer (*i*).

#### SECT. 2.—*Making of Regulations.*

Subject-matter.

**962.** The Board may make general regulations (*k*) known as the Board of Trade regulations with respect to:—(1) the verification and stamping of weights and measures, and weighing and measuring instruments, including the prohibition of stamping in cases where the nature, denomination, material, or principle of construction of the weight, measure, or instrument appears likely to facilitate the perpetration of fraud; (2) the circumstances and conditions under which and the manner in which stamps may be obliterated or defaced; (3) the tests to be applied for the purpose of ascertaining the accuracy and efficiency of weights and measures and weighing and measuring instruments; (4) the limits of error to be allowed on verification and to be tolerated either generally or as respects any trade (*l*); and (5) generally for the guidance of local authorities in the execution and performance of their powers and duties under the Weights and Measures Acts (*h*).

(*g*) Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 6.

(*h*) As to these Acts, see note (*a*) p. 460, *ante*.

(*i*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 8; Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 6.

(*k*) Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 5 (1). In pursuance of this provision the Board has issued the Board of Trade Weights and Measures Regulations (Stat. R. & O., 1907, p. 1075), which take the place of all local bye-laws made under the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49) and 1889 (52 & 53 Vict. c. 21), excepting bye-laws under *ibid.*, Part II., relating to the sale of coal. The Schedule to these Regulations comprises the Instructions issued by the Board to Inspectors of Weights and Measures. As to the other powers of the Board with reference to verification etc., see pp. 465 *et seq.*, *ante*.

(*l*) An Order in Council of the 20th December, 1907 (Stat. R. & O., 1907, p. 1134), defines the limits of error to be tolerated by local authorities.

**963.** Any such regulations issued by the Board of Trade may confer on local authorities power to make special regulations as respects their areas in relation to the inspection of weights and measures and weighing instruments, and to other matters which, having due regard to uniformity of administration, appear to the Board to be matters which can be better regulated by special regulations (*m*).

SECT. 2.  
Making of  
Regulations.

Delegation of  
powers.

**964.** The Board of Trade regulations, which must be laid before Parliament as soon as may be after they are made, have effect as if they were enacted in the Weights and Measures Act, 1904 (*n*), and any inspector who refuses or wilfully neglects to act in accordance therewith is guilty of an offence under the Weights and Measures Act, 1878 (*o*), s. 49 (*p*).

Effect of  
regulations.

### SECT. 3.—*Determination of Differences.*

**965.** Any difference arising between an inspector of weights and measures and any other person as to the meaning or construction of the Board of Trade regulations, or as to the method of testing or verifying any weight, measure, or weighing or measuring instrument, must, on the request of either party, be determined by the Board, whose decision is final (*q*).

Reference to  
Board of  
Trade.

**966.** The court before which any proceedings under the Weights and Measures Acts (*r*) are being taken must, at the request of either party, and may, without request, refer to the Board of Trade the question as to the accuracy or efficiency of any weight, measure, or weighing or measuring instrument, the accuracy or efficiency of which is in dispute, and the decision of the Board is final, any expenses incurred by the Board in making any test for the purpose being paid by the complainant or defendant as the court by order may direct (*s*). Such references are governed by the Board of Trade Arbitrations, etc. Act, 1874 (*t*).

References by  
the court.

## Part VI.—Special Provisions.

### SECT. 1.—*Coal.*

**967.** The Weights and Measures Act, 1878 (*o*), applies to all the weights, balances, scales, steelyards and weighing machines used at any mine for determining the wages payable to any person employed therein according to the weight of the mineral gotten by

Wages pay-  
able by  
weight.

(*m*) Weights and Measures Act, 1904 (4 Edw. 7. c. 28), s. 5 (2). The power of making such special regulations has not yet been conferred on local authorities.

(*n*) 4 Edw. 7. c. 28, s. 5 (3).

(*o*) 41 & 42 Vict. c. 49.

(*p*) Weights and Measures Act, 1904 (4 Edw. 7. c. 28), s. 5 (4). The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 49, imposes a penalty of £5 for each offence.

(*q*) Weights and Measures Act, 1904 (4 Edw. 7. c. 28), s. 7 (1).

(*r*) As to these Acts, see note (*a*), p. 460, *ante*.

(*s*) Weights and Measures Act, 1904 (4 Edw. 7. c. 28), s. 7 (2).

(*t*) 37 & 38 Vict. c. 40, applied by the Weights and Measures Act, 1904 (4 Edw. 7. c. 28), s. 7 (3); compare *Pollard v. Turner*, [1912] 3 K. B. 625.

SECT. 1.  
Coal.

him in like manner as it applies to weights, balances, scales, steelyards and weighing machines used for trade (*u*).

Times of  
inspection.

**968.** The weights, balances, scales, steelyards and weighing machines used, or in the possession of any person for use, at any mine must be inspected and examined by an inspector of weights and measures for the district in which such mine is situated once at least in every six months, and also at any other time when he has reasonable cause to believe that any false or unjust weight, balance, scale, steelyard or weighing machine is in use. He must also inspect and examine the measures and gauges in use at the mines within his district, but his inspection and examination must not interfere with the use of those ordinarily used at the mine (*v*).

Powers of  
inspector.

For the purpose of such examination and inspection an inspector may, without any authorisation from a justice of the peace, exercise at or in any mine, as respects all weights, measures, scales, balances, steelyards and weighing machines used, or in the possession of any person for use, at or in that mine, all such powers as he could exercise, if authorised in writing by a justice of the peace, under the Weights and Measures Act, 1878 (*a*), s. 48 (*b*), all the provisions of which, including the liability to penalties, apply to any such inspection; but the inspector must not in fulfilling his duties impede or obstruct the working of the mine (*c*).

Sale of coal.

**969.** All coal must be sold by weight only, except where it is sold, by written consent of the purchaser, by boatload, or by wagons and tubs delivered into his works from the colliery; any person selling coal otherwise is liable to a fine not exceeding £5 for every such sale (*d*).

Weight  
ticket.

**970.** Where any quantity of coal exceeding 2 cwts. is delivered to a purchaser the seller of the coal must, before any part of it is unloaded, deliver or cause to be delivered, or sent by post to him or his servant, a ticket or note (*e*) in the prescribed form (*f*),

(*u*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 15 (1); as to the weighing of coal generally, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 597 *et seq.*

(*v*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 15 (2), (3).

(*a*) 41 & 42 Vict. c. 49.

(*b*) As to these powers, see p. 475, *ante*.

(*c*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 15 (4), (5).

(*d*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 20; compare London Coal Act, 1831 (1 & 2 Will. 4, c. lxxvi.), ss. 42, 44, regulating the sale of coal in the cities of London and Westminster, as to which see note (*k*), p. 481, *post*.

(*e*) A ticket must be delivered with each cartload if more than one cartload is required (*Stangoe v. Slatter* (1896), 12 T. L. R. 335).

(*f*) See Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), Sched. III. The weight ticket or consignment note must contain the names of the buyer, of the seller, and of the person in charge of the vehicle; it must specify the amount of coal to be received, adding, when the coal is sold in sacks, the number of sacks and the weight in hundredweights contained in each sack; when the coal is sold in bulk, the weight of coal and vehicle, tare weight of vehicle, and net weight of coal therewith delivered to the purchaser



or one to the like effect (*g*). If the seller fails to comply with this provision, or if the quantity of coal is less than that expressed in the note or ticket (*h*), he is liable to a fine not exceeding £5; and any person in charge of the vehicle in which the coal is conveyed is liable to a fine of the same amount if he refuses or neglects to deliver the ticket or note to the purchaser, or to exhibit it to any inspector of weights and measures or other officer (*i*) appointed by the local authority when requested to do so (*k*).

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Coal.

**971.** If coal exceeding 2 cwts. is conveyed for delivery on sale in bulk the seller must, unless the vehicle is provided by the purchaser, cause the weight of the vehicle in which the coal is conveyed, as well as that of the coal, to be previously ascertained by a weighing instrument stamped by an inspector

Sale in bulk.

must also be stated. The prescribed form concludes with a summary of the provisions stated in the text. The trade name (not necessarily the real name) of the seller is all that it is necessary to enter on the ticket (*Cameron v. Tyler*, [1899] 2 Q. B. 94). Except in the case of a sale in bulk (compare Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 22; see the text, *infra*), the coal and the cart may be weighed and the ticket may be filled up on the premises of the purchaser (*Edwards v. Purnell*, [1899] 1 Q. B. 449).

(*g*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 21 (1).

(*h*) If the amount is described as 2 tons in twenty sacks of 2 cwts. each it is not necessary that each sack should contain exactly 2 cwts., but the total quantity must correspond with the total weight on the ticket (*Godfrey v. Radford* (1896), 75 L. T. 224). As to delivery in sacks in separate loads, see *Kyle v. Dunsdon*, [1908] 2 K. B. 293.

(*i*) See *Alty v. Farrell*, [1896] 1 Q. B. 636, where it was held that, as the selection of special persons for the purpose was contemplated, a bye-law under the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28 (see p. 483, *post*), empowering any constable to demand the re-weighing of coals was unreasonable, and although the re-weighing was demanded by an inspector of weights and measures the conviction was quashed.

(*k*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 21 (2), (3). The London Coal Act, 1831 (1 & 2 Will. 4, c. lxxvi.), s. 52 (which is still in force (*Houghton v. Fear Brothers, Ltd., and Willsher*, [1913] 2 K. B. 343)), enacts that any carman or driver of any cart, wagon, or other carriage laden with coals for sale, to be delivered to the purchaser or purchasers thereof by any seller or sellers of, or dealers in, or carrier or carriers of coals from any ship, lighter, barge or other craft, or from any wharf, warehouse or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the General Post Office, who has not placed in, on, or under his cart, wagon or carriage a perfect weighing machine marked at the Guildhall, London, by the proper officer there, is liable to forfeit and pay any sum not exceeding £10 for every such offence, and the seller or dealers or carriers of such coal is liable to forfeit and pay any sum not exceeding £20. By the London Coal Act, 1831 (1 & 2 Will. 4, c. lxxvi.), s. 43, all coal sold within the limits of the Act must be sold by weight. As to the sale of coal in sacks under the Act, see *Collins v. Hopwood* (1846), 15 M. & W. 459; as to weighing the coal at the request of the purchaser, see *Smith v. Wood* (1889), 24 Q. B. D. 23, C. A., following *Meredith v. Holman* (1847), 16 M. & W. 798. Stat. (1838) 1 & 2 Vict. c. ci., s. 1, which provides that the London Coal Act, 1831 (1 & 2 Will. 4, c. lxxvi.), and all its provisions, should be continued for the further term of seven years from the 31st December, 1838, has been held to refer only to those provisions of the earlier Act which required to be so continued if they were not to expire, and those of its provisions which were of a permanent nature (including *ibid.*, s. 52) have not been abrogated (*Houghton v. Fear Brothers, Ltd., and Willsher, supra*).

## SECT. 1.

## Coal.

of weights and measures, on or near to the place from which the coal is brought, and must from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approves. In any such case the seller of the coal is also required to insert, or cause to be inserted, in the ticket a statement of the correct weight of the vehicle (*l*), or of the vehicle and of the animal drawing it, where both are weighed together with the load, as well as of the correct weight of coal contained in the vehicle, and, on failure to comply with these provisions is liable to a fine not exceeding £5 (*m*). A similar penalty is imposed on any person in charge of any vehicle in which coal is being carried who wilfully makes any false statement, or does any act by which either the seller or purchaser of the coal is defrauded (*n*), and also on any person who, on the sale of coal in any quantity not exceeding 2 cwt., fraudulently delivers to the purchaser a less quantity than is agreed to be sold (*o*).

## Sale by retail.

**972.** Where coal is sold by retail for delivery at the place where it is kept for sale, and there is not at or near such place any weighing instrument stamped by an inspector of weights and measures, the seller must keep such an instrument at that place and weigh any coal before its sale or delivery, if required to do so by any purchaser, inspector of weights and measures, or any officer appointed for the purpose by the local authority; and if he fails to do so, he is liable to a penalty not exceeding £2 for a first offence, and £5 for any subsequent offence (*p*).

## Provision of weighing machines.

**973.** The local authority may erect and maintain fixed weighing instruments at convenient places for the purpose of weighing coal and provide and appoint proper persons to keep and attend weighing instruments for that purpose, and any person so appointed who refuses, without reasonable excuse, to weigh or re-weigh any vehicle or coal, or who weighs any vehicle or coal so as wilfully to defraud either the seller or the purchaser of coal, is liable to a fine not exceeding £5 (*q*).

## Weighing and re-weighing.

**974.** Any seller or purchaser of coal, person in charge of a vehicle in which coal is carried, inspector of weights and measures, or other officer appointed by the local authority for the purpose, may require any coal or any vehicle used for the carriage of coal in bulk to be weighed or re-weighed by any weighing instrument stamped by an inspector of weights and measures, and any person obstructing any such weighing or re-weighing is liable to a fine not exceeding £5. No seller of coal or person in charge of a vehicle is, however, required to carry coal beyond such distance, not exceeding half a

(*l*) "Correct weight" of the horse and vehicle means the correct weight at the time of loading at the seller's place of business (*Knowles & Sons v. Sinclair*, [1898] 1 Q. B. 170; compare *Beardsley v. Pike & Sons* (1904), 90 L. T. 652).

(*m*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 22.

(*n*) *Ibid.*, s. 23.

(*o*) *Ibid.*, s. 24.

(*p*) *Ibid.*, s. 25; compare note (*i*), p. 481, *ante*.

(*q*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 26.

mile, as may be prescribed by the local authority; and where such coal has, at the instance of the purchaser, been weighed or re-weighed, and found to be of the weight stated by the seller or the person in charge of the vehicle, the purchaser is liable to the payment of all reasonable costs actually incurred of and incidental to the weighing or re-weighing (*r*).

SECT. 1.

Coal.

**975.** Local authorities may from time to time make, revoke and alter bye-laws for—(1) regulating the sale of coal in quantities not exceeding 2 cwts.; (2) requiring, either generally or in specified classes of cases, a weighing instrument of a form prescribed by the local authority, to be carried in any vehicle in which coal is carried for sale (*s*) or delivery to a purchaser; (3) prescribing the distance beyond which coal is not to be carried for the purpose of being weighed or re-weighed; and (4) fixing the fees to be paid for the use of any weighing instrument maintained by the local authority.

Bye-laws.

Every bye-law made by a local authority must, before being brought into operation, be approved by the Board of Trade, and be published in such manner as the local authority thinks necessary for giving notice to persons interested, and a copy must also be sent to the Board (*t*).

Approval of  
Board of  
Trade.

**976.** Any inspector of weights and measures or officer appointed by the local authority for the purpose may, at all reasonable times, enter any building or other place in which coal is sold or exposed for sale, and may stop any vehicle carrying coal for sale or delivery to a purchaser and may test any weights and weighing instruments,

Powers of  
inspectors.

(*r*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 27.

(*s*) A person carrying coal for the purpose of fulfilling specific orders previously given does not carry it for sale within the meaning of such a bye-law, even though there has been no specific appropriation of specific coal to the customers (*Hunting v. Matthews* (1913), 108 L. T. 1019).

(*t*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28. By such bye-laws, fines, recoverable summarily, and not exceeding in each case £5, may be imposed for the breach of any such bye-law (*ibid.*). Bye-laws must be reasonable; but the fact that a portion of a bye-law is unreasonable or *ultra vires* does not invalidate other parts of that bye-law (*Kent County Council v. Humphrey*, [1895] 1 Q. B. 903, where it was held that a local authority may make a bye-law requiring coal dealers to provide, and persons employed by them in conveying coal for sale or delivery to a purchaser from or out of any vehicle to carry with such vehicle, a correct and stamped weighing machine of the form approved by the local authority). A bye-law requiring every vehicle carrying coal for sale to carry a weighing instrument of a form approved by the local authority has, however, been held to be too vague to be reasonable (*Martin v. Clarke* (1892), 62 L. J. (M. C.) 178). In *Alty v. Farrell*, [1896] 1 Q. B. 636, and *Crick v. Nicholls*, [1905] 1 K. B. 501, it was held, under a bye-law requiring means of weighing to be carried on carts, that sufficient weights must be carried to weigh any sack of coal in the cart. Where a bye-law provided that “the person in charge of every vehicle carrying coal for sale shall carry therewith a weighing instrument of a form approved by the local authority, together with correct weights,” it was held that a person carrying coal for the sole purpose of fulfilling specific orders, previously given, did not carry coal for sale within the meaning of the bye-law, even though there had been no unconditional appropriation of specific coal to the customers (*Hunting v. Matthews, supra*); compare *Ward v. Franklin* (1909), 101 L. T. 681; see title LOCAL GOVERNMENT, Vol. XIX., p. 328.



## SECT. 1.

## Coal.

and weigh any load, sack, or less quantity of coal found in such place or vehicle, or which is in course of delivery to any purchaser; and any person obstructing or hindering an inspector is liable to a fine not exceeding £5, or in the case of a second or any subsequent offence £10. If it appears to a court of summary jurisdiction that any load, sack or less quantity so weighed is of less weight than that represented by the seller (*a*), the person selling or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, is liable to a fine not exceeding £5 (*b*).

Exempted  
areas.

**977.** On the application of the local authority of any area, and on being satisfied that the provisions with respect to the sale of coal therein under any local Act in force on the 1st January, 1890, are more stringent than the provisions of the Weights and Measures Act, 1889 (*c*), His Majesty may, from time to time, exempt such area from the provisions of that Act relating to the sale of coal, by Order in Council, to such an extent and under such conditions as may appear expedient (*d*).

## SECT. 2.—Herrings.

Sale by cran.

**978.** Herrings may be sold by weight, or number, or in bulk (*e*). Where, however, the Board of Agriculture and Fisheries has, on the application of a local authority, declared, by order (to be published in such manner as the Board direct) the Cran Measures Act, 1908 (*f*), to be in force in the district of such authority or in any part thereof (*g*), any person buying, selling, delivering, or receiving fresh herrings may use the measure known as the cran, the content or capacity of which is determined by regulations made under s. 13 of the Herring Fishery (Scotland) Act, 1815 (*h*), or a quarter-cran measure, of such capacity that four times its content when

(*a*) A master does not necessarily make a representation by the representation of his servant under this provision (*Roberts v. Woodward* (1890), 25 Q. B. D. 412). Where, however, a coal dealer filled up a delivery check which was eventually given to a carman, the dealer was held to have made a representation, and was convicted of giving short weight (*Baker v. Herd* (1894), 58 J. P. 413); and a coal dealer has been convicted under this provision for misrepresentation for using metal labels indicating the weight contained attached to sacks, which did not in fact contain that weight (*Franklin v. Godfrey* (1894), 63 L. J. (m. c.) 239).

(*b*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 29. As to the liability of the carter under this provision for a representation by the seller, see *Paul v. Hargreaves*, [1908] 2 K. B. 289; *Atty v. Farrell*, [1896] 1 Q. B. 636.

(*c*) 52 & 53 Vict. c. 21.

(*d*) *Ibid.*, s. 30. An Order in Council under this provision was issued with respect to Nottingham on the 1st May, 1890 (Stat. R. & O., 1890, p. 1032).

(*e*) Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 1.

(*f*) 8 Edw. 7, c. 17.

(*g*) *Ibid.*, s. 11 (1). The district or part thereof in which the Act is declared to be in force includes "the sea adjoining that district or part" (*ibid.*).

(*h*) 55 Geo. 3, c. 94. This provision, which with most of the Act was repealed as regards Scotland by the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), empowered the Commissioners for the Herring Fisheries "to fix and determine by rules and regulations" the capacity, form, dimensions and materials of cran measures and the method of marking them, and imposed penalties for the infringement of such regulations.

filled with herrings are equal to one cran (*i*). Any local authority applying for an order must for two weeks at least before the application to the Board give notice of its intention by advertising once at least in each of such weeks in one or more newspapers circulating in its district, and no order can be made until proof of such advertisement has been given to the satisfaction of the Board and until a month after the date of the latest advertisement (*j*).

SECT. 2.  
Herrings.

**979.** A cran or quarter-cran measure must be made in such manner, of wood or other material, and be branded or otherwise marked by an inspector of weights and measures in such manner as may be prescribed (*k*); and when so made and marked such measures are the only legal measures for use in buying, selling, delivering, or receiving fresh herrings in any place in which the Cran Measures Act, 1908 (*l*), is in force. Any person using or having in his possession in any place for any such purpose any box, basket, or measure not so made and marked (except as hereinafter provided) is liable on summary conviction to a fine not exceeding £5 for the first offence, and not exceeding £20 for the second or any subsequent offence, with the forfeiture of the measure, and any bargain, contract, sale, or dealing made by such a measure is void (*m*).

Cran  
measures.

**980.** The local authority must fix the times and places within its district at which an inspector of weights and measures is to attend for the purpose of the verification of the cran and quarter-cran measures, and the inspector must then and there examine in the prescribed manner any measures brought to him for verification. If he finds the measure to be correctly made he must brand or otherwise mark it in the prescribed manner; but a cran or quarter-cran measure is not liable to be re-marked because used in any place other than that in which it was originally marked. Any inspector who brands or otherwise marks a cran or quarter-cran measure in contravention of the Cran Measures Act, 1908 (*l*), or regulations made there under, or without duly verifying it in the prescribed manner, or who is guilty of a breach of any duty imposed on him by or under the Act, or otherwise misconducts himself in the execution of his powers, is liable, on summary conviction, to a fine not exceeding £5 for each offence (*n*).

Verification  
of measures.

**981.** An inspector, if authorised in writing by a justice of the peace, may at all reasonable times inspect all cran or quarter-cran measures within his jurisdiction which are used or are in the possession of any person, or any premises for use for trade in fresh herrings, and may seize and detain any measure which is liable to be forfeited in pursuance of the Act, and may for the purpose of such inspection enter any place, whether a building or a vessel or in the open air, whether open or enclosed, where he has reasonable

Powers of  
inspector.

(*i*) Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 1.

(*j*) *Ibid.*, s. 11 (2).

(*k*) See Cran Measures Regulations, 1908 (Stat. R. & O., 1908, p. 353), which provide, *inter alia*, for the dimensions and mode of construction of each measure in both basket and box forms.

(*l*) 8 Edw. 7, c. 17.

(*m*) *Ibid.*, s. 1.

(*n*) *Ibid.*, s. 2.

SECT. 2.  
Herrings.

cause to believe that there is any measure which he is authorised to inspect. Any person who neglects or refuses to produce for such inspection all such measures in his possession or on his premises, or refuses to permit the officer to examine them or any of them, or who obstructs his entry or otherwise obstructs or hinders him, is liable, on summary conviction, to a fine not exceeding £5, or in the case of a second or subsequent offence £10 (*o*).

Fees.

An inspector may take, in respect of the verification and making of cran measures, only such fees as may be specified by Order in Council (*p*), and he must at such times, not less than once a quarter, as the local authority direct, account for and pay over all fees so taken to the local authority or as it directs (*q*).

False  
measures.

**982.** Any person who forges or counterfeits any mark used for marking cran or quarter-cran measures, or wilfully increases or diminishes the capacity of such measures, is liable, on summary conviction, to a fine not exceeding £50; and any person removing a mark from any measure and inserting it into another is deemed to forge or counterfeit such mark. Any person who knowingly sells, utters, disposes of, or exposes for sale any measure with a forged or counterfeit mark, or any measure so increased or diminished, is liable, on summary conviction, to a fine not exceeding £10, and all such measures are forfeited (*r*).

Legal cran  
measures.

**983.** Cran and quarter-cran measures made and marked under and in accordance with the Herring Fishery (Scotland) Act, 1889 (*s*), and the Branding of Herrings (Northumberland) Act, 1891 (*t*), are legal measures for use for buying, selling, delivering, or receiving fresh herrings in any place in which the Cran Measures Act, 1908 (*u*), is in force (*v*). Measures made and marked in accordance with the Cran Measures Act, 1908 (*u*), are legal measures for use in the Scotch herring fisheries, and in any area to which the powers of the Fishery Board for Scotland extend under the Branding of Herrings (Northumberland) Act, 1891 (*t*), and the powers of the Fishery Board for Scotland and of its officers under the last-named Act cease to be exercisable, so far as concerns the marking or otherwise dealing with cran or quarter-cran measures, in any part of an area in which the Cran Measures Act, 1908 (*u*), is put in force (*a*).

(*o*) Cran Measures Act, 1908 (8 Edw. 7, c. c. 16), s. 3.

(*p*) An Order of the 23rd January, 1911, specifies a fee of  $\frac{1}{2}$ d. for each quarter-cran and 1d. for each cran measure (Stat. R. & O., 1911, p. 453).

(*q*) Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 4.

(*r*) *Ibid.*, s. 5.

(*s*) 52 & 53 Vict. c. 23, s. 4, the provisions of which are similar to those of the Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 1, the authority for making regulations being the Fishery Board of Scotland.

(*t*) 54 & 55 Vict. c. 28, which extends the powers of the Fishery Board for Scotland in respect of the branding or marking of barrels specified in the Herring Fisheries (Scotland) Act, 1889 (52 & 53 Vict. c. 23), to the administrative county of Northumberland and the sea adjoining. The Act is now subject to the Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 7.

(*u*) 8 Edw. 7, c. 17.

(*v*) *Ibid.*, s. 6.

(*a*) *Ibid.*, s. 7.



**984.** The Board of Agriculture and Fisheries may, as regards cran and quarter-cran measures, make regulations with respect to any matter which may be prescribed, and with respect to which the Board of Trade may make general regulations under the Weights and Measures Acts, 1878—1904 (*b*), subject to the conditions applicable to the making of such regulations (*c*). SECT. 2.  
Herrings.  
Regulations.

**985.** Such portion of any fine under the Cran Measures Act, 1908 (*d*), not exceeding a moiety, as the court of summary jurisdiction before whom a person is convicted thinks fit to direct, may, if the court in its discretion so orders, be paid to the informer, unless such informer is an inspector of weights and measures (*e*). Application  
of fines.

All measures forfeited under the Cran Measures Act, 1908 (*d*), are broken up and the materials sold or otherwise disposed of as a court of summary jurisdiction directs; the proceeds of sale are applied in the same manner as fines under the Act (*f*).

**986.** A person is not liable to any increased penalty for a second offence unless such offence was committed after conviction within five years previously for an offence under the same provision of the Act; but where the court by which a person is convicted is of opinion that the offence was committed with intent to defraud, such person is liable to be imprisoned, with or without hard labour, for a term not exceeding one month in addition to, or in lieu of, any fine (*g*). Increased  
penalties

**987.** Where any cran or quarter-cran measure is found in the possession of any person carrying on trade in fresh herrings, or on the premises of any person which, whether a building or a vessel, or in the open air, whether open or enclosed, are used for trade in fresh herrings, that person is deemed, until the contrary is proved, to have the measures in his possession for use for trade in fresh herrings (*h*). Presumption  
of user.

**988.** Any person aggrieved by a conviction or order of a court of summary jurisdiction may appeal to quarter sessions (*i*). Appeals.

**989.** An inspector of weights and measures may, with the consent of the local authority, prosecute any proceedings arising under the Act or in the discharge of his duties (*k*). Prosecution  
by inspector.

**990.** The local authority under the Cran Measures Act, 1908 (*d*), is the local authority for the purposes of the Weights and Measures Local  
authorities.

(*b*) See note (*a*), p. 460, *ante*.

(*c*) Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 8; such regulations have been made; see note (*l*), p. 485, *ante*.

(*d*) 8 Edw. 7, c. 17.

(*e*) *Ibid.*, s. 9 (1).

(*f*) *Ibid.*, s. 9 (2).

(*g*) *Ibid.*, s. 9 (3), (4).

(*h*) *Ibid.*, s. 9 (5).

(*i*) *Ibid.*, s. 9 (6).

(*k*) *Ibid.*, s. 9 (7); compare Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 14. A general consent given by resolution applying to all prosecutions is sufficient for the purposes of this provision (*Tyler v. Ferris*, [1906] 1 K. B. 94).

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Herrings.

Acts, 1878—1904 (*l*), and the expenses incurred by such local authority are to be defrayed as expenses of the authority under those Acts. Two or more local authorities may combine in the same manner as for the purposes of the Weights and Measures Acts, 1878—1904 (*l*), and the jurisdiction of a local authority extends to the sea adjoining its district and within the exclusive fishery limits of the British Isles (*m*).

SECT. 3.—*Miscellaneous.*

SUB-SECT. 1.—*Particular Places.*

Wages  
payable  
by weight.

**991.** The Acts for the time being in force relating to weights and measures apply to weights, measures, scales, balances, steel-yards and weighing machines used in a factory or workshop in checking or ascertaining the wages of any person employed therein, as if they were used in the sale of goods and as if the factory or workshop were a place where goods are kept for sale (*n*); and every inspector or other person authorised to inspect or examine weights and measures may inspect, stamp, mark, search for, and examine such weights and measures, scales, balances, steelyards and weighing machines, and for that purpose has the same powers and duties in relation to them as he has in the case of the sale of goods (*o*).

Carriage  
of goods.

**992.** A toll-collector or other officer of a railway company may detain, examine, weigh, gauge or measure any carriage or goods conveyed in any carriage over the railway of the company in any case in which a difference arises between the toll-collector, or other officer, and the owner or person in charge of the goods respecting their weight, quantity, quality or nature; and if the goods, after examination or measuring, appear to be greater in weight or quantity, or to be of another nature, than is stated in the account describing them, the person giving the account must pay, and the owner of the carriage or the respective owners of the goods will be liable to pay the costs of measurement and examination (*p*). If, however, the goods are of the same or less weight or quantity than and of the same nature as stated in the account, the costs are payable by the company, and the company is also liable to the owner or person in charge of the carriage, and to the respective owners of the goods, for any damages which may appear to any

(*l*) See note (*a*), p. 460, *ante*.

(*m*) Cran Measures Act, 1908 (8 Edw. 7, c. 17), s. 10; compare Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 50, Sched. IV.

(*n*) As to the provisions relating to weights and measures used in the sale of goods, and to the places where goods are kept for sale, see pp. 470 *et seq.*, *ante*; as to the weighing and measuring of goods sold or offered for sale in public markets, see title MARKETS AND FAIRS, Vol. XX., pp. 25 *et seq.*; as to the weighing of cattle, see titles AGRICULTURE, Vol. I., p. 292; MARKETS AND FAIRS, Vol. XX., pp. 27 *et seq.*; as to the weighing of carts, see title MARKETS AND FAIRS, Vol. XX., p. 27; as to the measuring of gas, see title GAS, Vol. XV., pp. 344 *et seq.*; as to the measuring of hops, see title AGRICULTURE, Vol. I., p. 291; as to the weighing of bread, see title FOOD AND DRUGS, Vol. XV., pp. 49 *et seq.*

(*o*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 117; see title FACTORIES AND SHOPS, Vol. XIV., p. 514.

(*p*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 101.

justice to whom a summary application has been made for the purpose to be due to them (*q*); and where it appears to such justice that the detention, measuring, or examination was unreasonable or vexatious, the costs of and the damages resulting from such detention, measuring, or examination must be paid by the toll-collector or other officer himself, and in default of immediate payment may be recovered by distress (*r*).

SUB-SECT. 2.—*Particular Articles.*

**993.** Every miller, or other person keeping a mill for grinding corn, must have in the mill a true and equal balance with proper weights according to the imperial standard, and is liable on failure to comply with this provision to forfeit and pay a sum not exceeding 20s. (*s*). Grinding  
corn.

Every person who brings or causes any corn to be brought to any mill to be ground may require the miller, or other person acting for him or keeping the mill, to weigh, in his presence, such corn before it is ground, and after it is ground may require the miller or other person to weigh, in his presence, the produce of the corn so ground; and any miller or other person refusing to weigh the said corn is liable to forfeit and pay any sum not exceeding 40s. (*t*).

Every miller, or other person keeping a mill for grinding corn, must, after grinding any corn, deliver to the person who brings it, if such person requires, the whole produce of such corn in weight, allowing for the diminution in weight caused by the waste in grinding, and by taking toll in cases where toll (*u*) is allowed to be taken; or if the corn is dressed into flour, then the whole produce in weight, allowing for the diminution in weight caused by grinding and dressing, and taking toll. If the corn, on being weighed after grinding, or after grinding and dressing, weighs less than the full

(*q*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 101.

(*r*) *Ibid.*, s. 102. A railway company may charge for the use of weighing machines for weighing goods at its stations, the weighing for the convenience of the consignee being incidental to the statutory powers of the company (*London and North Western Rail. Co. v. Price* (1883), 52 L. J. (Q. B.) 754; 11 Q. B. D. 485); compare the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxi.), which contains a provision to this effect. As to the computation of weights for purposes of traffic under the Railway and Canal Traffic Acts, 1854 (17 & 18 Vict. c. 31), 1888 (51 & 52 Vict. c. 25), and 1894 (57 & 58 Vict. c. 54), see *Eastwood & Co., Ltd. v. London and North Western Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 137; *Lever Brothers, Ltd. v. Midland Rail. Co.* (1909), 13 Ry. & Can. Tr. Cas. 183; *Watson (Joseph) & Sons, Ltd. v. Midland Rail. Co.* (1911), 14 Ry. & Can. Tr. Cas. 18, C. A.

(*s*) Mills Act, 1795 (36 Geo. 3, c. 85), s. 1; Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 86, Sched. VI., Part I. The Mills Act, 1795 (36 Geo. 3, c. 85), does not apply to soke mills or mills where a right to take toll has been established by custom or law (*ibid.*, s. 5), nor to private mills (*ibid.*, s. 7).

(*t*) *Ibid.*, s. 2.

(*u*) *Ibid.*, s. 5, substitutes payment of toll—which by *ibid.*, s. 4, is to be deducted from corn before it is put into the mill—in money in lieu of in corn, as prior to the passing of the Act.



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Miscellaneous.

weight, after allowing for the diminution aforesaid, the miller must, for every bushel of corn so deficient in weight, forfeit and pay a sum not exceeding 1s., and also treble the value of such deficiency (*w*).

Returns to  
Board of  
Agriculture  
and Fisheries.

**994.** In the returns of the purchases of British corn directed to be made under the direction of the Board of Agriculture and Fisheries by certain towns and certain buyers of corn in such towns, specified by Order in Council, in accordance with the provisions of the Corn Returns Act, 1882 (*x*), the weekly summary of quantities and prices to be sent to the Board by inspectors of corn returns in such towns is computed with reference to the imperial bushel (*y*). An inspector of corn returns must convert into imperial bushels all returns made to him, in any other measure or by weight or by a weighed measure, and, in the case of weight or weighed measure, must convert them at the rate of sixty imperial pounds for every bushel of wheat, fifty imperial pounds for every bushel of barley, and thirty-nine imperial pounds for every bushel of oats (*a*).

Measurement  
of electricity  
etc.

**995.** The Board of Trade must from time to time cause such new denominations of standards for the measurement of electricity, temperature, pressure, or gravities as appear to the Board to be required for use for trade to be made and duly verified, and these new denominations of standards, when approved by His Majesty in Council, whether derived from imperial or from other standards, will be Board of Trade standards in the same manner as if mentioned in the Weights and Measures Act, 1878 (*b*), Schedule II. (*c*).

Sale of hay  
and straw.

**996.** A public book or register for entering and registering therein an account of all hay and straw sold within the cities of London and Westminster or within thirty miles thereof must be kept in some convenient place in every market for the sale of hay or straw; in the City of London by the clerk or toll-collector

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(*w*) Mills Act, 1795 (36 Geo. 3, c. 85), s. 3. *Ibid.*, s. 8, provides for the application of penalties and gives an appeal to quarter sessions.

(*x*) 45 & 46 Vict. c. 37, ss. 4—9. By the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 4, the powers of the Board of Trade under the former Act were transferred to the Board of Agriculture, now the Board of Agriculture and Fisheries; see title AGRICULTURE, Vol. I., p. 297.

(*y*) 41 & 42 Vict. c. 49.

(*a*) See p. 469, *ante*.

(*b*) Corn Returns Act, 1882 (45 & 46 Vict. c. 37), s. 8.

(*c*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 6. In pursuance of this provision an Order in Council of the 23rd August, 1894 (Stat. R. & O. Rev., Vol. XIII., Weights and Measures, pp. 16, 17), stated the limits of accuracy attainable in the use of denominations of standards for the measurement of electricity as: for the ohm, within one hundredth part of 1 per cent.; for the ampere, within one-tenth part of 1 per cent.; for the volt, within one-tenth part of 1 per cent. In consequence of conclusions arrived at by the International Conference on Electrical Units and Standards held in London in October, 1908, these standards have now been amended by an Order of the 10th January, 1910 (Stat. R. & O., 1910, p. 845), the schedule to which sets out new denominations of standards with respect to (i.) electrical resistance, (ii.) electrical current, and (iii.) electrical pressure. As to the statutory law relating to electricity, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 541 *et seq.*

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appointed by the Lord Mayor, commonalty and citizens, and also in and for every similar market within the city of Westminster and limits aforesaid by the clerks or toll-gatherers within their several jurisdictions. The book must be open daily for inspection between 9 a.m. and 6 p.m. on payment of the sum of one penny for each inspection (*d*). Every clerk or toll-collector must be provided with proper scales, weights, or engines for weighing hay and straw to be kept at the office of the clerk of every hay market within the two cities; and the clerk or toll-collector or his deputy is the hay and straw weigher (*e*).

**997.** The buyer of any hay or straw sold within the limits aforesaid, or his servant or agent, may, on its delivery at the abode, yard, or loft of the buyer, or any other place agreed to by the seller, cause it to be weighed in the presence of the seller, his servant or agent, and if the buyer or seller, or the servant or agent of either, is dissatisfied with such weighing, he may, if the hay is delivered within a parish having a hay market, with all convenient speed apply to the hay weigher nearest to the place where the hay or straw is delivered to re-weigh it. The hay weigher so applied to must come with all convenient speed and weigh the hay or straw complained of, and the weight as ascertained by him is conclusive on all parties; but his attendance to weigh cannot be demanded until the person requiring it has paid or tendered the sum of 3s. per load, or in proportion for a greater or less quantity. If the hay or straw weighed is not of the weight it purports to be, the sum paid must forthwith be repaid by the seller (*f*).

Duties of  
hay weigher.

Any clerk or toll-gatherer, within the limits aforesaid who omits to provide proper scales, weights, or engines for the weighing of hay or straw, or neglects or refuses to weigh any hay or straw at any reasonable time in the daytime when required after the tender or payment of the sum aforesaid, is liable to a penalty not exceeding £5 or less than 10s. for every offence (*g*).

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(*d*) Hay and Straw Act, 1796 (36 Geo. 3, c. 88), s. 10, which also provides for the regulations prescribed with respect to the registration of sales of hay and straw. Clerks and toll-collectors are prohibited by *ibid.*, s. 12, from buying or selling hay or straw under a penalty of 2s. 6d. per bundle of hay, and 1s. per bundle of straw, bought or sold.

(*e*) *Ibid.*, s. 13; the provision that scales etc. shall be kept at the watch-house of each parish by the churchwardens and overseers (*ibid.*) appears to be obsolete.

(*f*) *Ibid.* If the clerk or hay weigher applied to fails to come with all convenient speed the buyer may apply to such other as may be nearest to the place where the hay or straw is delivered (*ibid.*).

(*g*) *Ibid.* No penalty is, however, payable for selling hay or straw deficient in weight unless it be weighed at or before delivery with the privity of the buyer, his servant, or agent, or be complained of in respect of the quality at the time and place at which it has been agreed to be delivered by the seller in the presence of himself, his servant, or agent, or on neglect or refusal of such seller to attend to see the same weighed when required (*ibid.*, s. 14). Penalties are also imposed for fraudulently increasing weight (*ibid.*, s. 21; see also p. 492, *post*), and delivering less than the number of trusses sold (Hay and Straw Act, 1796 (36 Geo. 3, c. 88), s. 22). Provision is made for the recovery of forfeitures by *ibid.*, ss. 26, 30, and for the limitation of prosecutions by *ibid.*, s. 25.

## SECT. 3.

## Miscellaneous.

Fraudulent  
increase of  
weight.

Ticket.

Disputes as  
to weight.

Sale of  
intoxicating  
liquor.

**998.** No person may mix or put, or cause to be mixed or put, any water, sand, earth, or other matter, or thing whatsoever, in any bundle or truss of hay or straw intended for sale within the cities of London and Westminster or within thirty miles thereof with intent fraudulently to increase the weight, nor sell, offer, or expose for sale or cause to be sold, offered, or exposed for sale any hay or straw into or with which any water, sand, earth, or other matter has been mixed with such intent (*h*).

**999.** Every salesman or other person who sells any hay or straw for the owner in any market or place within the limits aforesaid (*i*) must, at the time of the sale or the delivery of the hay or straw, deliver or cause to be delivered to the buyer a ticket or note containing the number of trusses sold, and the christian name, surname, and address of the owner (*k*).

**1000.** Where any hay or straw is offered or exposed for sale in any public hay market within the foregoing limits, and complaint is made to the clerk or toll-collector that it is different in weight or quantity, or has been mixed or packed contrary to any of the foregoing provisions, the clerk or collector must weigh and examine the same, and if the hay or straw is then found different in weight or quantity, or mixed with any foreign matter contrary to the provisions aforesaid, he may summon the offender or offenders before any justice of the peace having jurisdiction in the district where the market is situated, who must upon proof thereof convict the offender or offenders in the respective penalties imposed for such offences (*l*).

**1001.** All intoxicating liquor sold by retail (*m*) and not in cask or bottle, and not sold in a quantity less than half a pint, must be sold in measures marked according to the imperial standards (*n*); and every person who acts or suffers any person under his control or in his employment to act in contravention of this provision is

(*h*) Hay and Straw Act, 1856 (19 & 20 Vict. c. 114).

(*i*) See the text, *supra*.

(*k*) Hay and Straw Act, 1856 (19 & 20 Vict. c. 114), s. 2.

(*l*) *Ibid.*, s. 3. The penalty for every offence against or disobedience to the provisions of the Act is a fine not exceeding £10 (*ibid.*, s. 4).

(*m*) "Sale by retail" means the sale of an intoxicating liquor in such quantities as is declared by any Acts relating to the sale of such liquors to be sale by retail (Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24) s. 110); as to beer, see Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), s. 19; *Fairclough v. Roberts* (1890), 24 Q. B. D. 350; see also Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 104; Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 4.

(*n*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 69; compare *Payne v. Thomas* (1890), 60 L. J. (m. c.) 3; *Addy v. Blake* (1887), 19 Q. B. D. 478; *Riddell v. Neilson* (1903), 5 Fraser (Justiciary Cases), 57; *Pennington v. Pinnock*, [1908] 2 K. B. 244; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 123, 124. A measure which is a multiple or part of an imperial standard is not an illegal measure (*Bellamy v. Pow* (1896), 60 J. P. 112). If the intoxicating liquor, though asked for under some local term, is, when supplied, of a quantity amounting to half a pint or more, the provision of the statute applies (*Payne v. Thomas*, *supra*); compare, however, *Craig v. M'Phee* (1883), 3 Rettie (Justiciary Cases), 51, where a conviction under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), for using glass vessels not represented to be imperial measures, for the sale of whisky, was quashed.



liable to a penalty not exceeding £10 for the first and not exceeding £20 for any subsequent offence, and also to forfeit the illegal measure in which the liquor was sold (o).

No person, however, is subject to any penalties under the Weights and Measures Acts (p) for the sale of an article in any vessel which is not represented as containing any amount of imperial measure or for being in possession of a vessel which is shown not to be used or intended for use as a measure (q).

**1002.** There must be legibly cut, branded, or painted with oil colour, on some conspicuous part of every fixed cask or other vessel used by a dealer or retailer for holding spirits in stock, and on the outside of both the ends of every movable cask used by him for keeping or delivering spirits, the number of gallons which the cask or vessel is capable of containing. Every cask not so cut, branded, or painted is liable to forfeiture with the contents, and the dealer or retailer incurs a fine of £50 (r). Where the strength of any spirits forming part of the stock of a dealer or retailer cannot be ascertained by Sykes's hydrometer or other authorised means (s), the dealer or retailer must, on being so required by an officer, cause the quantity and strength of the spirits to be legibly marked on the outside of the cask or vessel containing them; and every cask or vessel which a dealer or retailer neglects or refuses, on being so required, to mark, or fails to keep so marked, or which is found to be untruly marked, is liable to be forfeited with the contents, and the dealer or retailer, for each offence, incurs a fine of £50 (t). A cask or vessel is not, however, deemed to be untruly marked if the strength denoted by the mark corresponds with that expressed in the permit or certificate with which the spirits were received into stock, and no alteration has since been made to the spirits (a).

SECT. 3.  
Miscellaneous.

Marking of  
casks.

**1003.** All tuns, pipes, tertians, hogsheads, and other vessels of wine, oil, honey, and other gaugeable liquors imported or brought into

Rights of  
Lord Mayor  
of London.

(o) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & Geo. 5, c. 24), s. 69. It was held in *Caldwell v. Bethell* (1913), 77 J. P. 118, that a barman in the employ of a licensee could be convicted under this provision if he served a customer with intoxicating liquor in such a manner as to contravene its provisions.

(p) As to these Acts, see note (a), p. 460, *ante*.

(q) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 22; compare *ibid.*, s. 29; *Craig v. M'Phee* (1883), 3 Rettie (Justiciary Cases), 51; *Robinson v. Golding* (1910), 103 L. T. 248.

(r) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 98. By *ibid.*, s. 3, "spirits" means spirits of any description, and includes all liquors mixed with spirits, and all mixtures, compounds or preparations made with spirits.

(s) The Commissioners of Customs and the Commissioners of Inland Revenue may jointly make regulations authorising the use of any means described in the regulations for ascertaining for any purpose the strength or weight of spirits. Where by any enactment Sykes's hydrometer is directed to be used or may be used for the purpose of ascertaining the strength or weight of spirits, any means so authorised by regulations may be used instead of Sykes's hydrometer, and references to Sykes's hydrometer in any enactment will be construed accordingly. Such regulations must be published in the *London, Edinburgh, and Dublin Gazettes*, and take effect from the date of publication or such later date as may be mentioned therein (Finance Act, 1907 (7 Edw. 7, c. 13), s. 4). As to the meaning of "spirits," see note (r), *supra*.

(t) Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 99 (1), (2).

(a) *Ibid.*, s. 99 (3).

SECT. 3.  
Miscellaneous.

the port of the City of London and landed within the City and liberties are subject and liable to be gauged by the Lord Mayor in virtue of his office of gauger, or by his sufficient deputies lawfully appointed. All tuns, pipes, tertians, hogsheads or other vessels found to be deficient in capacity, together with the wine or other liquids therein contained, are liable to seizure and forfeiture under any Act or Acts of Parliament for ascertaining the true contents of tuns, pipes, tertians, hogsheads, or other vessels of wine, oil, honey, and other gaugeable liquors; the moieties of such forfeitures due to the Crown are ascertained and accounted for by the Lord Mayor, as such gauger and his deputies, to His Majesty in the High Court of Justice (*b*).

Sale of tea  
etc. in  
packets.

**1004.** The weighing of the wrapper or bag in which tea, sugar, or other goods are packed for delivery to the purchaser in the same scales with such goods may, in certain circumstances, render the vendor liable either for using false or unjust weights (*c*) or for wilfully committing a fraud in the using of such scales (*d*). The offence of using a scale which is false or unjust may be constituted by using a scale which is unjust as a scale when in use (*e*). Thus, a scale is false or unjust if it does not hang true at the time of weighing when an equal weight is put into the goods scoop and into the weight dish on the other side (*f*), and this may be due to the presence in the goods scoop of a folded bag (*g*) or piece of paper (*h*), or other equivalent in weight of the bag in which the tea is to be placed after removal from the scoop (*i*). A seller may be guilty of wilfully committing fraud in the use of his scales when tea is weighed with paper though the weighing is done before the customer's eyes, if it is so done as to suggest to him that the weight of the tea alone is being ascertained (*k*). There must, however, be fraud in the use

(*b*) Weights and Measures Act, 1824 (5 Geo. 4, c. 74), s. 25; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 3. The forfeitures due to the Crown would now be ascertained in the King's Bench Division (*ibid.*, s. 34 (3); Order in Council, 16th December, 1880 (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, p. 1). The remainder of the Weights and Measures Act, 1824 (5 Geo. 4, c. 74), was repealed by the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 86; see title INTOXICATING LIQUORS, Vol. XVIII., pp. 123, 124.

(*c*) In contravention of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25; see p. 471, *ante*.

(*d*) In contravention of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 26; see p. 471, *ante*.

(*e*) *London County Council v. Payne* (No. 2), [1905] 1 K. B. 410, *per* Lord ALVERSTONE, C.J., at pp. 414, 415, following *London County Council v. Payne*, [1904] 1 K. B. 194; *Lane v. Rendall*, [1899] 2 Q. B. 673.

(*f*) *London County Council v. Payne* (No. 2), *supra*.

(*g*) *London County Council v. Payne*, *supra*.

(*h*) *Lane v. Rendall*, *supra*; see also *Bridger v. Neilson* (1894), 31 Sc. L. R. 744.

(*i*) *London County Council v. Payne*, *supra*, where it was held to be immaterial that the bag in which the tea was supplied bore a printed statement that the weight of the paper was included and that the bag was supplied by the customer.

(*k*) *King v. Spencer* (1904), 68 J. P. 530, where it was held that evidence of a certain trade usage is admissible as bearing on the question whether there has been a wilful commission of fraud, the proceedings being taken against a grocer for being unlawfully a party to the commission of fraud in using a certain scale by adding paper to the goods thereupon when weighing tea.

of the scales (*l*). If, therefore, a customer who asks for a particular weight of goods receives a packet of that weight containing the goods specified, and the packet is not weighed in his presence, but is one of a number of similar packets which have been previously weighed by the seller, the goods in each packet having been in the paper bag in which they are contained, and the scales in which the weighing was done being perfectly just and accurate and giving the weight of each packet correctly, the seller is not guilty of a fraud wilfully committed in the using of such scales (*m*).

## Part VII.—Offences and Legal Proceedings.

**1005.** All offences under the Weights and Measures Acts (*n*) may be prosecuted and all fines and forfeitures recovered on summary conviction before a court of summary jurisdiction as provided by the Summary Jurisdiction Acts (*o*). The court when hearing or determining an information or complaint under the Weights and Measures Acts (*n*) must be constituted either of two or more justices of the peace in petty sessions, sitting at a place appointed for holding such sessions, or of some magistrate or other officer sitting alone or with others at some court or other place appointed for the administration of justice, and for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace (*p*). Such portion of any fine under the Weights and Measures Acts (*n*), not exceeding a moiety, as the court of summary jurisdiction before whom a person is convicted directs, may, if the court so orders, be paid to the informer, unless he be an inspector of weights and measures (*q*). All weights, measures, scales, balances, and steel-yards forfeited under the Acts must be broken up and the materials sold or otherwise disposed of as a court of summary Procedure.

(*l*) *King v. Spencer* (1904), 68 J. P. 530; *Nicholls v. Allwood* (1904), 68 J. P. 220.

(*m*) *Stone v. Tyler*, [1905] 1 K. B. 290, where KENNEDY, J., pointed out that the real fraud in such a case as this consists in handing over 1 lb. of sugar and paper in response to a request for 1 lb. of sugar; compare *Star Tea Co. v. Whitworth* (1904), 68 J. P. 443.

(*n*) As to these Acts, see note (*a*), p. 460, *ante*.

(*o*) As to these Acts, see title MAGISTRATES, Vol. XIX., p. 589, note (*a*).

(*p*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 56; as to the power of an inspector to conduct the proceedings, see pp. 476, 477, *ante*. The jurisdiction of justices of the county of London under this enactment is not excluded by the provision in the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), s. 42, that no other justice than a police magistrate shall take fees within the police district (*Dodson v. Williams* (1894), 10 T. L. R. 211). An appeal to the police magistrates of the metropolitan police courts is given by the Metropolitan Police Courts Act, 1840 (3 & 4 Vict. c. 84), s. 12, in respect of persons feeling themselves aggrieved by proceedings at courts leet with regard to examining or regulating, seizing, breaking, or destroying any weights, balances, or measures; compare *R. v. Young* (1891), 8 T. L. R. 26, where the Queen's Bench Division refused a mandamus to compel such justices to hear cases under the Acts. As to courts of summary jurisdiction and the procedure therein, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*, 589 *et seq.*

(*q*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 57 (4); Weights and Measures Act, 1904 (4 Edw. 7, c. 28), s. 13 (2).



## PART VII.

Offences  
and Legal  
Proceed-  
ings.Presumption  
as to use for  
trade.

jurisdiction directs, the proceeds of the sale being applicable in the same manner as fines under the Weights and Measures Acts (*r*).

No person is liable to any increased penalty for a second offence under the Acts unless it was committed after a conviction within five years previously for an offence under the same section (*s*).

**1006.** Where any weight, measure, scale, balance, steelyard, or weighing machine is found in the possession of any person carrying on trade within the meaning of the Weights and Measures Acts (*t*), or on the premises of any person which, whether a building or in the open air, whether open or enclosed, are used for trade within the meaning of the Acts, such person is to be deemed, until the contrary is proved, to have the weight, measure, scale, balance, steelyard, or weighing machine in his possession for use for trade (*u*).

Publication  
of conviction.

**1007.** Where a person is convicted before any court of any offence under the Weights and Measures Acts (*a*), the court may, if it thinks fit, cause the conviction to be published in such manner as it thinks desirable (*b*).

Appeals.

**1008.** Any person who feels himself aggrieved by a conviction or order of a court of summary jurisdiction may appeal therefrom to the next practicable court of quarter sessions (*c*).

Tender of  
amends.

**1009.** In an action for any act done in pursuance or execution, or intended execution, of the Weights and Measures Acts (*a*), or in respect of any alleged neglect or default in their execution, tender of amends before the action is commenced may, in lieu of or in addition to any other plea, be pleaded, if the action was commenced after such tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim. If the action is commenced after such tender or is proceeded with after such payment, and the plaintiff does not recover more than the sum tendered or paid respectively, the plaintiff may not recover any costs incurred after such tender or payment, and the defendant is entitled to his costs, to be taxed as between solicitor and client, as from the time of such tender or payment. This provision does not, however, affect costs on any injunction in the action (*d*).

Other  
remedies.

**1010.** No proceeding or conviction for any offence punishable under the Weights and Measures Acts (*a*) affects any civil remedy

(*r*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 57 (5); as to London, see note (*m*), p. 495, *ante*. As to the Weights and Measures Acts, see note (*a*), p. 460, *ante*.

(*s*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 58.

(*t*) As to these Acts, see note (*a*), p. 460, *ante*.

(*u*) *Ibid.*, s. 59; compare No. 39 of the Board of Trade Weights and Measures Regulations, 1907; as to the burden of proof under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 58, see *ibid.*, s. 25; *Hood v. Malcolm* (1887), 25 Sc. L. R. 17. It has been held that weights etc. used in a post office are in the postmaster's possession for use for trade (*R. v. Kent Justices* (1889), 24 Q. B. D. 181).

(*a*) As to these Acts, see note (*a*), p. 460, *ante*.

(*b*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 14.

(*c*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 60.

(*d*) *Ibid.*, s. 61; see also Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), by which this provision appears to be superseded; and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 338 *et seq.*

to which any person aggrieved by the offence may be entitled (*e*). Where proceedings are taken before any court against any person in respect of any offence punishable under the Acts which is also punishable at common law or under some Act of Parliament, the court may direct that proceedings shall instead be taken against him at common law or under some Act of Parliament other than the said Acts (*f*).

PART VII.  
Offences  
and Legal  
Proceed-  
ings.

## Part VIII.—Expenses of Local Authorities.

**1011.** The expense of providing and reverifying local standards, the salaries of inspectors, and all other expenses incurred by the local authority under the Weights and Measures Acts, 1878—1904 (*g*), are payable out of the local rate (*h*). Local rate.

**1012.** Any two or more local authorities may combine, as regards either the whole or any part of the areas within their jurisdiction, for all or any of the purposes of the Weights and Measures Acts, 1878—1904 (*g*), upon such terms and in such manner as may be from time to time mutually agreed upon; and an inspector appointed in pursuance of such an agreement has, subject to the terms of his appointment, the same authority, jurisdiction, and duties as if appointed by each of the authorities who are parties to it (*i*). Combination  
of authorities.

**1013.** Where a town or other place has been, or may hereafter be, authorised under any Act, whether local or otherwise, to appoint inspectors or examiners of weights and measures, or where any other place has been, or may hereafter be, possessed of legal jurisdiction by charter, Act of Parliament, or otherwise (*k*), and such Franchises.

(*e*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 33 (1); *ibid.*, s. 33 (2), was repealed by S. L. R., 1908.

(*f*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 33 (3).

(*g*) As to the Weights and Measures Acts, see note (*a*), p. 460, *ante*.

(*h*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 51. The treasurer of the county in which a borough having a separate court of quarter sessions is situate must exclude from the account kept by him of all sums expended out of the county rate, to which the borough is liable to contribute, all sums expended in pursuance of the Acts (*ibid.*).

(*i*) *Ibid.*, s. 52.

(*k*) The Weights and Measures (Purchase) Act, 1892 (55 & 56 Vict. c. 18), s. 1 (1), (3), empowers county or borough councils to purchase any franchise of weights and measures, and for that purpose to borrow, in the case of county councils in accordance with the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and in the case of borough councils, with those of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The expenses incurred by borough councils under this Act are defrayed out of the borough fund or borough rate, and any money borrowed must be borrowed on the security of such fund or rate (Weights and Measures (Purchase) Act, 1892 (55 & 56 Vict. c. 18), s. 1 (4)). The term "franchise of weights and measures" includes the authority which any court leet for any hundred or manor, or any jury or ward inquest, or the lord or lady of any manor, or any other person, may have for inspecting, examining, regulating, verifying, stamping, adjusting, seizing, breaking or destroying any weights or measures, or weighing instrument or measuring instrument (*ibid.*, s. 1 (5)).

PART VIII.  
Expenses  
of Local  
Authorities.

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Reimburse-  
ment by  
county  
council.

town or place is, for the time being, provided with legal local standards, the magistrates or other authorised persons may appoint, suspend, or dismiss inspectors of weights and measures within the limits of their jurisdiction. Such inspectors possess, exclusively within such limits, the same power and discharge the same duties as inspectors of weights and measures appointed by the local authority for the county, and must pay over and account for the fees received by them to persons duly authorised by the magistrates or other persons appointing them (*l*).

**1014.** The mayor, aldermen, and burgesses of a borough not being a county borough, and not having a separate court of quarter sessions, who were, on the 1st January, 1893, the legally constituted authority for the purposes of the Weights and Measures Acts, 1878—1892 (*m*), or for the execution of the law relating to weights and measures under any local Act, are entitled to be paid by the county council of the county in which the borough is situate, once in every year, the proportionate amount contributed towards the expenses incurred by the council in the execution of those Acts by the several parishes, and parts of parishes, within the borough, such proportion being calculated according to the values stated in the basis for county rates in force for the time being. When, however, the amount received by a county council from the execution of those Acts is in excess of the expenditure, a proportionate part of such excess must be deducted from any sum due to such borough as a recoupment under the Contagious Diseases (Animals) Acts (*n*) or the Sale of Food and Drugs Acts (*o*) respectively (*p*).

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Where a county council has acquired any such franchise in respect of any area within a borough, the council of which is not, at the time of acquisition, the local authority with respect to weights and measures, the council of that borough cannot become the local authority until it has recouped to the county council such proportion of the expenses of acquiring the franchise and in executing the law with respect to weights and measures as may be agreed upon by the respective councils, or, in the case of difference, determined by the Board of Trade (Weights and Measures (Purchase) Act, 1892 (55 & 56 Vict. c. 18), s. 2). A franchise of this description is "land" within the meaning of the Lands Clauses Acts, the provisions of which, except such as relate to the purchase and taking of land otherwise than by agreement, are incorporated with the Act (*ibid.*, s. 1 (2)).

(*l*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 54. *Ibid.*, s. 55, empowers vestries, commissioners or other bodies, exercising powers under local Acts or charters in any place in the metropolis, to put an end to the appointment of inspectors of weights and measures under such local Acts or charters. *Ibid.*, s. 67, saves the rights of the Founders' Company.

(*m*) 41 & 42 Vict. c. 49; 55 & 56 Vict. c. 18.

(*n*) As to these Acts, see title ANIMALS, Vol. I., pp. 421 *et seq.*

(*o*) As to these Acts, see title FOOD AND DRUGS, Vol. XV., pp. 5 *et seq.*

(*p*) Weights and Measures Act, 1893 (56 & 57 Vict. c. 19), s. 1.

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## WEI-HAI-WEI.

*See* DEPENDENCIES AND COLONIES.

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## WEIRS.

*See* FISHERIES ; SEWERS AND DRAINS ; WATERS AND WATERCOURSES.

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## WELLS.

*See* EASEMENTS AND PROFITS À PRENDRE ; WATER SUPPLY ;  
WATERS AND WATERCOURSES.

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## WELSH MORTGAGES.

*See* MORTGAGE.

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## WESLEYAN METHODISTS.

*See* ECCLESIASTICAL LAW.

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## WEST INDIAN ESTATES.

*See* LIEN ; RECEIVERS.

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## WEST INDIES.

*See* DEPENDENCIES AND COLONIES.

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## WESTERN AUSTRALIA.

*See* DEPENDENCIES AND COLONIES.

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## WHALES.

*See* CONSTITUTIONAL LAW; FISHERIES.

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## WHALING.

*See* CUSTOM AND USAGES.

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## WHARFINGERS AND WHARVES.

*See* CARRIERS; FISHERIES; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

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## WIDOW'S SHARE.

*See* DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS  
REAL.

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## WIFE.

*See* HUSBAND AND WIFE.

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## WILD ANIMALS.

*See* ANIMALS; NEGLIGENCE.

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## WILD BIRDS PROTECTION.

*See* ANIMALS; GAME.

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## Part I.—Nature of a Will.

### SECT. 1.—Definitions and Interpretation.

**1015.** A will or testament (*a*) is the declaration in a prescribed manner (*b*) of the intentions of the person making it, with regard to matters which he wishes to take effect upon or after his death (*c*). It may be made for the purpose of appointing his executors (*d*), or other persons whom he wishes to manage or assist in managing any part of his estate (*e*), or for the purpose of making dispositions

Definition of a will.

(*a*) The old distinction between the terms is said to be that "will" is a general term, and that where lands or tenements are devised, though no executor is appointed, the instrument is properly called a will (*Wyral v. Hall* (1675), 2 Rep. Ch. 59 [112]), and that where it concerns chattels only, and appoints an executor, it is called a testament (*Shep. Touch.* (ed. Preston) 399; *Bac. Abr.*, tit. Wills and Testaments (A); *Swinburne on Wills*, 7th ed., p. 4). The distinction is not adhered to; see *Littleton's Tenures*, s. 167; the terms appear to be used interchangeably, for example, in the now repealed stats. (1540) 32 Hen. 8, c. 1, and (1542) 34 & 35 Hen. 8, c. 5.

(*b*) As to the manner and form necessary, see pp. 545 *et seq.*, *post*.

(*c*) *Shep. Touch.* (ed. Preston) 399; *Termes de la Ley*, *sub voce* Testament; 2 Bl. Com. 499, explaining the definition of the civil law (*voluntatis nostræ juxta sententia de eo quod quis post mortem suam fieri velit*), adopted in *A.-G. v. Jones and Bartlett* (1817), 3 Price, 368, 391.

(*d*) As to executors or administrators, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 131 *et seq.*

(*e*) The mere appointment of any assistants or coadjutors to the executors, trustees, or persons beneficially entitled has no effect either on

SECT. 1.  
Definitions  
and Inter-  
pretation.

Definition of  
a codicil.

of property to take effect on or after his death (*f*), or appointing guardians of his infant children after his death (*g*), or exercising any power exercisable by him in this manner (*h*), or revoking or altering any previous will of his, or for any similar purpose taking effect on or after his death (*i*).

A codicil is of similar nature to a will, and in general is supplemental to and considered as annexed to a will previously made, and executed for the purpose of adding to, varying, or revoking the provisions of that will (*k*), though it is capable of independent existence (*l*).

the vesting of the property in the executors alone (*Anon.* (1346), Y. B. 20 Edw. 3, Mich. pl. 69; Rolls Series, p. 428), or as imposing on the executors, trustees or persons entitled beneficially under the will a trust or duty to employ the named persons in the specified manner (*Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, H. L. (appointment of tenant for life's land agent); *Finden v. Stephens* (1846), 2 Ph. 142 (appointment of trustees' receiver and manager); *Belaney v. Kelly* (1871), 24 L. T. 738; *Foster v. Elsley* (1881), 19 Ch. D. 518 (appointment of trustees' solicitor); and see title TRUSTS AND TRUSTEES, p. 16, *ante*); but they, or the court in an administration action (*Hibbert v. Hibbert* (1808), 3 Mer. 681), may give effect to such directions. In some cases, however, the will creates in the named person's favour a charge, trust, or other interest (*Friswell v. Moore* (1819), cited 5 Cl. & Fin. 142), which may endure so long as the appointee does the business to the satisfaction of the trustees or other persons interested (*Williams v. Corbet* (1837), 8 Sim. 349; *Belaney v. Kelly*, *supra*; and see *Saunders v. Rotherham* (1862), 3 Giff. 556).

(*f*) As to the effect of a will on the property disposed of, see p. 511, *post*. As to the appointment of trustees for any purpose, see title TRUSTS AND TRUSTEES, pp. 1 *et seq.*, *ante*; for the purposes of the Settled Land Acts, see title SETTLEMENTS, Vol. XXV., p. 631; and for the purposes of the Conveyancing and Law of Property Act, 1881, see *ibid.*, p. 711. As to the appointment of a protector of the settlement, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 251.

(*g*) As to the appointment of testamentary guardians, see title INFANTS AND CHILDREN, Vol. XVII., pp. 123 *et seq.*

(*h*) As to the exercise of testamentary powers, see p. 618, *post*; and title POWERS, Vol. XXIII., pp. 18, 19, 22 *et seq.*

(*i*) A direction for the commencement of proceedings to administer the estate in court does not make it imperative on the court to make the order for administration (*Re Stocken, Jones v. Hawkins* (1888), 38 Ch. D. 319, C. A.). As to directions for burial, cremation, etc., see p. 525, *post*; and Encyclopædia of Forms and Precedents, Vol. XV., p. 557. The will may appoint any person for the purpose of deciding questions between the donees; see, for instance, *Woodcock v. Woodcock* (1600), Cro. Eliz. 795; Encyclopædia of Forms and Precedents, Vol. XV., p. 494; and p. 630, *post*.

(*k*) 2 Bl. Com. 500; *Green v. Tribe* (1878), 9 Ch. D. 231, 238 ("its nature is not substantive but adjective"). As to codicils and their effect, see p. 579, *post*.

(*l*) The codicil does not now under the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20 (see p. 564, *post*), stand or fall together with the will (*Black v. Jobling* (1869), L. R. 1 P. & D. 685; *In the Goods of Savage* (1870), L. R. 2 P. & D. 78; *In the Goods of Turner* (1872), L. R. 2 P. & D. 403 (codicil unintelligible without will); *Farrer v. St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19; *Gardiner v. Courthope* (1886), 12 P. D. 14 (language of codicil dependent on will); *Paige v. Brooks* (1896), 75 L. T. 455; see also *Falle v. Godfray* (1888), 14 App. Cas. 70, 76, P. C.). Under the law previous to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), there was a presumption, subject to the intention of the testator, that the revocation of a will also effected the revocation of a codicil thereto (*Medlycott v. Assheton* (1824), 2 Add. 229).

**1016.** The person making the will or codicil is in this title called “the testator” (*n*), and, where the context admits, the word “will” includes a will or testament, a codicil, and an appointment by will or by writing in the nature of a will in exercise of a power (*n*), and also a disposition by will of the custody and tuition of any child under certain statutes (*o*), and any other testamentary disposition (*p*). The word strictly denotes the aggregate formal expression of the maker’s testamentary intentions subsisting at his death, but is commonly used to describe one of a series of such instruments (*q*); in some cases in this title, where it is necessary to draw a distinction between the two meanings, the expression “the whole will” denotes such aggregate.

A “modern will” denotes a will made, revived or republished (*r*) since the 1st January, 1838 (*s*), by a testator of full capacity (*a*).

The words “real estate” (*b*) include manors, advowsons,

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Definitions  
and Inter-  
pretation.

“Testator.”

“Will.”

“Modern  
will.”

“Real  
estate.”

(*m*) The term is applied whatever may be the contents of the will, and whether the will disposes of property or not; compare *Dowdall v. M’Cartan* (1880), 5 L. R. Ir. 313, 642, C. A. (meaning of the word in the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113)); but the terms “testate,” “intestate,” “testacy,” and “intestacy” in their ordinary sense are associated with the question how far the testator’s property is disposed of by the will, whether completely, incompletely, or not at all; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1 *et seq.*: in a technical sense, adopted in a court of probate, these terms may be used with reference to the question whether an executor is in existence; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 136.

(*n*) See title POWERS, Vol. XXIII., pp. 1 *et seq.*

(*o*) Stat. (1660) 12 Car. 2, c. 24, and the corresponding Act for Ireland, stat. (1662) 14 & 15 Car. 2, c. 19; see title INFANTS AND CHILDREN, Vol. XVII., p. 123.

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1.

(*q*) *Lemage v. Goodban* (1865), L. R. 1 P. & D. 57, 62; *Green v. Tribe* (1878), 9 Ch. D. 231, 234; *Re Elcom, Layborn v. Grover Wright*, [1894] 1 Ch. 303, 314, C. A. However many unrevoked testamentary writings a man may leave, they together constitute but one will in the strict sense (*Douglas-Menzies v. Umpfelby*, [1908] A. C. 224, 233, P. C., where the testator executed separate Scotch and Australian wills to be construed according to the law of those countries respectively). As to probate of concurrent wills dealing with the testator’s properties in different countries, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 165. “Last will” and similar phrases mean, as a rule, no more than “will” (*Walpole (Lord) v. Cholmondeley (Earl)* (1797), 7 Term Rep. 138, 146, 150); and, on construction, a reference by a testator to his “last will,” or a description of a document as such, may merely allude to or describe the last of a series of testamentary documents (*Thomas v. Evans* (1802), 2 East, 488, 496; *Stoddart v. Grant* (1851), 1 Macq. 163, 171, H. L.; *Cutto v. Gilbert* (1854), 9 Moo. P. C. C. 131; *Freeman v. Freeman* (1854), 5 De G. M. & G. 704, C. A.; *Pettinger v. Ambler, Bunn v. Pettinger* (1866), L. R. 1 Eq. 510; *In the Goods of de la Saussaye* (1873), L. R. 3 P. & D. 42, 44 (“last and deliberate will”); *Simpson v. Foxon*, [1907] P. 54 (“last and only will”)). As to the effect on prior testamentary instruments, see p. 566, *post*.

(*r*) As to revival, see p. 575, *post*; as to republication, see p. 577, *post*.

(*s*) Namely, wills to which the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), applies (*ibid.*, s. 34).

(*a*) As to testamentary capacity, see p. 532, *post*. The wills of married women were in certain respects excepted from the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), by *ibid.*, s. 8. As to the effect of this and the present law, see p. 534, *post*; title HUSBAND AND WIFE, Vol. XVI., p. 380.

(*b*) As to real estate, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 138, 163.



SECT. 1.  
Definitions  
and Inter-  
pretation.

"Personal  
estate."

"Devise."  
"Bequest,"  
or "legacy."

"Donee."

"Gift."

"Court of  
probate."

messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein (*c*).

"Personal estate" (*d*) includes leasehold estate and other chattels real (*e*), and also moneys, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property whatsoever (except real estate (*f*)) which by law devolves upon the executor or administrator, and any share or interest therein (*g*).

"Devise" denotes a gift of real estate (*h*), and "bequest" (*i*) or "legacy" denotes a gift of personal estate, and "devisee" or "legatee" denotes a person or other object taking a benefit under a gift of real or personal estate respectively.

"Donee" includes devisee and legatee, or other the object of the testator's bounty in any kind of property.

"Gift" includes devise and bequest (*k*).

Any court entertaining, within the scope of its jurisdiction, the grant of probate of a will or of letters of administration with the will annexed (*l*), or any question relating to the character of an instrument alleged to be testamentary, or as to the testamentary capacity of a testator, or as to the validity of a will generally, for the purposes of the will being admitted to probate, is hereinafter called a "court of probate" (*m*), and such grant is called the "probate."

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1.

(*d*) As to personal estate, see title PERSONAL PROPERTY, Vol. XXII., pp. 387, 388.

(*e*) The Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), proceeds, not on the distinction between *mobilia* and *immobilia* (see title CONFLICT OF LAWS, Vol. VI., pp. 199 *et seq.*), but on that between real and personal estate in English law, and a similar distinction is imported under the Wills Act, 1861 (24 & 25 Vict. c. 114) (*Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584, 590, 591).

(*f*) This exception is rendered necessary by the change in the law relating to devolution effected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(*g*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1.

(*h*) The word was formerly often used with respect to gifts by will of chattels real or other personal estate; see, for instance, *Tilley v. Simpson* (1746), 2 Term Rep. 659, n.; *Hopewell v. Ackland* (1710), 1 Salk. 239. The use in a will of the word "devise" in itself is not conclusive to show that the testator is dealing with real estate (*Camfield v. Gilbert* (1803), 3 East, 516, 521; *Hall v. Hall*, [1891] 3 Ch. 389, 393, affirmed, [1892] 1 Ch. 361, C. A.), though that *prima facie* is its meaning (*Phillips v. Beal* (1858), 25 Beav. 25).

(*i*) As to the origin of the term, see Pollock and Maitland, *History of English Law*, Vol. II., p. 336. The word "bequest" or "legacy" in a will may in a proper context carry real estate; see p. 704, *post*.

(*k*) The term "gift over" is commonly used to describe a gift in succession to a prior gift, especially by way of executory devise or bequest; see p. 526, *post*. The term "limitation" is commonly used to describe a gift of a limited interest, or one of a series of gifts of the same property to persons in succession.

(*l*) As to the grant of probate or letters of administration generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 151 *et seq.*

(*m*) As to the jurisdiction of the Probate, Divorce and Admiralty Division in probate matters, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV.,

Any court entertaining, within the scope of its jurisdiction, any question as to the meaning and effect of an instrument, admittedly of a testamentary nature, is hereinafter called a “court of construction” (*n*).

SECT. 1.  
Definitions  
and Inter-  
pretation.

“Court of  
construction.”

## SECT. 2.—*Characteristics and Effect of a Will.*

**1017.** The essential characteristics of a will are that, during the life of the testator, it is a mere declaration of his intention (*o*), and that it may be freely revoked or altered in a prescribed manner (*p*).

Essential  
characteris-  
tics.

It is therefore ambulatory, or without a fixed effect (*q*), until the testator's death (*r*); upon that event it crystallises, and may for the first time take effect as an appointment, disposition or otherwise, according to its tenor (*s*); it requires the death of the testator for its consummation (*t*), and must be distinguished from a disposition made *inter vivos*, such as a voluntary settlement with a power of revocation (*a*), or any instrument consummate on execution by the maker, although intended to take effect on some future event (*b*).

Ambulatory  
nature.

An instrument, however, which, though in form a conveyance (*c*), is made on condition that it is to take effect only on the death of the conveying party, is often testamentary in character (*d*).

**1018.** The revocable nature of a will cannot be lost, even by a declaration that the will is irrevocable (*e*) or by a covenant not to

Revocable  
nature.

pp. 151 *et seq.*; as to the jurisdiction of the county courts in contentious probate matters, see title COUNTY COURTS, Vol. VIII., pp. 644, 645.

(*n*) As to the separation of the two jurisdictions, see *Townsend v. Moore*, [1905] P. 66, 84, 86, 88, C. A.; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 159, 160.

(*o*) See note (*c*), p. 505, *ante*.

(*p*) As to revocation, see p. 562, *post*.

(*q*) A will is sometimes said to be “ambulatory” in that it may operate on property which becomes the testator's only after the date of the will (Pollock and Maitland, *History of English Law*, Vol. II., p. 313): but in this sense only modern wills can be so described, so far as real estate is concerned; see p. 517, *post*; and compare note (*i*), p. 512, *post*.

(*r*) Co. Litt. 112 b; *Baugh v. Read* (1790), 1 Ves. 257, 260; *Walpole (Lord) v. Cholmondeley (Earl)* (1797), 7 Term Rep. 138, 149; *Sherratt v. Bentley* (1834), 2 My. & K. 149, 162; *Beddington v. Baumann*, [1903] A. C. 13, 19; *Re Llanover (Baroness)*, *Herbert v. Freshfield* (2), [1903] 2 Ch. 330, 335; *Re Thompson*, *Thompson v. Thompson*, [1906] 2 Ch. 199, 205.

(*s*) *Cooper v. Martin* (1867), 3 Ch. App. 47; *Olivant v. Wright* (1878), 9 Ch. D. 646, 650. As to the effect of a will as regards property, see p. 512, *post*.

(*t*) *Forse and Hembling's Case* (1588), 4 Co. Rep. 61 b; *Re Rye's Settlement* (1852), 10 Hare, 106, 112; *In the Goods of Robinson* (1867), L. R. 1 P. & D. 384, 387; *Beddington v. Baumann*, *supra*, at p. 18; 2 Bl. Com. 502; *Shep. Touch.* (ed. Preston) 401; and see *Bindon (Lord) v. Suffolk (Earl)* (1707), 1 P. Wms. 96, *per Lord Cowper*, L.C., at p. 97; *Bunbury v. Doran* (1875), 9 I. R. C. L. 284, 286, Ex. Ch.

(*a*) *Tompson v. Browne* (1835), 3 My. & K. 32 (settlement).

(*b*) *Marjoribanks v. Hovenden* (1843), *Drury temp. Sug.* 11 (appointment on death without issue); *Fletcher v. Fletcher* (1844), 4 Hare, 67, 79 (deed of covenant); and see p. 546, *post*.

(*c*) Similarly, the mere fact that a document is executed as a will does not necessarily make it a will (*Thorncroft v. Lashmar* (1862), 2 Sw. & Tr. 479; and see *King's Proctor v. Daines* (1830), 3 Hag. Ecc. 218).

(*d*) *Patch v. Shore* (1862), 2 Drew. & Sm. 589, 598; see p. 546, *post*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 158.

(*e*) Bacon's *Maxims of the Law*, reg. 19; see p. 563, *post*.

## SECT. 2.

Charac-  
teristics  
and Effect  
of a Will.Instruments  
partly testa-  
mentary.Instruments  
conditionally  
testamentary.

revoke the will (*f*). After revocation, however, whether by marriage or otherwise, the will may be revived in the prescribed manner (*g*).

**1019.** An instrument may be partly testamentary, and partly intended to take effect during the life of the person making it (*h*), except that by statute (*i*) a will made after the 1st January, 1866, by a person serving in the Royal Navy as a seaman or marine cannot be in the same instrument as a power of attorney (*k*). Even apart from the testator's intention, a will may have an effect other than testamentary, for example, as a memorandum of a contract (*l*) under the Statute of Frauds (*m*), or an acknowledgment of a statute-barred debt (*n*).

**1020.** An instrument may also be conditionally testamentary (*o*). Thus, a testator may refer in his will to some contingency, such as an impending journey by him or a possible impending calamity (*p*), or other event (*q*), in terms which make the will conditional, or limited in operation. The terms may, however, merely import that the contingency is a reason for making the will, in which case the will is not conditional (*r*). If the contingency is coincident with

(*f*) Compare *Vynior's Case* (1609), 8 Co. Rep. 81 b, 82 a, and note (*b*) thereto; *Re McDonald* (1911), 30 New Zealand Law Reports, 896. As to the effect, however, of such a covenant and how far it is enforceable, see p. 515, *post*.

(*g*) See p. 575, *post*.

(*h*) *Doe d. Cross v. Cross* (1846), 8 Q. B. 714 (power of attorney intended to be partly testamentary); *Wolfe v. Wolfe*, [1902] 2 I. R. 246; *Re McDonald, supra* (power of attorney); see *In the Goods of Robinson* (1867), L. R. 1 P. & D. 384, 387 (lease with a direction to lessor's executors to sell at end of term, not intended to be testamentary).

(*i*) Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72).

(*k*) *Ibid.*, s. 4; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 162. As to the wills of merchant seamen, see title SHIPPING AND NAVIGATION, Vol. XXVI., p. 58.

(*l*) *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A.; see title CONTRACT, Vol. VII., pp. 367 *et seq.*

(*m*) 29 Car. 2, c. 3, s. 4.

(*n*) *Millington v. Thompson* (1852), 3 I. Ch. R. 236; see title LIMITATION OF ACTIONS, Vol. XIX., p. 92.

(*o*) As, for instance, conditionally on the consent of another person (*In the Goods of Smith* (1869), L. R. 1 P. & D. 717 (option to wife to add codicil to will, or not)).

(*p*) *Parsons v. Lanoe* (1749), 1 Ves. Sen. 189 ("if I die before my return"); *In the Goods of Winn* (1861), 2 Sw. & Tr. 147 ("in case of my decease during my absence"); *Roberts v. Roberts* (1861), 2 Sw. & Tr. 337 ("should anything happen to me on my passage"); *In the Goods of John Porter* (1869), L. R. 2 P. & D. 22 ("should anything happen to me while abroad"); *In the Goods of Robinson* (1870), L. R. 2 P. & D. 171; *Lindsay v. Lindsay* (1872), L. R. 2 P. & D. 459; *In the Goods of Hugo* (1877), 2 P. D. 73; *Edmondson v. Edmondson* (1901), 17 T. L. R. 397 ("in case I should not return home owing to death").

(*q*) *In the Goods of Da Silva* (1861), 2 Sw. & Tr. 315 ("in case I survive my wife, . . . but not otherwise").

(*r*) *Strauss v. Schmidt* (1820), 3 Phillim. 209 ("in case I should die"); *Burton v. Collingwood* (1832), 4 Hag. Ecc. 176 ("lest I should die before the next sun"); *In the Goods of Hobson* (1861), 7 Jur. (N. S.) 1208; *In the Goods of Thorne* (1865), 4 Sw. & Tr. 36; *In the Goods of Dobson* (1866), L. R. 1 P. & D. 88 ("in case of any fatal accident, being about to travel," etc.); *In the Goods of Martin* (1867), L. R. 1 P. & D. 380 ("in



a period of danger to the testator, there is ground for supposing that the danger was regarded by the testator only as a reason for making a will (*s*). A conditional will is of no effect if the contingency fails (*t*), but may take effect free from the contingency in question if re-executed or republished after the contingency has passed (*u*).

SECT. 2.  
Charac-  
teristics  
and Effect  
of a Will.

**1021.** In considering whether an instrument is of a testamentary character (*a*), or is conditionally or unconditionally testamentary, a court of probate construes the will in the manner of a court of construction (*b*), and may receive evidence accordingly (*c*); and, further, may receive extrinsic evidence of the intention of the alleged testator with regard to the character of the instrument where that character is ambiguous (*d*).

Evidence  
admissible in  
court of  
probate.

**1022.** As a disposition of his property, a will is subject to any subsequent disposition *inter vivos* by the testator in his lifetime (*e*), and to the administration of his property for the payment by his representatives of death duties (*f*) and his debts and funeral and testamentary expenses after his death (*g*). The disposition made by a will need not come into operation immediately on the testator's death, but may, to the extent that dispositions *in futuro* are allowed, take effect at a future time (*h*). As regards real

Effect of will  
on property.

event of my death during" a time of removal to hospital ship); *In the Goods of Mayd* (1880), 6 P. & D. 17; *In the Goods of Stuart* (1888), 21 L. R. Ir. 105, 108; *In the Goods of Spratt*, [1897] P. 28 (where these cases are considered and compared); *Halford v. Halford*, [1897] P. 36.

(*s*) *In the Goods of Spratt*, *supra*.

(*t*) *Parsons v. Lanoe* (1749), 1 Ves. Sen. 189; *In the Goods of Winn* (1861), 2 Sw. & Tr. 147; *Roberts v. Roberts* (1861), 2 Sw. & Tr. 337; *In the Goods of Robinson* (1870), L. R. 2 P. & D. 171. For a case where the contingency could still arise when the testator died, see *In the Goods of Cooper* (1855), 1 Dea. & Sw. 9.

(*u*) *Parsons v. Lanoe*, *supra*, at p. 191; *In the Goods of Cawthron* (1863), 10 Jur. (N. S.) 51.

(*a*) With respect to the grounds on which probate may be refused and the evidence admissible on such questions, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 177 *et seq.*

(*b*) The court considers the whole language of the will and the surrounding circumstances (*In the Goods of Spratt*, *supra*, per JEUNE, P., at p. 30; *In the Estate of Vines*, *Vines v. Vines*, [1910] P. 147; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 160, note (*i*)).

(*c*) As to the evidence receivable in a court of construction, see pp. 632 *et seq.*, *post*.

(*d*) *In the Goods of English* (1864), 3 Sw. & Tr. 586; *Cock v. Cooke* (1866), L. R. 1 P. & D. 241; *Robertson v. Smith* (1870), L. R. 2 P. & D. 43; *In the Goods of Coles* (1871), L. R. 2 P. & D. 362; *In the Goods of Slinn* (1890), 15 P. D. 156; *In the Goods of Spratt*, *supra*; *In the Estate of Vines*, *Vines v. Vines*, *supra* (conditional wills); and see *In the Goods of Nosworthy* (1865), 4 Sw. & Tr. 44; *Gould v. Lakes* (1880), 6 P. D. 1; and p. 551, *post*. As to evidence of the contents of a testator's will in a court of probate, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 160.

(*e*) As to ademption, see p. 602, *post*.

(*f*) See titles ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 177 *et seq.*; REVENUE, Vol. XXIV., pp. 558, 559, 561.

(*g*) As to administration generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 240 *et seq.*

(*h*) *In the Goods of News* (1861), 7 Jur. (N. S.) 688 (disposition by writing to take effect two years after death of wife). As to executory devises, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 231 *et seq.*; as to executory bequests, see p. 527, *post*.

SECT. 2.  
Charac-  
teristics  
and Effect  
of a Will.

Conditions of  
an effectual  
gift by will.

estate, except in so far as the executors, if any, appointed by the will represent the testator and take his estate, the effect of a will is not, in English law, the institution of an heir, but a gift of specific property (*i*). The donee takes by purchase, in the technical sense (*k*), though, as a rule, not in the ordinary sense of the words (*l*).

**1023.** The following are necessary conditions that a gift by will may be effectual to confer a title to the property given on the donee (*m*):—

- (1) The testator must be dead (*n*).
- (2) The testator must have been a person who at the date of the will had the legal capacity to make a will (*a*).
- (3) At the time of making the will the testator must have had the intention to make it, so as to take effect upon his death (*b*). The gift will be defeated if the testator's mind was not free and unaffected by fear, fraud, or undue influence, or by any other matters which by law vitiate his intention (*c*).
- (4) The will must be made in the form and manner required by law (*d*).
- (5) The gift must not have been revoked (*e*) or altered (*f*), or if revoked must have been revived before the death of the testator (*g*).
- (6) Probate of the will or letters of administration with the will

(*i*) *Harwood v. Goodright* (1774), 1 Cowp. 87, 90; *Hogan v. Jackson* (1775), 1 Cowp. 299, *per* Lord MANSFIELD, C.J., at p. 305. Notwithstanding the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 24, 25, a residuary gift of real estate is still specific (*Mirehouse v. Scaife* (1837), 2 My. & Cr. 695, 706; *Hensman v. Fryer* (1867), 3 Ch. App. 420, 425; *Lancefield v. Iggulden* (1874), 10 Ch. App. 136; *Phillips v. Low*, [1892] 1 Ch. 47, 50); as to the effect of this on the order of administration of assets, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 291 *et seq*.

(*k*) *Roper v. Radcliffe* (1714), 9 Mod. Rep. 167, H. L.: for instance, for the purpose of tracing descent; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 7, 8.

(*l*) For example, a voluntary settlement was never defeated by a devise of the settled property by the settlor's will, even though the devise was for payment of his debts (*Villers v. Beaumont* (1682), 1 Vern. 100; *Bale v. Newton* (1687), 1 Vern. 464); see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 92 *et seq*.

(*m*) *Shep. Touch.* (ed. Preston) 413. With regard to the conditions (2)—(5), the grant of probate or letters of administration with the will annexed in general affords sufficient evidence that they are complied with; see p. 629, *post*; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 211, 213. As to the failure of a gift in respect of any of the first six of these conditions, see *ibid.*; as to the failure of a gift on other grounds, see p. 601, *post*.

(*n*) *Thorp v. Tomson* (1588), 2 Leon. 120; and see p. 509, *ante*.

(*a*) As to the legal capacity to make a will, see p. 532, *post*.

(*b*) The testator must have *animus testandi* (*Shep. Touch.* (ed. Preston) 413); see p. 545, *post*.

(*c*) Such matters are grounds for refusing probate; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 177 *et seq*.

(*d*) As to the form of wills made in England, see p. 545, *post*; as to the form of wills made abroad, see p. 558, *post*.

(*e*) As to revocation, see p. 562, *post*.

(*f*) As to the effect of codicils, see p. 579, *post*; as to alterations and erasures, see pp. 559 *et seq.*, *post*.

(*g*) See pp. 575 *et seq.*, *post*.

annexed must be obtained (*h*) in cases where the title of the legal personal representatives is paramount to that of the donee (*i*).

(7) The words used by the testator in making the gift must be sufficient to make his intention capable of being ascertained (*k*).

(8) The subject-matter of the gift described by the testator must be ascertainable and capable of being so disposed of by the will of the testator (*l*); or if not, the gift must be validated, under the equitable doctrine of election (*m*) or otherwise.

(9) The donee described by the testator must be an ascertainable object, capable by law of taking the benefit of the gift (*a*).

(10) The gift so intended must be consistent with law (*b*), or must be capable of being effectuated in a manner consistent with law (*c*).

(11) The gift must be assented to or given effect to by the executors or administrators of the testator (*d*).

(12) All other conditions precedent imposed by the testator or by law must be performed (*e*).

(13) The gift must not fail, or have been defeated by a condition subsequent (*f*).

**1024.** The authenticity and safe keeping of wills both during the life of the testator and after his death are subject to statutory safeguards (*g*). Safe keeping  
of wills.

(*h*) As to probate generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 131 *et seq.* Statutory penalties (see *ibid.*, p. 150, note (*l*)) are imposed on any person who takes possession of and in any way administers (see *ibid.*, pp. 147 *et seq.*) the testator's property, in such cases, without obtaining such grant (*Fernandes' Executors' Case* (1870), 5 Ch. App. 314, 317; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205, 222, 225, C. A., affirmed, [1899] A. C. 62).

(*i*) See p. 5 83, *post*.

(*k*) As to construction generally, see pp. 626 *et seq.*, *post*.

(*l*) As to property capable of being disposed of, see p. 516, *post*; as to the interests which may be created, see pp. 526 *et seq.*, *post*.

(*m*) See title EQUIT, Vol. XIII., pp. 116 *et seq.*

(*a*) As to the capacity to benefit under a will, see p. 536, *post*.

(*b*) As to the interests created, see p. 526, *post*; as to the legal incidents of a gift, see, generally, pp. 583 *et seq.*, *post*; and, in case of settled gifts, title SETTLEMENTS, Vol. XXV., pp. 521 *et seq.*

(*c*) As to the *cy-près* doctrine and similar rules, see p. 672, *post*.

(*d*) As to the effect of a will in passing the property to the personal representatives, see p. 583, *post*; as to the assent of the personal representative, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 3 (2); title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265. As to executory trusts, see title TRUSTS AND TRUSTEES, p. 22, *ante*.

(*e*) As to vesting of conditional interests, see pp. 797 *et seq.*, *post*. In certain cases registration of the title may be necessary; see, generally, title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 308 *et seq.*; and, as to lead mines in Derbyshire, title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 644.

(*f*) As to modes of failure, see p. 601, *post*.

(*g*) The fraudulent forgery of a will is a felony (Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 2; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 734), as are the larceny of a will and the fraudulent destruction, obliteration, or concealment of a will (*ibid.*, p. 642). Provision was made by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 91, for the deposit for safe custody of the wills of living persons. As to the custody of wills by the Public Trustee on his appointment as custodian trustee, see title TRUSTS AND TRUSTEES, p. 215, *ante*. As to the deposit in the Court of Lunacy of a lunatic's testamentary papers, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 434, 435.



## SECT. 3.

Contracts  
Relating  
to Wills.Contracts  
relating  
to wills.How  
enforceable.SECT. 3.—*Contracts Relating to Wills.*

**1025.** Though a will is always revocable (*h*), and the last will of a testator, notwithstanding any agreement, must always be his will, yet he may bind himself personally by an agreement as to the contents of his will, and may so bind his assets by such agreement that a person deriving title under his will or intestacy is a trustee for the performance of that agreement (*i*).

Accordingly, a contract duly evidenced (*k*) to make an ascertainable gift (*l*) by will is, as a rule, enforceable (*m*) usually by way of damages, which may be claimed the moment the covenantor has put it out of his power to perform the contract, even during his life (*n*). The court may order specific performance (*o*) of the contract against persons deriving title under the testator, if the contract is for valuable consideration and that remedy is appropriate in the circumstances (*p*); in such a case the court does not set aside a will not according to the contract, but can order the heir or devisee to convey the property according to the contract, and under the Trustee Act, 1893 (*q*), can make a vesting order or direct that someone shall convey for him if he refuses (*r*). A representation of

(*h*) As to revocation, see p. 562, *post*.

(*i*) *Dufour v. Pereira* (1769), 1 Dick. 419; 2 Hargrave, Juridical Arguments, 304, 309, cited in *Stone v. Hoskins*, [1905] P. 194, 196, 197. As to a covenant not to revoke a will, see note (*u*), p. 515, *post*; compare *Re Turner*, *Turner v. Turner* (1902), 4 Ontario Law Reports, 578 (devise on condition that devisee made a will in favour of testator's children).

(*k*) If the contract is to give an interest in land by will, the contract must be in writing under the Statute of Frauds (29 Car. 2, c. 3), s. 4, subject to the equitable doctrine of part performance (*Humphreys v. Green* (1882), 10 Q. B. D. 148, C. A.; *Maddison v. Alderson* (1883), 8 App. Cas. 467); see title CONTRACT, Vol. VII., pp. 361, 379.

(*l*) See *Stocken v. Stocken* (1838), 4 My. & Cr. 95 (covenant extending only to intestacy); *Kay v. Crook* (1857), 3 Sm. & G. 407 (agreement to recognise a son in common with the rest of the family held uncertain); *Macphail v. Torrance* (1909), 25 T. L. R. 810 (agreement to make ample provision for donee, held uncertain); *O'Sullivan v. National Trustees, Executors and Agency Co. of Australasia, Ltd.*, [1913] Victorian Law Reports, 173 (agreement to provide for donee so that she would have to work no more, held sufficiently certain).

(*m*) *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L.; *Synge v. Synge*, [1894] 1 Q. B. 466, C. A., where an inquiry as to damages was made.

(*n*) *Synge v. Synge*, *supra*; see title CONTRACT, Vol. VII., pp. 438 *et seq.*

(*o*) See title SPECIFIC PERFORMANCE, Vol. XXVII., pp. 76, 77. Such contracts, if purely voluntary, are not as a rule enforceable in equity; see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 359; EQUITY, Vol. XIII., pp. 97 *et seq.*

(*p*) *Goilmere v. Battison* (1682), 1 Vern. 48, also reported *sub nom. Goylmer v. Paddiston*, 2 Vent. 353; *Dufour v. Pereira*, *supra*; *Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121; see *Walpole (Lord) v. Orford (Lord)* (1797), 3 Ves. 402, where the court declined to enforce the contract on equitable grounds. As to a contract by a married woman to exercise a general power of appointment by will, see title HUSBAND AND WIFE, Vol. XVI., p. 388; as to covenants to appoint by will in exercise of a power, see title POWERS, Vol. XXIII., p. 59, note (*i*); as to covenants to leave property by will generally, see title SETTLEMENTS, Vol. XXV., pp. 543 *et seq.*

(*q*) 56 & 57 Vict. c. 53.

(*r*) As to vesting orders and appointments of persons to convey in lieu of vesting orders, see title TRUSTS AND TRUSTEES, pp. 103 *et seq.*, *ante*.

intention to leave property by will, unless it amounts to a contract, is not enforceable (s). It appears that a covenant not to revoke a will is not enforceable in damages when the breach is occasioned by the marriage of the covenantor (t), but that otherwise there is no difference between such a contract and other agreements relating to wills as regards their binding effect (u). The covenantor's estate is not liable in damages if the provision made by him in pursuance of the contract is defeated by circumstances over which he has no control (a); but the covenantor cannot evade his obligation by disposing of the property during his life in a manner inconsistent with his contract by any instrument having the same effect as a testamentary disposition (b) or by purposely altering the nature of the property (c).

SECT. 3.  
Contracts  
Relating  
to Wills.

#### SECT. 4.—Joint and Mutual Wills.

**1026.** A single disposition by two or more persons jointly cannot take effect as a will (d). Two or more persons may, however, join in making a single instrument which becomes operative, according to its purport, on the death of each and every one of such persons, severally, as their respective wills (e), or on the death of the survivor or other contingent one of such persons, as his will (f). To such

Joint and  
mutual wills.

(s) *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331, 334; see title SETTLEMENTS, Vol. XXV., p. 536.

(t) *Robinson v. Ommanney* (1883), 23 Ch. D. 285, C. A., per JESSEL, M.R., at pp. 286, 287; S. C. (1882), 21 Ch. D. 780, per KAY, J., at p. 783, holding that although the covenant was bad in so far as it was in restraint of marriage, it was divisible and enforceable as regards revocation by other means; see title CONTRACT, Vol. VII., p. 397, note (i). As to revocation by marriage, see p. 562, *post*.

(u) "There is no difference between promising to make a will in such a form, and making a will with a promise not to revoke it" (*Dufour v. Pereira* (1769), 1 Dick. 419, as reported *sub nom. Durour v. Perraro*, 2 Hargrave, Juridical Arguments, 304, per Lord CAMDEN, L.C., at p. 309, cited in *Stone v. Hoskins*, [1905] P. 194, 196, 197; and see *Robinson v. Ommanney*, *supra*; *Jopling v. Jopling* (1908), 8 Commonwealth Law Reports, 33.

(a) As, for instance, by lapse (*Re Brookman's Trust* (1869), 5 Ch. App. 182; and see *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18; *Jones v. How* (1850), 7 Hare, 267).

(b) *Jones v. Martin* (1798), 5 Ves. 266, n., H. L.; *Fortescue v. Hennah* (1812), 19 Ves. 67.

(c) *Lewis v. Madocks* (1803), 8 Ves. 150; *Cochran v. Graham* (1812), 19 Ves. 63, 66; see *Logan v. Wienholt* (1833), 1 Cl. & Fin. 611, H. L. As to the mode in which a contract to leave property by will may be wholly or partially performed, and as to the meaning and effect of such a contract, see, generally, title SETTLEMENTS, Vol. XXV., pp. 543 *et seq.*; as to the performance of such a covenant by intestacy, see title EQUIT, Vol. XIII., p. 141; as to election, see *ibid.*, pp. 116 *et seq.*; as to lapse, see p. 607, *post*.

(d) *Darlington (Earl) v. Pulteney* (1775), 1 Cowp. 260, 268 (joint power of appointment must be executed by instrument *inter vivos*; "there cannot be a joint will").

(e) *Hobson v. Blackburn and Blackburn* (1822), 1 Add. 274; *In the Goods of Stracey* (1855), Dea. & Sw. 6; *In the Goods of Piazz-Smyth*, [1898] P. 7; and see *In the goods of Fletcher* (1883), 11 L. R. Ir. 359; compare *Denyssen v. Mostert* (1872), L. R. 4 P. C. 236 (Cape of Good Hope); *Dias v. De Livera* (1879), 5 App. Cas. 123, 136, P. C. (Ceylon). As to probate in such cases, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 160.

(f) *In the Goods of Raine* (1858), 1 Sw. & Tr. 144, distinguished in *In the Goods of Miskelly* (1869), 4 I. R. Eq. 62; *In the Goods of Lovegrove* (1862), 2 Sw. & Tr. 453.

SECT. 4.  
Joint and  
Mutual  
Wills.

Their effect.

an instrument is applied the term "joint will," or in cases where on the death of each one of such persons mutual benefits are given to the survivors or survivor, the term "mutual will"; the term "mutual wills" is also applied to the wills of two or more persons, executed in separate documents, conferring mutual benefits on each other, in pursuance of some agreement between them (*g*).

Notwithstanding any agreement, the revocation of such a will or a subsequent will by any of the testators is valid for the purpose of the question what constitutes the will of that testator (*h*); subject to this, in general, the effect of joint or mutual wills and of the revocation of such wills is regulated by the agreement, if any, between the testators (*i*).

## Part II.—Possible Subjects of Dispositions by Will.

### SECT. 1.—Property which may be Dealt with.

General rule  
for any  
testator and  
any property.

**1027.** The extent to which a person may dispose by will of property belonging to him (*k*) depends, in the case of immovables, on the law of the place where they are situated (*l*), and in the case

(*g*) For examples, see *Stone v. Hoskins*, [1905] P. 194; and see *In the Estate of Meyer*, [1908] P. 353; *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 437, 438. As to joint and mutual wills generally, see *Robertson v. Robertson* (1909), 136 American State Reports, 589, 592, n.

(*h*) *Hobson v. Blackburn and Blackburn* (1822), 1 Add. 274; *In the Estate of Heys*, *Walker v. Gaskill*, [1914] P. 192.

(*i*) As to the effect of contracts relating to wills generally, see p. 514, *ante*. In *Dufour v. Pereira* (1769), 1 Dick. 419, as reported *sub nom. Durour v. Perraro*, 2 Hargrave, Juridical Arguments, 304, Lord CAMDEN, L.C., at p. 308, said that "a mutual will is a revocable act; it may be revoked by joint consent clearly; by one only, if he give notice, I can admit." The latter *dictum*, however, was made only by way of demurrer to the argument in that case. In *Stone v. Hoskins*, *supra*, it was held, following Lord CAMDEN's *dicta*, that the first testator to die need not stand by the bargain; and that a survivor would not be prejudiced in such a case, as he would have notice of revocation as from the death of the first, and consequently was not entitled to have either probate of the mutual will or a declaration that the executor under the later will should hold the property in trust for persons benefited under the mutual will.

At all events, if a mutual will is not revoked during the joint lives by any open act, and is standing at the death of the first to die, and a survivor has taken a benefit by that death, the survivor cannot depart from the arrangement on his part (*Dufour v. Pereira*, *supra*; *Stone v. Hoskins*, *supra*, at pp. 196, 197). One of the testators has no right to revoke the provisions of a joint will so far as they concern the property of another of the testators, except by virtue of a power given to him, which operates as a contractual right, and not as a right incident to the nature of the will; see *United Free Church of Scotland v. Black*, [1909] S. C. 25, 29, 30; *Ebden's Executors v. Ebden*, [1910] South African Law Reports (Appellate Division), 321.

(*k*) As to the exercise of general and special powers, see title POWERS, Vol. XXIII., pp. 18, 19.

(*l*) *Freke v. Carbery (Lord)* (1873), L. R. 16 Eq. 461; see title CONFLICT OF LAWS, Vol. VI., pp. 219, 220.



of movables on the law of the domicile of the testator at his death (*m*). In this title it is assumed that in both cases there is no foreign element to consider, and the law of England is referred to.

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Property which may be Dealt with.

**1028.** By statute (*n*) a testator of full capacity (*o*) may dispose by a modern will of all real estate and all personal estate (*p*) to which he is entitled, either at law or in equity, at the time of his death (*q*), which if not so disposed of would devolve on the heir-at-law or

General rule in case of no foreign element.

(*m*) See title CONFLICT OF LAWS, Vol. VI., pp. 220 *et seq.*

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3.

(*o*) As to testamentary capacity, see pp. 532 *et seq.*, *post*, and as to wills of married women in particular, see p. 534, *post*.

(*p*) For the definitions of real and personal estate, see p. 508, *ante*.

(*q*) The will of a testator disposing of all his real estate operated at common law before 1535 (see note (*c*), p. 518, *post*) as an appointment or declaration of uses of specific hereditaments, and after stat. (1540) 32 Hen. 8, c. 1, and stat. (1542) 34 & 35 Hen. 8, c. 5, and prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), as a conveyance of specific hereditaments: it was essential in order to pass the land by the will that the testator should be seised of the land both at the date of the will and date of the death (*A.-G. v. Vigor* (1803), 8 Ves. 256, 283); a will made after the testator was disseised was void as regards the lands of which he was so disseised, unless he afterwards re-entered, when the re-entry related back (*Bunter v. Coke* (1707), 1 Salk. 237; *Shep. Touch.* (ed Preston) 428). The will might comprise any after-acquired interests in such lands, which after the date of the will and before the death had become merged in the interest therein belonging to the testator at the date of the will; as, for instance, interests acquired by escheat (*Bunter v. Coke*, *supra*, at p. 238), or purchase of tenants' interests, or, in cases of the devise of a manor, a purchase of copyholds of the manor (*Roe d. Hale v. Wegg* (1796), 6 Term Rep. 708). Otherwise a will did not comprise real estate acquired subsequently to the date of the will, or even the legal estate in realty, to which the testator was entitled in equity, as under a contract for purchase, at the date of the will, and which was subsequently conveyed to him; in the latter case, however, the heir was held bound by a trust, and the equitable interest might be devised (*Greenhill v. Greenhill* (1712), 2 Vern. 679), although the equitable interest in lands comprised in a contract to purchase made after the date of the will could not be devised (*Langford v. Pitt* (1731), 2 P. Wms. 629; *Gaskarth v. Louther* (Lord) (1805), 12 Ves. 107). The republication of the will, however, or the execution of a subsequent codicil confirming the will, operated to include in the devise all the real estate acquired between the dates of the will and the codicil (see p. 580, *post*). The effect of an intention clearly expressed by a testator to pass after-acquired property was to put the heir to his election between the benefits conferred on him by the will and the property afterwards acquired (*Thellusson v. Woodford*, *Woodford v. Thellusson* (1806), 13 Ves. 209, affirmed, *sub nom. Rendlesham v. Woodford* (1813), 1 Dow, 249, H. L.); but the heir was not put to election unless the intention was clear (*Back v. Kett* (1822), Jac. 534; see *Churchman v. Ireland* (1831), 1 Russ. & M. 250); as to election, see title EQUITY, Vol. XIII., pp. 116 *et seq.* Leases for terms of years and other personal estate belonging to the testator at his death, though not at the date of his will, might pass by the will even before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26) (*Bunter v. Coke*, *supra*; *Masters v. Masters* (1718), 1 P. Wms. 421, 424; *Wind v. Jekyl and Albone* (1719), 1 P. Wms. 572, *per PARKER, L.C.*, at p. 574). Leaseholds, except in the case of freehold leases for lives, might pass by a will showing an intention to dispose of them made even before the date of demise (*Marwood v. Turner* (1733), 3 P. Wms. 163; *Carte v. Carte* (1744), Amb. 28, 29; *Abney v. Miller* (1743), 2 Atk. 593, 599; *Stirling v. Lydiard* (1744), 3 Atk. 199; *James v. Dean* (1805), 11 Ves. 383, 390; (1808) 15 Ves. 236). The result of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), is, therefore, to render the law as to realty similar to that as to personalty in this respect.

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which may  
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with.

Extent of  
right of  
disposition.

Examples.

customary heir of him, or, if he became entitled by descent, of his ancestor (*r*), or upon his executor or administrator (*s*).

**1029.** This right of disposition by will extends over the whole interest of the testator, so that he is able entirely or to any extent to exclude the rights of a surviving spouse (*t*), and of his heir or next of kin, as the case may be, to take his property on his death (*u*) by a will validly disposing of that property completely or to the required extent in favour of other objects of his bounty (*w*) capable of taking such bounty (*a*).

**1030.** The following are examples of kinds of property (*b*) which may be thus disposed of:—

(1) Freeholds (*c*) held for any estate other than an estate tail or an estate ceasing with the life of the testator.

(*r*) *Ingilby v. Amcotts* (1856), 21 Beav. 585; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 4. It has been suggested that where a testator dies without heirs, so that his realty cannot devolve on the heir-at-law of him or of his ancestor, the formalities of execution of the will should be in accordance with the Statute of Frauds (29 Car. 2, c. 3) (Williams, Real Property, 18th ed., p. 55 n.; but see 22nd ed., p. 56, note (i)); but the words in the text are probably descriptive only of the kind of realty devisable, and should be read as though “if he had one” were inserted after “him” and “his ancestor.” In *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261, C. A., the will was assumed without discussion to be operative; compare *Wentworth v. Humphrey* (1886), 11 App. Cas. 619, 625, P. C. (construction of similar words in a colonial statute). The expressions in the repealed stat. (1542) 34 & 35 Hen. 8, c. 5, referred to persons “having a sole estate or interest in fee simple, or seised in fee simple in coparcenary or as tenants in common.”

(*s*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq.*, 236 *et seq.*

(*t*) As to dower, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 189 *et seq.*; as to curtesy, see *ibid.*, pp. 183 *et seq.*

(*u*) For a sketch of the history of this unrestricted power of disposition, see note (*c*), *infra*, note (*k*), p. 519, *post*.

(*w*) As to the rule against disinheriting the heir etc., except expressly or by necessary implication, see p. 667, *post*; a clause merely excluding the next of kin (*A.-G. v. Parkin* (1769), Amb. 566; *Sykes v. Sykes* (1868), 3 Ch. App. 301), or merely directing that personalty shall devolve or pass to persons successively as realty (*Re Walker, Macintosh-Walker v. Walker*, [1908] 2 Ch. 705, *per* PARKER, J., at p. 712), is in itself inoperative. A clause excluding certain of the next of kin may be capable of being construed, however, as a gift to the persons entitled under the Statutes of Distribution (see title DESCENT AND DISTRIBUTION, Vol. XI., p. 16, note (*o*)), excluding the named persons (*Vachell v. Breton* (1707), 5 Bro. Parl. Cas. 51; *Bund v. Green* (1879), 12 Ch. D. 819).

(*a*) *Pickering v. Stamford* (Lord) (1797), 3 Ves. 492, 493; *Ferguson v. Ferguson* (1878), 2 Canada Supreme Court Reports, 497, 520.

(*b*) As to the double meaning of “property,” see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 137. For forms of specific devises applicable to various kinds of property, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 569 *et seq.*

(*c*) At common law, under the feudal system, no lands or tenements of freehold tenure were devisable by will, except, by custom, in some boroughs or in Kent (Littleton’s Tenures, s. 167; Co. Litt. 111 b; Shep. Touch. (ed. Preston) 399, 420). The difficulty was obviated by the doctrine of uses; it was held that the use of the land might be devised, and accordingly by means of a feoffment to the uses of the testator’s will made prior to the will, which operated as a declaration of the uses, a testator had, for all practical purposes, the right of devising the land itself (1 Sanders, Uses and Trusts, 64). The Statute of Uses (27 Hen. 8, c. 10) abolished this right, but



(2) Customary freeholds, copyholds, and real estate of other tenures (*d*) held for the like estate.

(3) Incorporeal hereditaments (*e*), including easements (*f*), *profits à prendre*, rent-charges (*g*), and advowsons (*h*) held for the like estate.

(4) All or any such part of the testator's personal estate (*i*) as devolves on his executors (*k*).

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by stat. (1540) 32 Hen. 8, c. 1, and stat. (1542) 34 & 35 Hen. 8, c. 5, express powers were given of devising, by a will in writing, all the lands of common socage tenure and two-thirds of lands of tenure in chivalry held by a testator for an "estate of inheritance," explained by the latter statute to mean "fee simple only," but as so explained judicially construed to include determinable fees (*Cowper v. Frankline* (1616), 3 Bulst. 184, *per* DODDERIDGE, J., and COKE, C.J., citing *Cassandra's Case* (*Vernon v. Gatacre* (1566), Dyer, 253 a)), and other modified fees other than fees tail; see, generally, title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 168 *et seq.* Stat. (1660) 12 Car. 2, c. 24, by converting tenure in chivalry into common socage, extended these powers. The Statute of Frauds (29 Car. 2, c. 3), s. 5, required all wills of lands, whether devisable by custom or by statute, to be executed with certain formalities, and (*ibid.*, s. 12) extended the power of disposition by will to estates *pur autre vie*.

(*d*) See p. 522, *post*.

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 1; for the definition of "real estate," see p. 508, *ante*; see also the repealed stat. (1542) 34 & 35 Hen. 8, c. 5, s. 4. Examples of devisable incorporeal hereditaments are a seignior (Shep. Touch. (ed. Preston) 429) and gales in the Forest of Dean (see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 647).

(*f*) As regards the transfer of easements by deed or will, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 274.

(*g*) As to rentcharges, see, generally, title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 463 *et seq.* For a form of devise of tithe rentcharge, see Encyclopædia of Forms and Precedents, Vol. XV., p. 580.

(*h*) As to advowsons, see title ECCLESIASTICAL LAW, Vol. XI., pp. 582, 583. For a form of devise of an advowson, see Encyclopædia of Forms and Precedents, Vol. XV., p. 580.

(*i*) For the definition, see p. 508, *ante*; as to choses in action, see pp. 522, 525, *post*.

(*k*) Up to the seventeenth century the power of disposing of personal estate by will was confined by custom, in the province of York, the City of London, and various districts of Wales, and perhaps in early times generally throughout the country (Bract. fo. 64 b; *Kemps v. Kelsey* (1722), Prec. Ch. 594, *per* Lord MACCLESFIELD, L.C., at p. 596), in cases where the testator left a wife and children, to a third, and, in cases where he left either a wife only or children only, to a moiety of the testator's estate. In respect of the remainder of his estate, the wife and children had the writ *de rationabili parte bonorum* for division of it among them; the writ was issued, in early times, according to some authorities, as of right at common law, and in later times on proof of the special custom (Fitz. Nat. Brev. 9 b; 2 Bl. Com. 492; Somner, Gavelkind, 91; Co. Litt. 176 b, note by Hargrave). By stat. (1693) 4 Will. & M. c. 2 and stat. (1703) 2 & 3 Anne, c. 5 (province of York, excepting Chester); stat. (1725) 11 Geo. 1, c. 18, s. 17 (London), and stat. (1695) 7 & 8 Will. 3, c. 38 (Wales), the testamentary power was extended to the whole personalty of the testator, notwithstanding the respective customs in the districts concerned. In places where no such custom existed, or where the testator left neither wife nor children, the whole personalty could be bequeathed. As to customary heriots, mortuaries and corse-presents, see 2 Bl. Com. 473, 493; titles BURIAL AND CREMATION, Vol. III., p. 431; COPYHOLDS, Vol. VIII., pp. 37 *et seq.* The testamentary power, in all cases, could be exercised without formality, or, as it was said, by a nuncupative will. The Statute of Frauds (29 Car. 2, c. 3), ss. 18—21, restricted the power of making a nuncupative will of personalty over £30 in value, and the power was finally abolished, except in certain cases (see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161 *et seq.*; ROYAL FORCES, Vol. XXIV., pp. 94 *et seq.*), by the Wills



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(5) Estates *pur autre vie* (*l*), whether there is or is not any special occupant, and whether the estate is freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the estate is a corporeal or incorporeal hereditament.

(6) All contingent, executory or other future interests in any real or personal estate (*m*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested (*n*), and whether he may be entitled thereto under the instrument by which the same were created or under any disposition thereof by deed or will (*o*).

(7) Rights, described as possibilities coupled with an interest, which appear to be included in the preceding subdivision (*p*).

Act, 1837 (7 Will. 4 & 1 Vict. c. 26). As to Government annuities before that Act, see stat. (1715) 1 Geo. 1, stat. 2, c. 19, s. 12; stat. (1795) 35 Geo. 3, c. 14, s. 16; Shep. Touch. (ed. Preston) 431. For forms of specific bequests of various kinds of personal estate, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 561 *et seq.*, 582 *et seq.*, 601 *et seq.*

(*l*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3, re-enacting and extending the Statute of Frauds (29 Car. 2, c. 3), s. 12; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 181. Under stat. (1542) 34 & 35 Hen. 8, c. 5, such an estate was not devisable (*Gawen v. Ramtes* (1601), Cro. Eliz. 804; *Took v. Glascock* (1669), 1 Saund. 250, 261). It is suggested in Hayes, Introduction to Conveyancing, p. 375; Jarman, Wills, 1st ed., p. 55; 6th ed., p. 74, that an estate *pur autre vie* limited to a man and the heirs of his body cannot be devised; that the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), has not altered the law previous to that Act, under which such an estate was not devisable on the ground that the entails of such an estate should, as nearly as possible, be put on the same footing as entails of lands of inheritance; see *Blake v. Blake* (1786), 3 P. Wms. 10, n.; *Campbell v. Sandys* (1803), 1 Sch. & Lef. 281, 294; *Dillon v. Dillon* (1809), 1 Ball & B. 77, 95, where it was put on the ground that the estate tail had determined; *Blake v. Luxton* (1815), Coop. G. 178; *Hopkins v. Ramage* (1826), Batt. 365; *Allen v. Allen* (1842), 2 Dr. & War. 307, 326, dissenting from the *dictum* of Lord KENYON, that such an estate was devisable, in *Doe d. Blake v. Luxton* (1795), 6 Term Rep. 289, 293. As to the analogy to entails of lands of inheritance, see, further, *Re Barber's Settled Estates* (1881), 18 Ch. D. 624, 629; *Re Michell*, *Moore v. Moore*, [1892] 2 Ch. 87. As to the nature of such an estate, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 178, 180, note (*r*). The recommendations of the Real Property Commissioners (4th Report, pp. 23, 80), who proposed legislation expressly excepting estates *pur autre vie* held in *quasi*-entail, were not adopted on this point in the drafting of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3, which is in terms wider than their proposals.

(*m*) As to the creation of these interests, see, generally, titles PERSONAL PROPERTY, Vol. XXII., pp. 413 *et seq.*; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 212 *et seq.*, 278; SETTLEMENTS, Vol. XXV., pp. 570 *et seq.*; as to executory bequests, see p. 527, *post*.

(*n*) Prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), a contingent or executory interest could not be devised unless the testator was ascertained as the person in whom the interest must vest (*Doe d. Calkin v. Tomkinson* (1813), 2 M. & S. 165, 170).

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3.

(*p*) Even before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), this was the case; see *Selwyn v. Selwyn* (1761), 2 Burr. 1131 (remainder), explained in *Jones v. Roe d. Perry* (1789), 3 Term Rep. 88, *per* KENYON, C.J., at p. 94, and BULLER, J., at p. 96; *Moor v. Hawkins* (1765), 2 Eden, 342 (equitable executory interest); *Roe d. Noden v. Griffiths* (1766), 1 Wm. Bl. 605, *per* DENNISON, J.; *Roe d. Perry v. Jones* (1788), 1 Hy. Bl. 30, affirmed, *sub nom. Jones v. Roe d. Perry*, *supra*; *Scawen v. Blunt* (1802), 7 Ves. 294, *per* GRANT, M.R., at p. 300, not following *Bishop v. Fountaine* (1695),

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(8) Rights of entry for conditions broken, and other rights of entry, including the possibility of reverter on failure of heirs in a fee simple conditional in copyholds, where there is no custom to entail (*q*).

(9) Property given to the testator by the will of an ancestor or other person who survived him, in cases where such gift does not lapse (*r*).

(10) The rent reserved by a lease (*s*).

(11) Emblements, to which the testator is entitled by reason of his interest in land (*t*).

3 Lev. 427, and 1 Roll. Abr. 609; *Perry v. Phelps* (1810), 17 Ves. 173, 182. Executory interests in terms of years were held devisable at an early period (*Cole v. Moore* (1607), *Moore* (K. B.), 806; *Veizy v. Pinwell* (1639), Poll. 44). In *Jones v. Roe d. Perry* (1789), 3 Term Rep. 88, KENYON, C.J., distinguished a "bare" possibility, as the expectation of an heir or the next of kin of a living person, which is not a title to property in English law; see titles CHUSES IN ACTION, Vol. IV., p. 376; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 238; and the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), such a possibility may be devised so as to pass on the death of the testator, provided that it has then ripened into an interest by the death of the named person before the testator (see *Re Parsons, Stockley v. Parsons* (1890), 35 Ch. D. 51; and see subdivision (9) in the text, *infra*; with these exceptions the testator's expectations under the will or intestacy of a living person cannot be disposed of by will; compare *Izard v. Tamahau Mahupuku* (1902), 22 New Zealand Law Reports, 418. As to the old law before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), under which a right of entry for the purpose of revesting an estate divested by disseisin was not devisable, see *Goodright d. Fowler v. Forrester* (1807), 8 East, 552, 566; *Doe d. Souter v. Hull* (1822), 2 Dow. & Ry. (K. B.) 38, where there was no disseisin; *Culley v. Doe d. Taylerson* (1840), 11 Ad. & El. 1008, 1020; Hayes, Introduction to Conveyancing, 346.

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3; *Pemberton v. Barnes*, [1899] 1 Ch. 544. At common law the possibility was not grantable (*Stafford (Earl) v. Buckley* (1751), 2 Ves. Sen. 171, *per* Lord HARDWICKE, L.C., at p. 180). The benefit of a right of entry on breach of condition was not devisable prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26) (*Avelyn v. Ward* (1750), 1 Ves. Sen. 420, *per* Lord HARDWICKE, L.C., at pp. 422, 423). As to such interests generally, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 237; they are not included in the executory or contingent interests mentioned in subdivision (6) in the text, p. 520, *ante*, but properly are vested interests, although for the purpose of the rule against perpetuities they have in certain cases been treated as contingent; see title PERPETUITIES, Vol. XXII., pp. 314, 315.

(*r*) See *Re Scott*, [1901] 1 K. B. 228, C. A.; *Johnson v. Johnson* (1843), 3 Hare, 157; *Winter v. Winter* (1846), 5 Hare, 306. As to the effect of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 32, 33, see p. 610, *post*.

(*s*) *Ards v. Watkin* (1599), Cro. Eliz. 637, 651; *Re Dameron, Bowen v. Churchill*, [1893] 3 Ch. 421.

(*t*) *Primâ facie* the growing crops pass to the devisee of the land, if any (*Spencer's Case* (1622), Win. 51); but the testator may show an intention to the contrary, as, for example, by a specific bequest of the stock on the farm (*Cox v. Godsalue* (1700), 6 East, 604, note (d); *West v. Moore* (1807), 8 East, 339; *Re Roose, Evans v. Williamson* (1880), 17 Ch. D. 696 ("farming stock"), disapproving *Vaisey v. Reynolds* (1828), 5 Russ. 12), or by a specific bequest of live and dead stock (*Blake v. Gibbs* (1825), 5 Russ. 13, n.; *Rudge v. Winnall* (1849), 12 Beav. 357); but it appears that a contrary intention is not shown merely by a bequest of residuary personal estate (*Cooper v. Woolfitt* (1857), 2 H. & N. 122; *Re Roose, Evans v. Williamson*, *supra*). For certain statutory rights to bequeath emblements, see Statute of Merton (1235), 20 Hen. 3, c. 2 (widows); stat. (1536) 28 Hen. 8, c. 11, s. 6 (incumbents); Co. Litt. 556. As to emblements, see

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be Dealt  
with.

Copyholds  
and similar  
property.

Choses in  
action.

(12) Interests in the above, arising by way of use or trust, and merely equitable (*a*), such as the testator's interest in property which he has agreed to purchase (*b*).

**1031.** This power to devise may be exercised as regards real estate of the nature of customary freehold, tenant right, customary or copyhold, without the necessity of a surrender to the use of the will (*c*), or where the testator is entitled to be, but has not been, admitted, without the necessity of admittance; the want of a custom to devise or surrender to the use of a will or other want of power at law to dispose of the same, or any custom that a will or surrender to the use of a will should continue in force for a limited time only, or any other special custom, does not affect the power (*d*).

**1032.** Those choses in action which devolve on the personal representative may be bequeathed, such as those rights of action for damages or other matters which devolve on the personal representative (*e*); copyright, for the full extent of the term of that right (*f*); or a debt or bond (*g*). A bequest of a debt or bond does

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titles AGRICULTURE, Vol. I., p. 282; LANDLORD AND TENANT, Vol. XVIII., pp. 565, 566.

(*a*) *Manning v. Andrews* (1576), 1 Leon. 256 (use might be devised though suspended by disseisin of feoffee to uses); *Car v. Ellison* (1744), 3 Atk. 73 (equitable interest in copyhold, under devise of real estate); *Perry v. Phelps* (1790), 1 Ves. 251, 254; *Cholmondeley (Marquis) v. Clinton (Lord)* (1821), 4 Bli. 1, 80, H. L.; *Shep. Touch.* (ed. Preston) 429, 430 (trust, equity of redemption, use); and see title EQUIT, Vol. XIII., p. 94, note (*u*).

(*b*) *Davie v. Beardsham* (1663), 1 Cas. in Ch. 39; *Greenhill v. Greenhill* (1712), 2 Vern. 679; *Gibson v. Montfort (Lord)* (1750), 1 Ves. Sen. 485; *Morgan v. Holford* (1852), 1 Sm. & G. 101. As to the rights of the devisees of land subject to contract to purchase by the testator, see *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31; *Broome v. Monck* (1805), 10 Ves. 597, 605; *Re Cockcroft, Broadbent v. Groves* (1883), 24 Ch. D. 94; *Re Kidd, Brooman v. Withall*, [1894] 3 Ch. 558; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239.

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3, substantially re-enacting the repealed stat. (1815) 55 Geo. 3, c. 192. Prior to the latter statute a surrender, made after admittance (*Doe d. Tofield v. Tofield* (1809), 11 East, 246) to the use of the will, was necessary; the earlier stat. (1540) 32 Hen. 8, c. 1, and stat. (1542) 34 & 35 Hen. 8, c. 5, did not include copyholds (*Royden v. Malster* (1623), 2 Roll. Rep. 383), but as copyholds were not within the Statute of Uses (27 Hen. 8, c. 10) the method continued of surrendering the copyholds to the uses of the testator's will. An equitable interest in copyholds was devisable without this formality and might pass under a devise in general words if the intention to devise them was shown or could be inferred (*Gibson v. Montfort (Lord)*, *supra*; *Torre v. Browne* (1855), 5 H. L. Cas. 555; *Car v. Ellison*, *supra*). Under stat. (1815) 55 Geo. 3, c. 192, copyholds might pass under a devise of real estate without the previous formality of a surrender (*Doe d. Clarke v. Ludlam* (1831), 7 Bing. 275).

(*d*) As to the nature and effect of a will of copyholds, see title COPYHOLDS, Vol. VIII., p. 109; as to the effect of a devise in barring freebench, see *ibid.*, p. 79.

(*e*) *Shep. Touch.* (ed. Preston) 431 (actions for goods or for an account); *Drew v. Merry* (1701), 1 Eq. Cas. Abr. 175 (right to set aside a release). As to the benefit of restrictive covenants relating to user of land, see *Formby v. Barker*, [1903] 2 Ch. 539, C. A.

(*f*) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 5 (2); see title COPYRIGHT, Vol. VIII., p. 157.

(*g*) *Anon.* (1714), 1 P. Wms. 267; *Shep. Touch.* (ed. Preston) 430.



not, however, of itself enable a legatee who is not also an executor to sue in his own name and to oust the right of the executor to sue (*h*).

*Primâ facie*, the money payable under a policy of assurance which a man effects on his own life is his own and he can dispose of it by will, but the conditions under which the assurance is effected may provide otherwise (*i*).

SECT. 1.  
Property  
which may  
be Dealt  
with.

Insurance  
policy.

**1033.** The title of the testator need not be a good title (*k*): thus, his interest may be merely possessory (*l*); the devise or bequest in such a case is good, subject to the paramount rights of the persons dispossessed (*m*). A testator who has sold property in circumstances entitling him to have the sale set aside has a devisable interest (*n*).

State of  
testator's title.

**1034.** Coparceners and tenants in common may dispose by will of their shares of the property held in common (*o*). Co-owners.

As regards joint tenants, a gift by the will of one of them of his share in the property does not sever the joint tenancy (*p*), and does not affect the contingent paramount title of the other joint

Where a bond is of the nature of immovables in a foreign country, the question whether it is bequeathable by will then depends on the law of that country (*Glover v. Strothoff* (1786), 2 Bro. C. C. 33).

(*h*) *Bishop v. Curtis* (1852), 18 Q. B. 879; and see *Robertson v. Quidding-ton* (1860), 28 Beav. 529 (bequest of share of testator's interest in goodwill of a partnership); title PARTNERSHIP, Vol. XXII., p. 83. The will may make the legatee a special executor with regard to the debt so as to be able to sue in his own name; and, in any event, the legatee may compel the executor to sue (*Shep. Touch.* (ed. Preston) 430). In the case of negotiable instruments payable to the testator's order, the executors, subject to administration of the estate, are bound to indorse them, or to allow one of their number to indorse them, and to deliver them to the legatee in order to enable him to sue (*Re Robson, Robson v. Hamilton*, [1891] 2 Ch. 559, 563, 564); mere delivery by the executors after indorsement by the testator himself is not generally sufficient (*Bromage v. Lloyd* (1847), 1 Exch. 32; see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 481). As to the costs of recovering a specifically bequeathed debt, see *Re De Sommery, Coelenbier v. De Sommery*, [1912] 2 Ch. 622, 628, discussing *Perry v. Meddowcroft* (1841), 4 Beav. 197.

(*i*) *Re Phillips' Insurance* (1883), 23 Ch. D. 235, C. A., per LINDLEY, L.J., at p. 247. As to policies effected under the Married Women's Property Acts, 1870 (33 & 34 Vict. c. 93) and 1882 (45 & 45 Vict. c. 75), see title HUSBAND AND WIFE, Vol. XVI., pp. 399 *et seq.*

(*k*) As to estoppel of a beneficiary taking possession under the terms of the will in any property, see, generally, title ESTOPPEL, Vol. XIII., p. 374.

(*l*) *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1; *Clarke v. Clarke* (1868), 2 L. R. C. L. 395; *Calder v. Alexander* (1900), 16 T. L. R. 294.

(*m*) *Shep. Touch.* (ed. Preston) 428.

(*n*) *Gresley v. Mousley* (1859), 4 De G. & J. 78, 89, 92, C. A., following *Uppington v. Bullen* (1842), 2 Dr. & War. 184, and *Stump v. Gaby* (1852), 2 De G. M. & G. 623, 630; *Turner v. Turner*, *Hall v. Turner* (1880), 28 W. R. 859; *Shep. Touch.* (ed. Preston) 429.

(*o*) The repealed stat. (1542) 34 & 35 Hen. 8, c. 5, s. 4, made express mention of these interests; see also Co. Litt. 185 b. As to joint owners generally, see titles PERSONAL PROPERTY, Vol. XXII., pp. 393, 394, 403; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 199 *et seq.*

(*p*) 2 Bl. Com. 186; Bac. Abr., tit. Joint Tenants, (I.) 3; *Shep. Touch.* (ed. Preston) 414, 431; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 205. But as to an agreement by a joint tenant to devise his share, see *ibid.*; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192 (agreement to make mutual wills).

SECT. 1.  
Property  
which may  
be Dealt  
with.

What cannot  
be subject of  
a gift by will.

Trust or  
mortgage  
estates.

tenant to take by survivorship (*q*). Under the modern law a gift of his interest in the property made by the will of one joint tenant during the joint tenancy may, in the event of the testator becoming before his death the surviving owner, be effectual to pass the property (*r*).

**1035.** Apart from the execution by will of a power (*s*), a testator cannot effectually (*t*) dispose by will of property which is not his own (*a*), or which he holds in a representative or official capacity (*b*), as, for example, heirlooms, which are such by custom (*c*); real estate in which the testator has merely an estate tail (*d*); property bound by the covenant of the testator to devolve in some other manner (*e*); or personal rights belonging to the reversioner for the time being under a lease for years, where the testator is a tenant for life of the reversion who dies without reducing them into possession (*f*).

The devolution of trust or mortgage estates is now, notwithstanding any disposition by will, subject to statutory rules (*g*).

(*q*) Littleton's Tenures, s. 287; Doctor and Student (18th ed.), 18, 185; *Butler and Baker's Case* (1591), 3 Co. Rep. 25 a, 30 b; *Lannoy v. Lannoy* (1725), Cas. temp. King, 48; *Crabb v. Crabb* (1834), 1 My. & K. 511; *Turner v. A.-G.* (1876), 10 I. R. Eq. 386, 392. The share would not, in default of disposition, devolve on the heir or executor within the meaning of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3. Questions may arise, however, whether the joint tenant is bound under the doctrine of election (*Dummer v. Pilcher* (1831), 5 Sim. 35; (1833), 2 My. & K. 262; *Coates v. Stevens* (1834), 1 Y. & C. (EX.) 66; *Grosvenor v. Durston* (1858), 25 Beav. 97).

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 3, 24. Before that Act a will of a joint tenant of real property, made during the joint tenancy, did not operate even to pass his share to which he became entitled in severalty on a subsequent partition, unless the will were republished (*Swift d. Neale v. Roberts* (1764), 3 Burr. 1488, explaining Perkins, Laws of England, s. 500). The law is now rendered similar to that concerning personal property before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), which was as stated in the text (Shep. Touch. (ed. Preston) 430). As to the construction of a will in this respect, see p. 691, *post*.

(*s*) See title POWERS, Vol. XXIII., pp. 1 *et seq*.

(*t*) Such a disposition may, however, raise a question of election; see title EQUIT, Vol. XIII., p. 116.

(*a*) As to dispositions by a husband of his wife's non-separate property, see title HUSBAND AND WIFE, Vol. XVI., pp. 322 *et seq*.

(*b*) Shep. Touch. (ed. Preston) 432, giving as instances the masters and governors of colleges and hospitals in respect of the property of the body; mayors or other heads of corporations in respect of corporate property; and churchwardens in respect of church property. "No man can devise anything but what he has to his own use" (*Bransby v. Grantham* (1578), Plowd. 525, 526; *Hastings (Lord) v. Douglas* (1634), Cro. Car. 343, 345).

(*c*) Co. Litt. 18 b (Crown jewels), 185 b; *Pusey v. Pusey* (1684), 1 Vern. 273; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 240.

(*d*) *Kirkham v. Smith* (1749), Amb. 518; *Ireson v. Pearman* (1825), 3 B. & C. 799; *O'Hanlon v. Unthank* (1872), 7 I. R. Eq. 68, 80; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 264. The property in such cases does not descend to the heir general of the testator under the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 3; see p. 517, *ante*. See also *Jerningham v. Cornwallis* (1592), Cro. Eliz. 286; and note (*c*), p. 518, *ante*. As to the rights of a tenant of an estate *pur autre vie* limited to him and the heirs of his body, see note (*l*), p. 520, *ante*.

(*e*) *Page v. Cox* (1852), 10 Hare, 163 (covenant in partnership articles). As to the effect of covenants to leave property by will, see p. 514, *ante*.

(*f*) *Basset v. Basset* (1774), Amb. 843.

(*g*) See titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 5, 6; MORTGAGE, Vol. XXI., p. 182; TRUSTS AND TRUSTEES, p. 101, *ante*.

**1036.** No person can make a binding disposition of his own dead body, so as to oust the executors' right to the custody and possession of it and their duties relating to disposal of it (*h*); but by statute a direction for the anatomical examination of his body after death may in certain cases be effective (*i*).

SECT. 1.  
Property  
which may  
be dealt  
with.

**1037.** Those rights of action which do not on death devolve on the personal representative, or which come to an end with the life of the owner, cannot be disposed of by will (*k*).

Corpse.  
Rights of  
action.

The powers of nomination, conferred by the rules of a friendly society, over the sums payable on death of a member operate as powers of appointment and may give the member no right of property in the sum assured (*l*). By the terms of a policy of assurance the money payable thereunder may not be subject to the right of disposition by the assured's will (*m*). Such a limitation of a testator's power of disposition by will is valid not only against persons claiming under the will (*n*), but against creditors (*o*).

Friendly  
society  
nominations  
and policies.

Similarly, a testator may have no right, or only a restricted right, to dispose by will of shares in a company under the Companies (Consolidation) Act, 1908 (*a*), and any amending statutes (*b*), if the articles of association of the company so provide (*c*).

Shares in a  
company.

A covenant against assignment in a lease is not in general construed so as to forbid a disposition of the term by the will of the tenant (*d*).

Lease.

**1038.** By statute a testator cannot, by a will made after the 31st December, 1865 (if abroad there is an extension of time), and previously to his entering into service as a seaman or marine, dispose of any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty (*e*).

Money  
payable by  
Admiralty.

(*h*) *Williams v. Williams* (1882), 20 Ch. D. 659. As to the executors' rights and duties, see title BURIAL AND CREMATION, Vol. III., p. 404.

(*i*) See title MEDICINE AND PHARMACY, Vol. XX., pp. 341, 342. For a form of direction as to the ascertainment of the testator's death, see Encyclopædia of Forms and Precedents, Vol. XV., p. 557.

(*k*) As to such rights in respect of contracts, see title CONTRACTS, Vol. VII., p. 502; and in respect of torts, title TORT, Vol. XXVII., p. 491; and, generally, see title CHOSSES IN ACTION, Vol. IV., pp. 400 *et seq.*

(*l*) *A.-G. v. Rowsell* (1844), 36 Ch. D. 67, n.; *Re Phillips' (William) Insurance* (1883), 23 Ch. D. 235, C. A.; *Urquhart v. Butterfield* (1887), 37 Ch. D. 357, C. A.; and see title FRIENDLY SOCIETIES, Vol. XV., pp. 152 *et seq.*

(*m*) See p. 523, *ante*.

(*n*) *Re Davies, Davies v. Davies*, [1892] 3 Ch. 63, *per* NORTH, J., at p. 69; see *Page v. Cox* (1852), 10 Hare, 163; *Phillips v. Cayley* (1889), 43 Ch. D. 222, C. A.; *Ashby v. Costin* (1888), 21 Q. B. D. 401. The nomination in such a case is not revocable by will (*Bennett v. Slater*, [1899] 1 Q. B. 45, C. A.).

(*o*) *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89.

(*a*) 8 Edw. 7, c. 69.

(*b*) See title COMPANIES, Vol. V., pp. 1 *et seq.*

(*c*) *Re White, Theobald v. White*, [1913] 1 Ch. 231; as to restrictions on transfer of shares in a company, see title COMPANIES, Vol. V., pp. 187 *et seq.*

(*d*) See title LANDLORD AND TENANT, Vol. XVIII., p. 577.

(*e*) Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), s. 3. As to the formalities now necessary to pass such property by a will made after entering the service, see *ibid.*; Navy and Marines (Wills) Act, 1897 (60 & 61 Vict. c. 15); title ROYAL FORCES, Vol. XXIV., p. 95.



## SECT. 2.

Interests  
which may  
be Created  
by Will.

Creation of  
interests.

Incorporeal  
heredita-  
ments.

Successive  
and future  
interests.

Legal  
remainders.

Executory  
interests.

Estates *pur*  
*autre vie*.

SECT. 2.—*Interests which may be Created by Will.*

**1039.** The power of disposition by will is not at the testator's caprice, but extends only to the creation of those interests which are recognised by law, and no others (*f*).

**1040.** Certain incorporeal hereditaments, such as rentcharges (*g*) and easements (*h*), may be created by will.

**1041.** Successive and future estates and interests, legal or equitable (*i*), may be created by will in both real (*k*) and personal estate, including chattels real (*l*) and chattels personal (*m*), provided that they satisfy the rules of law relating to perpetuities respectively applicable to such interests (*a*).

In so far as such future estates in real estate are created by way of legal remainder, they are subject to the rules of law applicable to such limitations in a conveyance operating at common law (*b*).

Other future interests take effect by way of executory limitation (*c*). No particular technical device, such as a use (*d*) or trust (*e*), is necessary in a will in order to create such interests, either when they spring up in the future or when property is made to shift from one person to another on any future event (*j*).

**1042.** There may be created by will a legal estate *pur autre vie* where the *cestui que vie* or one or more of the *cestuis que vie* is or are unborn, at all events in cases where the latter is or are necessarily ascertained at such a time within the limits allowed by the law as to perpetuities, that there can be no hiatus or discontinuity in the estate (*g*).

(*f*) *Soulle v. Gerard* (1596), Cro. Eliz. 525; *Roe d. Dodson v. Grew* (1767), Wilm. 272, 274, commenting on the phrase "at his will and pleasure" in the now repealed stat. (1540) 32 Hen. 8, c. 1; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 242; *Re Elliott, Kelly v. Elliot*, [1896] 2 Ch. 353, 356.

(*g*) See title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 476.

(*h*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 245.

(*i*) See title EQUITY, Vol. XIII., p. 93.

(*k*) As to future interests in real estate, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 212 *et seq.*

(*l*) See title PERSONAL PROPERTY, Vol. XXII., p. 413.

(*m*) See pp. 527 *et seq.*; title PERSONAL PROPERTY, Vol. XXII., p. 413.

(*a*) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(*b*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 220.

(*c*) See *ibid.*, p. 231.

(*d*) As to uses generally, see *ibid.*, pp. 271 *et seq.*

(*e*) As to trusts generally, see title TRUSTS AND TRUSTEES, pp. 1 *et seq.*, *ante*.

(*f*) See title PERSONAL PROPERTY, Vol. XXII., p. 413; Underhill and Strahan, *Interpretation of Wills and Settlements* (2nd ed.), p. 281. As to the devices necessary in a settlement or gift *inter vivos*, see REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 214 *et seq.*

(*g*) *Re Amos, Carrier v. Price*, [1891] 3 Ch. 159, 166, 167 (estate for the life of the donee and for the life of his heir); *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535, 542, 546 (estate for the lives of unborn grandchildren and the life of the survivor of them). It appears that such a legal limitation is not possible in common law assurances; see 49 Sol. Jo. 793 (citing 2 Preston, Abstracts, 148; *Doe d. Pemberton v. Edwards* (1836), 1 M. & W. 553), where *Re Ashforth, Sibley v. Ashforth, supra*, is criticised.

Where lands are devised conditionally on the payment of a legacy the testator may give the legatee an express right of entry to secure the payment (*h*).

The duration of an interest, as distinct from the conditions attached to a gift (*i*), cannot be defined by reference to certain matters the investigation of which the court considers contrary to public policy (*k*).

**1043.** Formerly, although the use of a chattel could be made the subject of successive limitations without conferring any legal rights on the donee (*l*), a gift of the chattel itself for a life or other limited time was an absolute gift (*m*). Now, however, at all events with regard to chattels which are not consumed in the use of them, successive limitations of the chattel itself, whether it is a chattel real (*n*) or chattel personal (*o*), may be made by will, so as to confer enforceable legal rights on the second and subsequent donees (*p*) indefeasible by any act or default on the part of the first donee (*q*); such limitations are therefore of an executory nature (*r*), and are termed executory bequests.

SECT. 2.  
Interests  
which may  
be Created  
by Will.

Chattels given  
to successive  
donees.

As to estates *pur autre vie* generally, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 178 *et seq.*

(*h*) Such a right is said to be in the nature of a tenancy by *elegit* (*Wigg v. Wigg* (1739), 1 Atk. 382, 383; *Emes v. Hancock* (1743), 2 Atk. 507, 508; *Sherman v. Collins* (1746), 3 Atk. 319, 322); as to *elegit*, see title EXECUTION, Vol. XIV., pp. 61 *et seq.*

(*i*) As to conditions, see pp. 583 *et seq.*, *post*.

(*k*) *Re Moore, Trafford v. Maconochie* (1888). 39 Ch. D. 116, C. A. (separation of husband and wife). As to the construction of gifts to last until indefinitely distant events, see p. 774. *post*.

(*l*) *Case of the Grail* (1459), Y. B. 37 Hen. 6, fo. 30; *Anon.* (1548), Bro. (N. C.) pl. 388; *Hastings (Lord) v. Douglas* (1634), Cro. Car. 343; *Welcden v. Elkington* (1578), Plowd. 516, 520; *Paramour v. Yardley* (1579), Plowd. 539, 541.

(*m*) "A devise of the chattel for an hour is for ever" (*Anon.* (temp. Hen. 8), Bro. (N. C.) pl. 334; *Welcden v. Elkington*, *supra*, at p. 520).

(*n*) *Manning's Case* (1609), 8 Co. Rep. 94 b; *Lampet's Case* (1612), 10 Co. Rep. 46 b.

(*o*) *Vachel v. Vachel* (1669), 1 Cas. in Ch. 129; *Catchmay v. Nicholas* (1674), 1 P. Wms. 6, n.; *Smith v. Clever* (1688), 2 Vern. 38, 59; *Shirley v. Ferrers* (1690), 1 P. Wms. 6, n.; *Clarges v. Albemarle (Duchess)* (1691), 2 Vern. 245; *Anon.* (1695), Freem. (CH.) 206; *Hyde v. Parrat* (1695), 1 P. Wms. 1; *Tissen v. Tissen* (1718), 1 P. Wms. 500, 502; *Upwell v. Halsey* (1720), 1 P. Wms. 651; *Foley v. Burnell* (1783), 1 Bro. C. C. 274.

(*p*) *Hoare v. Parker* (1788), 2 Term Rep. 376 (trover). The interest of the second legatee pending the contingency may be a transmissible interest (*Doe d. Roberts v. Polgrean* (1791), 1 Hy. Bl. 535), and is of the nature of a chose in action within the Bills of Sale Acts (*Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301; *Re Thynne, Thynne v. Grey*, [1911] 1 Ch. 282), although not a chose in action in the ordinary sense; see title PERSONAL PROPERTY, Vol. XXII., p. 413. Originally the future legatee was without remedy in a court of law if the first legatee disposed of the chattel (*Anon.* (1541), Bro. (N. C.) pl. 209; *Anon.* (1552), 1 Dyer, 74 a (18); *Anon.* (1573), 3 Dyer, 328 b (11); *Welcden v. Elkington*, *supra*; *Paramour v. Yardley*, *supra*). A court of equity originally required the first taker to give security that the goods should be forthcoming (*Vachel v. Vachel*, *supra*); but now this is only insisted on in a case of danger, and ordinarily the first taker signs an inventory; see title PERSONAL PROPERTY, Vol. XXII., p. 413, note (*q*).

(*q*) *Cotton v. Heath* (1638), Poll. 26; *Fearne, Contingent Remainders*, 421.

(*r*) *Fonnereau v. Fonnereau* (1745), 3 Atk. 315, 318.

## SECT. 2.

Interests  
which may  
be Created  
by Will.

Chattels  
consumed in  
the use.

With regard, however, to specific gifts of chattels which are consumed in the use of them, the use and the property in the chattels can *primâ facie* have no separate existence(s); and the old rule *primâ facie* still applies, that a gift of a life interest is an absolute gift, and that a limitation over after a life interest is ineffectual (t). The old rule, however, does not apply in a case where the chattels, by the terms of the will or by implication from the circumstances of the case, are given to the successive legatees in the character of money's worth, and are not intended for personal use or consumption by the legatee (a). Thus, if they are stock of a farming or other business given in connexion with a gift for life of that business, at all events where the stock is necessary to carry on the business, and the business and stock are intended to be kept up (b), the first legatee does not take absolutely (c). Nor does the old rule apply to residuary gifts of personal estate so far as they comprise such chattels, because under another rule (d), to

(s) *Randall v. Russell* (1817), 3 Mer. 190, *per* GRANT, M.R., at p. 195.

(t) *Ibid.* (corn and hay); *Andrew v. Andrew* (1845), 1 Coll. 686, 691 (wine, spirits and hay); *Montresor v. Montresor* (1845), 1 Coll. 693 (wine, provisions); *Bryant v. Easterson* (1859), 5 Jur. (N. S.) 166 (farming stock); *Phillips v. Beal* (No. 1) (1862), 32 Beav. 25 (wine for household consumption); *Breton v. Mockett* (1878), 9 Ch. D. 95; *In the Will of Nilen, Kidd v. Nilen*, [1908] Victorian Law Reports, 332 (determinable life interest). The fact that the personal estate bequeathed is of a description not likely to be given for limited interests has been considered in construction of the will (*Porter v. Tournay* (1797), 3 Ves. 311, 313; *Manning v. Purcell* (1855), 7 De G. M. & G. 55, 61, C. A.; *Randfield v. Randfield* (1860), 8 H. L. Cas. 225, 236, 237; and see *Re Moir's Estate, Moir v. Warner*, [1882] W. N. 139).

(a) *Bryant v. Easterson*, *supra*, *per* STUART, V.-C., at pp. 167, 168 (inventory, but no valuation directed by the will "with a view, by a valuation, to secure a right to the tenants in remainder...so that they should be considered to pass as money and not as specific things"); *Re Hall's Will* (1855), 1 Jur. (N. S.) 974 (man's clothes not suitable for use by female legatee).

(b) Compare *Maynard v. Gibson*, [1876] W. N. 204, followed in *Paine v. Warwick (Countess)*, [1914] 2 K. B. 486 (deer, intended to be kept up by tenant for life). As regards growing crops from time to time on a farm, the life tenant takes absolutely, although intended to keep up the business (*Steward v. Cotton* (1777), 5 Russ. 17, n.; and see *Bryant v. Easterson*, *supra*).

(c) *Montresor v. Montresor*, *supra* (live and dead stock; tenant for life entitled to produce only); *Groves v. Wright* (1856), 2 K. & J. 347 (farming stock); *Phillips v. Beal* (No. 1), *supra* (wine used in wine merchant's business); *Cockayne v. Harrison* (1872), L. R. 13 Eq. 432; *Myers v. Washbrook*, [1901] 1 K. B. 360 (farming stock). In *Groves v. Wright*, *supra*, at p. 351, it was suggested, and in *Myers v. Washbrook*, *supra*, it was held, that the old rule did not apply in any case to farming stock, although not given in connexion with a business, and DARLING, J., suggested also that grain, roots and other similar things, which are consumed by being used as food for cattle, or by being sown in the ground, are not within the rule, because they are consumed with the object of being reproduced. In *Bryant v. Easterson*, *supra*, however (not cited in *Myers v. Washbrook*, *supra*), where the obligations of the first legatee under the lease of the farm to consume such produce on the land were considered, the rule was held to apply to such produce and other farming stock. A provision that the first legatee should not be liable for depreciation assists a construction giving him an absolute interest; see *Breton v. Mockett* (1878), 9 Ch. D. 95.

(d) The rule in *Howe v. Darlington (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137, as to which see titles EXECUTORS AND ADMINISTRATORS,



effectuate a presumed intention that the legatees should successively enjoy the same subject-matter (*e*), the chattels must in such a case be sold and only the interest of the proceeds paid to the legatee for life (*f*), unless, by the terms of the will, he is given the right to enjoy them *in specie* (*g*). Further, in every case, by the express terms of the will, the first legatee, whether taking an absolute or a limited interest, may be made responsible for the value of the chattels (*h*). The testator may expressly give a right to consume so much of certain consumables as the donee may require during his lifetime; the donee then has an absolute interest only in the chattels actually consumed, and the testator may validly make a gift over of the amount remaining unconsumed (*i*).

Where the legatees are given successive interests in the chattels, the property in the chattels at law vests on the assent of the executor in the first legatee, and on the happening of respective future contingencies in the other successive takers (*k*); the assent of the executor to the first is an assent to all (*l*).

**1044.** A gift may be made as a conditional gift or limitation subject to the rules restricting such conditions and gifts (*m*); and a further gift to take effect on a condition not being fulfilled may be made subject to the like restrictions (*n*), and subject also to the restriction that the second gift must fit in sensibly with the previous gift so as to show what is to be done with the property (*o*).

**1045.** A common example of a conditional gift is an option to purchase (*p*), or other form of gift conditional on some consideration

SECT. 2.  
Interests  
which may  
be Created  
by Will.

Vesting of  
interests.

Conditional  
gifts; gifts  
over.

Options to  
purchase.

Vol. XIV., pp. 282 *et seq.*; SETTLEMENTS, Vol. XXV., p. 611; TRUSTS AND TRUSTEES, p. 30, *ante*.

(*e*) As to this presumption as the ground of the rule in *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137, see title SETTLEMENTS, Vol. XXV., p. 611.

(*f*) *Randall v. Russell* (1817), 3 Mer. 190, 195; compare *Re Maclachlan, Maclachlan v. Campbell* (1900), 26 Victorian Law Reports, 548 (tenant for life held liable to account for live stock).

(*g*) See *Re Bagshaw's Trusts* (1877), 46 L. J. (CH.) 567, 571, C. A.; and title TRUSTS AND TRUSTEES, p. 31, *ante*.

(*h*) *Deering v. Hanbury* (1687), 1 Vern. 478; and see *Connolly v. Connolly* (1887), 56 L. T. 304.

(*i*) *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344.

(*k*) *Foley v. Burnell* (1789), 4 Bro. Parl. Cas. 34 (1785), 319; *Stevenson v. Liverpool Corporation* (1874), L. R. 10 Q. B. 81; Shep. Touch. (ed. Preston) 419, 420. Formerly, where the use only of the chattel was devised, the property continued to be vested in the executors (*Case of the Grail* (1459), Y. B. 37 Hen. 6, fo. 30; *Anon.* (1692), Freem. (CH.) 137; *Chamberlaine v. Chamberlaine* (1674), Freem. (CH.) 141).

(*l*) *Manning's Case* (1609), 8 Co. Rep. 94 b, 96 a; *Foley v. Burnell*, *supra*. As to assent generally, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 265 *et seq.*

(*m*) As to conditions in general, see p. 583, *post*; as to the limits of suspension of vesting, see title PERPETUITIES, Vol. XXII., pp. 293 *et seq.*

(*n*) See, generally, *Shaw v. Ford* (1877), 7 Ch. D. 669, 673, 674.

(*o*) *Re Catt's Trusts* (1864), 2 Hem. & M. 46, 53; *Musgrave v. Brooke* (1884), 26 Ch. D. 792, 794.

(*p*) *Radnor (Earl) v. Shafto* (1805), 11 Ves. 448, 454. For forms of options to purchase, see Encyclopædia of Forms and Precedents, Vol. XV., p. 655. As to the effect of acts in the nature of advancement to the donee of the property subject to the option, see *Sharpe v. Sharpe* (1840), 10 L. J. (EX. EQ.) 2.

SECT. 2.  
Interests  
which may  
be Created  
by Will.

Rights of  
person  
exercising  
option.

being given (*a*). A mere option to purchase to a named donee may be personal to the donee and not transmissible (*b*); on the other hand, a gift for a named consideration is *primâ facie* construed as transmissible to the donee's representatives and assigns (*c*). Such a gift, according to the context of the will and the circumstances, may be an option over the testator's interest as a mere bounty (*d*), or may create the relationship of vendor and purchaser between the testator's estate and the donee (*e*).

The donee must as a rule strictly comply with any terms of the option as to the time of signifying his exercise of the option (*f*), time of payment (*g*) or otherwise. He is entitled on exercising the

(*a*) For examples of options to purchase at a valuation, see *Edwards v. Edwards* (1837), 1 Jur. 654; *Waite v. Morland* (1866), 12 Jur. (N. S.) 763, C. A.; as to options at a price to be fixed by the trustees, see *Radnor (Earl) v. Shafto*, (1805) 11 Ves. 448; *Edmonds v. Millett* (1855), 20 Beav. 54. As to directions for taking the price into account on distribution, see *Re Dallmeyer*, *Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372, C. A.

(*b*) *Kadnor (Earl) v. Shafto*, *supra*, at p. 456; *Doe d. Davies v. Davies* (1851), 15 Jur. 1029; *Re Cousins*, *Alexander v. Cross* (1885), 30 Ch. D. 203, C. A. In such a case, in order to affect persons claiming under him, the donee must do some act to show his exercise of the option (*Radnor (Earl) v. Shafto*, *supra*, at p. 455 (apparently an acceptance by will might suffice)). See also *McKendrick v. Lewis* (1889), 15 Victorian Law Reports, 450 (after option exercised, obligation to pay was not personal to donee).

(*c*) *Taylor v. Cooper* (1846), 10 Jur. 1078; *Belshaw v. Rollins*, [1904] 1 I. R. 284, 289.

(*d*) In such a case it appears that the donee is a mere devisee under the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1 (Locke King's Act), and does not take free from incumbrances (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 288); he therefore may not be entitled to an abstract of title (*Brooke v. Garrod* (1857), 2 De G. & J. 62, affirming S. C., 3 K. & J. 608; *Re Davison and Torrens* (1865), 17 I. Ch. R. 7).

(*e*) In such a case the donee is entitled to take free from incumbrances and to have the title shown at all events to this extent *Given v. Massey* (1892), 31 L. R. Ir. 126; *Re Wilson*, *Wilson v. Wilson*, [1908] 1 Ch. 839. It appears that a gift conditional on the giving of any consideration (*Blower v. Morret* (1752), 2 Ves. Sen. 420, 422), such as a release of an existing right of dower (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 276, notes (*k*)—(*m*)) or of an existing debt due from the testator (*ibid.*, notes (*g*)—(*i*)), *primâ facie* constitutes the donee a purchaser, so as to give him priority for his legacy; but it seems that where the consideration is the conveyance of land to third persons, and not to the testator's estate, the legatee conveying the land accordingly has no lien on the land for payment of his legacy (*Barker v. Barker* (1870), L. R. 10 Eq. 438); and if the gift is conditional on releasing a claim against a third party the donee has no priority (*Re Whitehead*, *Whitehead v. Street*, [1913] 2 Ch. 56). See also *Davies v. Davies* (1901), 20 New Zealand Reports, 636 (gift of term of years conditional on payment of rent etc.).

(*f*) In cases where an offer has to be made by the trustees, or the price has to be fixed, time may run only from communication of the terms to the donee (*Lilford (Lord) v. Powys Keck* (No. 1) (1862), 30 Beav. 295; *Austin v. Tawney* (1867), 2 Ch. App. 143). If time is directed to run from an event actually happening in the testator's lifetime, but assumed by the testator to happen after his death, the direction may be construed so that time will run from the death of the testator (*Evans v. Stratford* (1864), 2 Hem. & M. 142). If no time is fixed, the donee is allowed a reasonable time (*Huckstep v. Mathews* (1686), 1 Vern. 362).

(*g*) *Master v. Willoughby* (1706), 2 Bro. Parl. Cas. 244; *Dawson v. Dawson* (1837), 8 Sim. 346; *Brooke v. Garrod* (1857) 2 De G. & J. 62. In all these cases there was a gift over on non-payment within the time; the mere signification of acceptance was not sufficient to comply with the will



option to the surplus, after deducting the price, on any sale after the testator's death made on a compulsory purchase (*h*) or in an action to administer the testator's estate (*i*). Where two or more options to purchase the same property are given to different donees without any priority, and all are exercised concurrently, the effect may be that all the options fail to take effect (*k*).

SECT. 2.  
Interests  
which may  
be Created  
by Will.

**1046.** A testator who has several properties all having the same description may by his will give one of them to a donee, leaving the choice of that one to the donee (*l*); and generally the testator may give rights to select property to any value or amount (*m*). The fact that the donee is to be able to select may appear either by express words in the will, or by reasonable inference from it (*n*), and where no limit is placed on the right of selection, the court treats the donee as entitled to take the whole property to which the right applies, if he duly shows that such is his choice (*o*).

Rights of  
selection.

If, however, the will shows that the testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, the court is unable to say either from the will itself or from extrinsic evidence (*p*) which of the several

Imperfect  
selection by  
testator.

(*h*) *Re Cant's Estate* (1859), 4 De G. & J. 503, C. A.

(*i*) *Re Kerry, Bocoock v. Kerry, Arnall v. Kerry*, [1889] W. N. 3.

(*k*) See *Huckstep v. Mathews* (1686), 1 Vern. 362, 363; *Jeffrey v. Scott* (1879), 27 Grant (Ontario), 314.

(*l*) *Asten v. Asten*, [1894] 3 Ch. 260, *per* ROMER, J., at p. 262; *Harley v. Moore* (1860), 6 Jur. (N. S.) 883; Co. Litt. 145 a. As to this principle, in the case of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 457.

(*m*) For an example of a right to select land of a certain value, see *Bandon (Earl) v. Moreland*, [1910] 1 I. R. 220. After an unequivocal selection, the donee cannot change and make a fresh selection (*Littledale v. Bickersteth* (1876), 24 W. R. 507); compare p. 601, *post*.

(*n*) *Asten v. Asten*, *supra*, at p. 263; *Marshal's (Grace) Case* (1598), Dyer, 281 a, n. Thus, where a devise is general of ten acres adjoining or surrounding a house, part of a larger quantity, the choice of such ten acres is in the donee (*Hobson v. Blackburn* (1833), 1 My. & K. 571, 575; *Tapley v. Eagleton* (1879), 12 Ch. D. 683 ("two houses in K. street," the testator having three); *Duckmanton v. Duckmanton* (1860), 5 H. & N. 219 ("one close in R. field")). In the case of a gift of a number of shares out of a larger number, some of which are fully paid and others only partly paid, the legatee has an absolute right to select the best shares (*Jacques v. Chambers* (1846), 2 Coll. 435, 441; *Millard v. Bailey* (1866), L. R. 1 Eq. 378; *O'Donnell v. Welsh*, [1903] 1 I. R. 115; Shep. Touch. (ed. Preston) 251), unless the class of shares referred to by the testator can be ascertained by construction of the will (*Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620, C. A.). In *Wilson v. Wilson* (1847), 1 De G. & Sm. 152, on the words of the will, the right of choice was given not to the donee, but to the other persons interested.

(*o*) *Arthur v. Mackinnon* (1879), 11 Ch. D. 385, where JESSEL, M.R., said that, following the words literally, the donee might take the whole with the exception of one article of probably no value, when the maxim *de minimis* would apply; *Re Sharland, Kemp v. Rozey*, [1896] 1 Ch. 517; and see *Cooke v. Farrand* (1816), 7 Taunt. 122; *Kennedy v. Kennedy* (1853), 10 Hare, 438; not followed in *Arthur v. Mackinnon*, *supra*, but distinguished from the latter case and followed in *Re Gillespie, Gillespie v. Gillespie* (1902), 22 New Zealand Law Reports, 74, 76, C. A. (selection after taking possession).

(*p*) *Richardson v. Watson* (1833), 4 B. & Ad. 787; *Blundell v. Gladstone* (1852), 3 Mac. & G. 692; see p. 632, *post*.



SECT. 2.  
Interests  
which may  
be Created  
by Will.

Lapse of right  
of selection.

properties the testator referred to, the gift must fail for uncertainty, and the court cannot, in order to avoid an intestacy, change the will or construe it as giving to the legatee the option of choosing one of the properties (*q*).

Where a right of selection is given to one donee, and the remainder of the property after selection is given to another donee, specifically and not by way of residuary gift, and the right of selection lapses by the death of the first donee in the testator's lifetime, the gift to the second donee also fails (*r*).

## Part III.—Testamentary Capacity.

### SECT. 1.—*Soundness of Mind.*

Soundness  
of mind.

**1047.** It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which time out of mind have been held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature (*a*); but a will is not revoked by the subsequent insanity of the testator (*b*).

Meaning.

In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from participation in that property (*c*). For this purpose it is essential that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it which if the mind had been sound would not have been made (*d*). Perversion of moral feeling does not constitute unsoundness of mind (*e*).

Eccentricity.

Eccentricity alone does not prevent a man from disposing of his property by will (*f*); and though the extravagance of the provisions of a will may be sufficient to place the burden of proving capacity upon the person propounding it, yet it is not in itself conclusive evidence of unsoundness of mind (*g*).

(*q*) *Asten v. Asten*, [1894] 3 Ch. 260, 263, adopted in *Re Oheadle, Bishop v. Holt*, [1900] 2 Ch. 620, C. A., *per* Lord ALVERSTONE, M.R., at p. 623.

(*r*) *Boyce v. Boyce* (1849), 16 Sim. 476.

(*a*) *Hastilow v. Stobie* (1865), L. R. 1 P. & D. 64, 68.

(*b*) *Swinburne on Wills*, Part II., sect. 3, pl. 3; *Forse and Hembling's Case* (1588), 4 Co. Rep. 60 b, 61 b.

(*c*) *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549, 569, citing *Harwood v. Baker* (1840), 3 Moo. P. C. C. 282; and see, generally, title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 403, 404.

(*d*) *Banks v. Goodfellow*, *supra*, *per* COCKBURN, C.J., at p. 565; *Hope v. Campbell*, [1899] A. C. 1.

(*e*) *Frere v. Peacocke* (1846), 1 Rob. Eccl. 442, 456.

(*f*) *Pilkington v. Gray*, [1899] A. C. 401, 407, P. C.

(*g*) *Austen v. Graham* (1854), 8 Moo. P. C. C. 493.

**1048.** Generally speaking, the law presumes sanity, and no evidence is required to prove the testator's sanity if not impeached (*h*). When, however, it is impeached and the whole case is before the court on evidence, the court must pronounce against the validity of the will unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind at the time of execution (*i*).

SECT. I.  
Soundness  
of Mind.

Presumption  
of sanity.

**1049.** The burden of proof therefore that a testator was of sound mind at the date of executing his will is upon the person who sets up the will (*k*); but where habitual insanity does not exist the proof of actual insanity at the time of executing the will must come from those who impeach the will (*l*). The issue of capacity is one of fact (*a*). The burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind (*b*), and in such a case a will should be regarded with great distrust, and every presumption should in the first instance be made against it (*c*); especially where the will is an inofficious one, for the justice or injustice of the disposition may throw some light upon the question of the testator's capacity (*d*).

Proof of  
sanity.

**1050.** Once insanity before the date of the will in question has been established, the burden lies on the party propounding the will to show that it was made after recovery or during a lucid interval (*e*). It is not, however, necessary in order to constitute a lucid interval that the subject thereof should be restored to as vigorous or active a state of intellect as he had enjoyed previously to the visitation of the lunacy (*f*).

Lucid  
interval.

**1051.** Where the testator has been found lunatic by inquisition from a period prior to the execution of the will, this, though not conclusive against the will, is sufficient to require the party propounding it to prove that the testator was of sound mind when the will was executed (*g*).

Lunatics so  
found.

(*h*) *Steed v. Calley* (1836), 1 Keen, 620, 635; see *Sutton v. Sadler* (1857), 5 W. R. 880.

(*i*) *Symes v. Green* (1859), 1 Sw. & Tr. 401, 402; *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398; *Keays v. M'Donnell* (1872), 6 I. R. Eq. 611. As to evidence of insanity, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 406 *et seq.*

(*k*) *Smee v. Smee* (1879), 5 P. D. 84, 91; and see *Longford (Earl) v. Purdon* (1877), 1 L. R. Ir. 75; *Waring v. Waring* (1848), 6 Moo. P. C. C. 341, 355; *Sutton v. Sadler, supra*; *Cleare v. Cleare* (1869), L. R. 1 P. & D. 655, 657.

(*l*) *Chambers and Yatman v. Queen's Proctor* (1840), 2 Curt. 415, 441.

(*a*) *Longford (Earl) v. Purdon, supra*, at p. 79; *Sutton v. Sadler, supra*.

(*b*) *Smee v. Smee, supra*; *Groom v. Thomas* (1829), 2 Hag. Ecc. 433.

(*c*) *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549, 570 (testator subject to delusions).

(*d*) *Harwood v. Baker* (1840), 3 Moo. P. C. C. 282, 291.

(*e*) *Cartwright v. Cartwright* (1793), 1 Phillim. 90, 100; *White v. Driver* (1809), 1 Phillim. 84, 88; *Nichols and Freeman v. Bins* (1858), 1 Sw. & Tr. 239; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 407.

(*f*) *Ex parte Holyland* (1805), 11 Ves. 10, 11; *Creagh v. Blood* (1845), 8 I. Eq. R. 434, 439.

(*g*) *Bannatyne v. Bannatyne* (1852), 2 Rob. Ecc. 472, 477; *In the Goods of Watts* (1837), 1 Curt. 594; *Snook v. Watts* (1848), 11 Beav. 105.

## SECT. 1.

Soundness  
of Mind.

## Delusions.

**1052.** The true criterion of insanity is the existence or non-existence of delusion, that is, the belief in facts which no rational person could believe (*h*).

The existence of a delusion compatible with the retention of the general powers and faculties of the mind is not, however, sufficient to overthrow the will, unless the delusion is such as was calculated to influence the testator in making it (*i*). Thus, the mere existence of a delusion in the mind of a person making a disposition is not sufficient to avoid it, even though connected with the subject-matter of the disposition (*k*). It is a question of fact whether the delusion affected the disposition (*l*).

## Senile decay.

**1053.** In cases where unsoundness of mind arises from want of intelligence occasioned by defective organisation, or by supervening physical infirmity, or by the decay of advancing age, as distinguished from mental derangement, such defect of intelligence is also a cause of incapacity. In these cases, however, though the mental power may be reduced below the ordinary standard, yet if there is sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains (*m*).

SECT. 2.—*Infants.*

## Infants.

**1054.** Except in certain special cases (*n*), no will made by any person under the age of twenty-one years is valid (*o*).

SECT. 3.—*Married Women.*Statutory  
power of  
disposition.

**1055.** A woman married on or after the 1st January, 1883, can dispose by will of all her property, whether real or personal, as if she were a *feme sole* (*p*). A woman married before the 1st January,

(*h*) *Dew v. Clark* (1826), 3 Add. 79, 90; *Boughton v. Knight* (1873), L. R. 3 P. & D. 64, 67; *Pilkington v. Gray*, [1899] A. C. 401, P. C.; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 392, 393.

(*i*) *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549, 571, followed in *Murfett v. Smith* (1887), 12 P. D. 116; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 396.

(*k*) *Jenkins v. Morris* (1880), 14 Ch. D. 674, C. A., disapproving the principle laid down in *Waring v. Waring* (1848), 6 Moo. P. C. C. 341, and *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398, that once a delusion has been shown to exist the burden of proving capacity is on the person insisting on the disposition.

(*l*) See *Dew v. Clark*, *supra*, where the delusion was held to avoid the will.

(*m*) *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549, 566; see *Osmond v. Fitzroy* (1731), 3 P. Wms. 129.

(*n*) As to these exceptions, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161, 162; INFANTS AND CHILDREN, Vol. XVII., pp. 49, 104; ROYAL FORCES, Vol. XXV., p. 94, note (*q*). As to the power once possessed by an infant to appoint a guardian by will for his infant children, see title INFANTS AND CHILDREN, Vol. XVII., p. 59, note (*i*).

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 7. It seems that this provision does not bind the King, who in legal contemplation is never a minor; see title CONSTITUTIONAL LAW, Vol. VI., p. 364.

(*p*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1; see title HUSBAND AND WIFE, Vol. XVI., p. 380. For a form of will of a married woman, see Encyclopædia of Forms and Precedents, Vol. XV., p. 443.



1883, is enabled to dispose by will of property to which her title accrues after that date, including any wages, earnings, money, or property gained or acquired by her (*q*).

SECT. 3.  
Married  
Women.

The statutory provision (*r*) that a will is to be construed to speak from the death of the testator applies to the will of a married woman dying after the 5th December, 1893, made during coverture, either before or after that date (*s*), whether she is or is not entitled to any separate property at the time of making it, and such a will does not require to be re-executed or republished after the death of her husband (*t*). Her will executed during coverture operates on all the property she has at her death (*u*).

**1056.** Irrespective of statute, a married woman can dispose by will of property to which she is entitled as executrix so far as to appoint an executor to the original testator for the purpose of continuing the chain of representation (*a*); of personal estate, not settled as her separate property, if her husband consents to the particular will, and survives her, and does not retract the consent before probate (*b*); of real and personal property settled in equity as her separate property and the savings thereof and rents and profits of real estate to which she is entitled (*c*); and of real and personal property over which she has a power of appointment (*d*).

Power of  
disposition  
apart from  
statute.

#### SECT. 4.—*Aliens*.

**1057.** Real and personal property of every description may, since the 12th May, 1870, be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*e*). This provision does not, however, apply to property to which any person has or may become entitled by reason of any disposition made before that date, or in pursuance of any devolution by law on the death of any person dying before that date (*f*).

Aliens.

#### SECT. 5.—*Convicts*.

**1058.** There seems never to have been any personal incapacity to prevent a convict from making a will, but under the old law of forfeiture for treason and felony and of attainder the convict

Convicts.

(*q*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5. As to a married woman's powers of disposition before 1883, see title HUSBAND AND WIFE, Vol. XVI., pp. 348 *et seq.*; and as to her power of disposing of personalty with her husband's consent, see *ibid.*, p. 325, note (*k*); *Elliot v. North*. [1901] 1 Ch. 424.

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24; see pp. 691 *et seq.*, *post*.

(*s*) *Re Wylie, Wylie v. Moffat*, [1895] 2 Ch. 116.

(*t*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3. As to the law in the case of married women dying before this date, see title HUSBAND AND WIFE, Vol. XVI., p. 380, note (*g*).

(*u*) *Re James, Hole v. Bethune*, [1910] 1 Ch. 157.

(*a*) *Scammell v. Wilkinson* (1802), 2 East, 552.

(*b*) *Fettiplace v. Gorges* (1789), 1 Ves. 46; *Braham v. Burchell* (1826), 3 Add. 243, 263; *In the Goods of Crofts* (1869), L. R. 2 P. & D. 18.

(*c*) *Brownrigg v. Pike* (1882), 7 P. D. 61.

(*d*) See title HUSBAND AND WIFE, Vol. XVI., p. 386.

(*e*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2.

(*f*) *Ibid.*, s. 2 (3); see title ALIENS, Vol. I., p. 307.

SECT. 5.  
Convicts.

ceased to have any property on which such will could operate (*g*). Since the 4th July, 1870, forfeiture for treason and felony has been abolished (*h*), and the convict's property may be vested in an administrator (*i*); but it seems that the convict has full testamentary capacity (*k*).

## Part IV.—Capacity to Benefit under a Will.

### SECT. 1.—*In General.*

Ascertain-  
ment of the  
donee

**1059.** There must be a donee capable of being made the owner of the thing given, at the time when the gift is to vest in interest (*l*). As a general rule, whoever may be a grantee under a gift *inter vivos*, whether in a conveyance at common law, under the Statute of Uses or otherwise, may be a donee under a will (*m*); and the testator is not restricted to donees who are in existence at the date of the will, though the donee must always be described with certainty, or must be capable of being ascertained on evidence which is admissible (*n*). The description may, if the will requires, or allows,

(*g*) See Bl. Com., p. 499, n.; Williams, Executors and Administrators, 10th ed., pp. 50, 51. As to probate of the will of a *felo de se*, see *In the Goods of Bailey* (1861), 2 Sw. & Tr. 156.

(*h*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23).

(*i*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; PRISONS, Vol. XXIII., pp. 261 *et seq.*

(*k*) See Williams, Executors and Administrators, 10th ed., pp. 50, 51; *Re Harris, Ex parte Graves* (1881), 19 Ch. D. 1; *In the Estate of Crippen*, [1911] P. 108.

(*l*) *Brown v. Burdett* (1882), 21 Ch. D. 667; and see S. C. (1888), 40 Ch. D. 244, C. A., *per KAY, J.*, at p. 256 (direction to block up a house for twenty years). Gifts to non-existent persons or corporations by name or description, *tanquam in esse*, are void for want of proper objects (1 Preston, Abstracts of Title, pp. 128, 129; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 122). Gifts to persons for the benefit of animals or the maintenance of inanimate objects are in some cases valid; see titles CHARITIES, Vol. IV., p. 116; PERPETUITIES, Vol. XXII., p. 297, note (*r*); and as to the lawful objects of a trust, see title TRUSTS AND TRUSTEES, p. 25, *ante*.

(*m*) Shep. Touch. (ed. Preston) 414. As to competency to take a gift *inter vivos*, see title GIFTS, Vol. XV., p. 404.

(*n*) For examples of gifts void for uncertainty in this respect, see *Cheyney's (Lord) Case* (1591), 5 Co. Rep. 68 a, 68 b; *Webb's Case* (1607), 1 Roll. Abr. 609 (twenty of the poorest of the testator's kindred); *Beal v. Wyman* (1650), Sty. 240 (the heirs male of any of the testator's sons or next of kin); *Bate v. Amherst* (1663), T. Raym. 82; *Strode v. Russel* (1708), 2 Vern. 621, *per TRACY, J.*, at p. 624 (to one of the sons of J. S., who had several sons); *Doe d. Hayler v. Joinville* (1802), 3 East, 172 (to A.'s family, where no certain meaning could be given to the words); *Doe d. Smith v. Fleming* (1835), 2 Cr. M. & R. 638 (to the younger branches of the family of W., where several interpretations were equally possible; compare *Doe d. Wright v. Plumtre* (1820), 3 B. & Ald. 474, 480); *In the Goods of Baylis* (1862), 8 Jur. (N. S.) 546 (appointment of A. executor, with any two of the testator's sons); *In the Goods of Blackwell* (1877), 2 P. D. 72 (appointment of one of the testator's sisters to be executrix); *Smithwick v. Hayden* (1887), 19 L. R. Ir. 490, C. A. ("any female niece or female relative of A. provided she marries a person of the name of B., residing in C., and . . . a Roman Catholic"); *Re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, C. A. (gift to "the children of the deceased son (named

be acquired by the donee after the date of the will on any future event and contingency, or, it seems, by the testator's own act in the ordinary course of his affairs or in the management of his property, or by the acts of third persons (*o*). There may thus be a gift to a child *en ventre sa mère* (*p*), or other person unborn or not ascertained at the date of the will, or to a class, that is to say to persons who are intended (*q*) to be ascertained as those composing a described fluctuating (*r*) body of persons (*s*) at a particular future time (*t*), and are to take one divisible subject in certain proportionate shares (*u*), the amount of which depends on the ascertainment of all those persons (*w*). In the case, however, of such gifts to take effect in the future, the rules of law directed to prevent perpetuity must be observed (*x*).

SECT. 1.  
In General.

## SECT. 2.—Incapacity of Various Persons.

**1060.** The common law disability of aliens to take under a devise of land has now been removed by statute (*a*). Aliens.

**1061.** The attesting witnesses, and the husbands or wives of the attesting witnesses, are under a disability, and may not take under a gift contained in the testamentary instrument so attested (*b*). Attesting witnesses.

**1062.** The character of the estate taken by a person who is at once the donee under the will and the heir of the testator is now by statute that of an estate by purchase and not by descent (*c*). Heir.

B.) of my father's sister"; there were three such sons; no evidence to clear up the ambiguity appears to have been tendered); and see *Pyot v. Pyot* (1749), 1 Ves. Sen. 335, 337, citing *Huckstep v. Mathews* (1686), 1 Vern. 362.

(*o*) *Stubbs v. Sargon* (1837), 2 Keen, 255, per Lord LANGDALE, M.R., at p. 269; S. C. on appeal (1838), 3 My. & Cr. 507, per Lord COTTENHAM, L.C., at p. 511 (partners, or the persons to whom testatrix might have disposed of her business). The act must not be testamentary in character, unless the proper formalities are observed; compare the cases cited in note (*n*), p. 636, *post*.

(*p*) *Marsh v. Kirby* (1635), 1 Rep. Ch. 41 [76]; *Burdet v. Hopegood* (1718), 1 P. Wms. 486, 487 (gift over in case testator should leave no son at the time of his death, held not to have taken effect owing to birth of posthumous son); *Mogg v. Mogg* (1816), 1 Mer. 654, 705; *Blackburn v. Stables* (1814), 2 Ves. & B. 367. As to gifts to illegitimate children *en ventre sa mère*, see p. 543, *post*. As to the construction of certain gifts under which a child *en ventre* is considered as living, see p. 740, *post*.

(*q*) Whether a gift is a class gift is a question of construction of the will, and of intention (*Kingsbury v. Walter*, [1901] A. C. 187, 190, 193).

(*r*) A gift to persons all *nominatim*, or all so described as to be fixed at the time of gift, and so that there is no fluctuation, is not a class gift (*Cruse v. Howell* (1858), 4 Drew. 215; see *Dimond v. Bostock* (1875), 10 Ch. App. 358, 361); but as to cases where some members are so referred to, see p. 615, *post*.

(*s*) As to what descriptions constitute the donees into a class, see p. 614, *post*.

(*t*) As to the canons of construction as to the time of ascertaining a class, see pp. 616, 714, *post*. A gift cannot be made to benefit the members of a non-charitable fluctuating body indefinitely in time; see p. 545, *post*.

(*u*) *Pearks v. Moseley* (1880), 5 App. Cas. 714, 723.

(*w*) *Bentinck v. Portland (Duke)* (1877), 7 Ch. D. 693, 698.

(*x*) See title PERPETUITIES, Vol. XXII., pp. 293 *et seq*.

(*a*) See title ALIENS, Vol. I., pp. 306, 307.

(*b*) See p. 556, *post*.

(*c*) See title DESCENT AND DISTRIBUTION, Vol. XI., p. 8.



## SECT. 2.

Incapacity  
of Various  
Persons.

Wife.

Persons dead,  
and their  
estates.

**1063.** A testator's wife has from early times been capable of taking under his will (*d*).

**1064.** In general a gift by will cannot be made to a person who is dead at the date of the will (*e*), and the gift fails if the donee is dead at the death of the testator, even though he is alive at the date of the will (*f*); the representatives of such persons take no interest under such gifts. The burden of proof that the donee was alive at the death of the testator so as to be capable of taking benefits under the will is on those deriving title under the donee (*g*).

A gift may well be made, however, to form part of the estate of a deceased person (*h*); and further, even where the donee predeceases the testator, in certain cases by statute (*i*), and in every case by the addition of a sufficient substitutional gift (*k*), the property may pass as if the donee had survived the testator, or may be made to form part of the donee's estate.

Roman  
Catholics etc.

**1065.** Individual Roman Catholics are no longer under a disability to take any gift (*l*); and the fact that a donee is a Jesuit or belongs to any society under vows as to the property of its members does not affect his right to take a benefit (*m*).

Monasteries  
etc.

**1066.** A testator cannot give property by will to any superstitious uses (*n*); nor, it seems, to any order or society of the Church of Rome bound by religious or monastic vows (*o*), as distinct from the individual members of such orders (*p*); or for or to any other purpose or object forbidden by statute or by public policy (*q*).

(*d*) Bract. fo. 94 (Rolls Series, Vol. II., pp. 66, 67); Littleton's Tenures, s. 168; *Anon.* (1533), Bro. (N. C.) pl. 55. As to the rule in conveyances by deed, see title HUSBAND AND WIFE, Vol. XVI., p. 391.

(*e*) *Re Smith's Trusts* (1875), 5 Ch. D. 497, n., 498, n.; *Kelsey v. Ellis* (1878), 38 L. T. 471, 473.

(*f*) As to lapse, see pp. 607 *et seq.*, *post*.

(*g*) *Wing v. Angrave* (1860), 8 H. L. Cas. 183; *Underwood v. Wing* (1855), 4 De G. M. & G. 633; *Re Phené's Trusts* (1870), 5 Ch. App. 139; *Re Lewes' Trusts* (1871), 6 Ch. App. 356; *Re Walker* (1871), 7 Ch. App. 120; *Re Benjamin, Neville v. Benjamin*, [1902] 1 Ch. 723; *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181; and see *Dowley v. Winfield* (1844), 14 Sim. 277; *Mason v. Mason* (1816), 1 Mer. 308. As to the presumption of the fact of death from absence without being heard of for seven years, see title EVIDENCE, Vol. XIII., pp. 500 *et seq.*

(*h*) See p. 609, *post*.

(*i*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 32, 33; see p. 610, *post*.

(*k*) As to the meaning of substitutional gifts, see p. 608, *post*.

(*l*) The disability was removed by the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 23.

(*m*) *Re Metcalfe's Trusts* (1864), 10 L. T. 78, C. A.; *Galwey v. Barden*, [1899] 1 I. R. 508.

(*n*) See title CHARITIES, Vol. IV., p. 120.

(*o*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 28; Roman Catholic Charities Act, 1860 (23 & 24 Vict. c. 134); *Cussen v. Hynes*, [1906] 1 I. R. 539, C. A.; see *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937 (Franciscans); and see title CHARITIES, Vol. IV., p. 122.

(*p*) *Re Wilkinson's Trusts* (1887), 19 L. R. Ir. 538; *Roche v. M'Dermott*, [1901] 1 I. R. 394; *Bradshaw v. Jackman* (1887), 21 L. R. Ir. 12.

(*q*) *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 241, 242; for examples, see title CHARITIES, Vol. IV., pp. 122, 123. As to fraudulent devises, splitting an interest in order to create votes, see title ELECTIONS, Vol. XII., p. 153. As to gifts to illegitimate children, see p. 542, *post*; as to public policy in relation to conditions, see pp. 583, 585, *post*.

**1067.** A donee who has obtained a gift by fraud or undue influence is liable to have the gift set aside (*r*). Similarly, where a legacy is given to a person under a particular character which he has falsely assumed for the purpose of obtaining the bounty, and which alone is shown or is inferred to be the motive of the bounty, the law does not permit the donee to avail himself of the legacy on the ground of fraud (*s*). In these cases the question must be raised in the court of probate (*t*).

**1068.** In general, on grounds of public policy (*u*), a person who is proved (*a*) to be guilty of the murder (*b*) or manslaughter (*c*) of the

SECT. 2.  
Incapacity  
of Various  
Persons.

Donees  
obtaining  
gift by fraud.

Donee killing  
testator.

(*r*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 179. As to gifts to the testator's solicitor, see title SOLICITORS, Vol. XXVI., p. 752.

(*s*) *Kennell v. Abbott* (1799), 4 Ves. 802, 809, explained in *Pratt v. Mathew* (1856), 22 Beav. 328; *Re Boddington, Boddington v. Clariat* (1883), 22 Ch. D. 597, 602; *Wilkinson v. Joughin* (1866), L. R. 2 Eq. 319; and see *M'Kenna v. Everitt* (1838), 1 Beav. 134. On the other hand, in *Giles v. Giles, Penfold v. Penfold* (1836), 1 Keen, 685; *Rishton v. Cobb* (1839), 5 My. & Cr. 145; *Re Pitts* (1859), 29 L. J. (CH.) 168; *Turner v. Brittain* (1863), 3 New Rep. 21; and *Re Boddington, Boddington v. Clariat*, *supra*, the assumption of the false character or the concealment of the truth was held not to have been practised for the purpose of obtaining the bounty, and the gifts were not set aside.

(*t*) *Meluish v. Milton* (1876), 3 Ch. D. 27, C.A., following *Allen v. McPherson* (1845), 1 H. L. Cas. 191. For cases where the gift has been obtained on a secret understanding between the testator and the donee, see title TRUSTS AND TRUSTEES, p. 21, *ante*.

(*u*) *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, *per* FRY, L.J., at p. 156: "it appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour." The rules, similar to that in the text, adopted in other systems of jurisprudence in general depend on the principle that the donee is unworthy to take as a beneficiary (*erbunwürdig*), and that the deceased would presumably have disinherited his slayer or revoked the bequest to him (see Code Napoleon, ss. 727, 901; German Bürgerliches Gesetzbuch, ss. 2339—2344; Wilson, Digest of Anglo-Muhammadan Law, ss. 267, 275; *Lundy v. Lundy* (1895), 24 Canada Supreme Court Reports, 650, 654), but this principle is not applicable to English law (see note (*i*), p. 540, *post*). The rule laid down in *Cleaver v. Mutual Reserve Fund Life Association*, *supra*, is, it appears, restricted to the assertion of a claim by the criminal or his representatives, and third parties *bonâ fide* acquiring a title to personal property through the criminal may in some cases have protection; see titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 511—513; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.* (restitution of property); PERSONAL PROPERTY, Vol. XXII., p. 395 (rights annexed to mere possession); SALE OF GOODS, Vol. XXV., p. 198 (revesting of property in stolen goods).

(*a*) The incapacity is said not to depend on the trial or conviction of the donee, but on the fact of murder or manslaughter itself (see *Ellerson v. Westcott* (1895), 88 Hun's Reports (New York), 389, 393); the conviction is evidence of the fact (*In the Estate of Crippen*, [1911] P. 108, 112). If there is any possibility of a question whether the donee has been guilty of the crime, that must be tried in court, but proof of a conviction, upheld by the Court of Criminal Appeal, renders the fact "conclusively proved" and "indisputable" (*In the Estate of Hall, Hall v. Knight and Baxter*, [1914] P. 1, C. A., *per* COZENS-HARDY, M.R., at pp. 4, 7).

(*b*) *In the Estate of Crippen*, *supra*; and see *Riggs v. Palmer* (1889), 115 New York Reports, 506 (murder, where the motive was to prevent revocation of will in murderer's favour).

(*c*) *In the Estate of Hall, Hall v. Knight and Baxter*, *supra*; and see



SECT. 2.  
Incapacity  
of Various  
Persons.

No person  
unworthy  
to take.

testator, or, it seems, to have caused the death of the testator by any act which is a felony or misdemeanour (*d*), cannot claim to take (*e*) under the testator's will (*f*) as against other persons claiming under the testator (*g*); but, it appears, this is not the case if, for example, the will is made in the interval between the wound and the death (*h*).

**1069.** There is, however, no incapacity merely on account of the unmeritorious character of the donee, as distinct from some invalidity in the intention of the testator (*i*).

*Lundy v. Lundy* (1895), 24 Canada Supreme Court Reports, 650. The motives and degree of moral guilt of the crime are not considered to be important; see the latter case in the court below, *sub nom. McKinnon v. Lundy* (1894), 21 Ontario Court of Appeal Reports, 560, where the distinction was taken; *In the Estate of Hall, Hall v. Knight and Baxter*, [1914] P. 1, C. A., *per* HAMILTON, L.J., at p. 7.

(*d*) See *In the Estate of Hall, Hall v. Knight and Baxter*, *supra*, *per* COZENS-HARDY, M.R., at p. 2. As to how far this may differ from manslaughter, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 580 *et seq.* It appears that the rule does not apply to excusable or justifiable homicide (*Lundy v. Lundy*, *supra*, at p. 652).

(*e*) As to the power of felons in general to take, see p. 541, *post*. In *In the Estate of Hall, Hall v. Knight and Baxter*, *supra*, it was assumed that the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), had nothing to do with the matter. There appears, however, to be no reported case before that Act in which the Crown, owing to the disability in question, lost property acquired by the felon at the time of conviction, and otherwise forfeitable to the Crown. In *Prince of Wales, etc. Association Co. v. Palmer* (1858), 25 Beav. 605 (referred to in *In the Estate of Crippen*, [1911] P. 108, 115, n., as deciding a point similar to that in question), the Crown disclaimed, and the decision is grounded on fraud.

(*f*) It appears from certain American decisions that there is no similar restriction on the capacity to take on the death of another person where the right to take is conferred by statute without qualification, such as the right of one of the next of kin under the Statutes of Distribution (see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1 *et seq.*), who may take even where the intestate is murdered by him (*Re Carpenter's Estate* (1895), 170 Pennsylvania Reports, 203 (parricide); *Re Johnson's Estate* (1905), 29 Pennsylvania Superior Court Reports, 255 (wife murderer)); or such as a statutory right to take as heir (*Shellenberger v. Ransom* (1894), 59 North Western Reporter, 935, C. A.), or a right to dower (*Owens v. Owens* (1888), 100 North Carolina Reports, 242); but there may be a restriction in other cases of common law rights (*Box v. Lanier* (1904), 79 South Western Reporter, 1042 (husband not entitled to take murdered wife's choses in action)); the point appears to have been assumed also in *In the Estate of Crippen*, *supra*.

(*g*) It appears that the property goes to the persons who under the will would have been entitled thereto had the donee died before the testator; see *In the Estate of Crippen*, *supra*.

(*h*) "It cannot be denied that a will by any one in favour of the person who killed him is good, if made in the interval between the wound and the death" (*Lundy v. Lundy*, *supra*, *per* TASCHEREAU, J., at p. 653). Apparently, the effect of revival (see p. 575, *post*) or republication (see p. 577, *post*) after the wound would be the same.

(*i*) *Thellusson v. Woodford, Woodford v. Thellusson* (1799), 4 Ves. 227, 312, 329 (a will is not affected "on account of the unmeritorious object in the view of the testator"); S. C. (1805), 11 Ves. 112, 145, H. L. (regret that such a will should be maintained "goes no farther than as a motive to see whether . . . it is an attempt to make an illegal disposition"). In the civil law, as administered by the Ecclesiastical Courts of Probate, it appears to have been the rule that a legacy to a heretic, apostate, traitor, felon, excommunicate person, outlawed person, bastard, unlawful college, libeller, sodomite, or usurer was void (2 Swinburne, Testaments, 7th ed.,



**1070.** The capacity to be a donee under a will is distinct from the capacity to receive the gift. Thus, an infant may be a donee under a will, but cannot give the executor a receipt for the gift, unless expressly or impliedly authorised to do so by the testator (*k*). Similarly, a traitor or felon (not having killed the testator (*l*)) may be a donee, but the property and the right to give a receipt for the gift may be vested in the administrator of his property (*m*). A married woman can take under a will, and, except in cases where her husband has rights in the gift under the old law, can give a receipt for the gift (*n*). A person of unsound mind may be a donee (*o*); but an executor having notice of the unsoundness of mind cannot get a good receipt from such a person himself (*p*).

Where the disability to receive the gift which is in question arises from the principles or custom or positive law of a foreign

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Incapacity  
of Various  
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receive gift.

Part V.), but this was not the case at common law (Shep. Touch. (ed. Preston) 414; as to felons, see the text, *infra*; as to bastards, see p. 542, *post*; and as to institutions, see pp. 543 *et seq.*, *post*). The crime of a person named as executor, however, may be a special circumstance for refusing him a grant of probate, under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73 (*In the Estate of Crippen*, [1911] P. 108, 111).

(*k*) See titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 271; INFANTS AND CHILDREN, Vol. XVII., pp. 75, 76, where the question whether a parent or guardian can give a receipt for an infant's legacy is also considered. In the case of an infant legatee the executors can obtain a good discharge by payment into court under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42, re-enacting the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 32, and other subsequent enactments, now repealed (*Re Salaman, De Pass v. Sonnenthal*, [1907] 2 Ch. 46). Mere appropriation and accumulation of the dividends may not exonerate the residue of the estate (*Rimell v. Simpson* (1848), 18 L. J. (CH.) 55); *Re Salaman, De Pass v. Sonnenthal*, *supra*), although by this means the executors may in a proper case become themselves free from liability (*Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226, 233, C.A.). For a form of legacy to an infant, see Encyclopædia of Forms and Precedents, Vol. XV., p. 425.

(*l*) See pp. 539, 540, *ante*.

(*m*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 9, 10; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; PRISONS, Vol. XXIII., p. 261.

(*n*) See title HUSBAND AND WIFE, Vol. XVI., p. 348.

(*o*) In the case of a conditional gift the court has jurisdiction to order the committee to do for the lunatic whatever is necessary to comply with the conditions imposed on him (*Re Sefton (Earl) (a Person of Unsound Mind)*, [1898] 2 Ch. 378, 386, C.A.). The lunacy, however, may be an act of God preventing performance, and the lunatic's representatives may take on his death free from the condition if it is a condition subsequent (*Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 749, C.A.).

(*p*) The executors may obtain a discharge by payment into court in the Chancery Division; see *Re Parker's Will* (1888), 39 Ch. D. 303, C.A.; title TRUSTS AND TRUSTEES, p. 175, *ante*. As to payments out of court in the Chancery Division for the benefit of the lunatic, see *Re Upfull's Trust* (1851), 3 Mac. & G. 281; *Re Irby* (1853), 17 Beav. 334. not followed in *Re Macfarlane* (1862), 2 John. & H. 673; *Re Law* (1861), 7 Jur. (N. S.) 410; and title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 411. If the executors in proper time honestly appropriate and set apart the legacy and invest it and accumulate the dividends after appropriation, they are free from responsibility for the legacy, in the case of an adult legatee of unsound mind (*Pothecary v. Pothecary* (1848), 2 De G. & Sm. 738, not following *Rimell v. Simpson*, *supra*). As to the authority of a committee or quasi-committee appointed by the court, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 432 *et seq.*

SECT. 2.  
Incapacity  
of Various  
Persons.

Incapacity  
imposed by  
foreign law.  
When  
illegitimate  
children etc.  
may take.

Future  
illegitimate  
children.

References  
to paternity.

country, especially of a penal nature, it is not regarded by the English court (*q*).

SECT. 3.—*Illegitimate Children.*

**1071.** A doubt may arise whether the illegitimate children or other illegitimate relatives of the testator or a named person take under a gift in a will. The question depends upon, first, whether the words of the will describing the donees indicate such children or relatives (*r*), which is a matter of construction of the will (*s*); and, secondly, whether they are such persons as the law allows to be provided for in this manner.

**1072.** It is a rule of law grounded on public policy that gifts cannot be made by will to the illegitimate children or other illegitimate relatives of any person, who are not born or begotten at the death of the testator, by a description expressly or impliedly referring to them as such (*t*). In the case of a gift to the future illegitimate children of a woman, without further description, this rule is the only restriction in this respect (*u*).

Further, there cannot be a valid gift to an illegitimate child not alive at the date of the will, and described only by reference to the fact of its paternity (*w*). Where, however, the child is described expressly or impliedly by reference to the reputation of its paternity (as in the case of a gift to the children which a particular woman is reputed to have by a particular man), the gift is good, provided that the child in question has acquired the reputation (*a*) of such paternity at the testator's death (*b*).

(*q*) *Worms v. De Valdor* (1880), 49 L. J. (CH.) 261, followed in *Re Selot's Trust*, [1902] 1 Ch. 488 (both cases as to the appointment of a *conseil judiciaire* of a French *prodigue*, where, however, the foreign law did not vest the property of the *prodigue* in the *conseil judiciaire*); see titles ACTION, Vol. I., p. 17; CONFLICT OF LAWS, Vol. VI., pp. 283, 284.

(*r*) A gift to illegitimate children living at the date of the will, and clearly referred to, is valid; see *Metham v. Devon (Duke)* (1719), 1 P. Wms. 529; *Barnett v. Tuquell* (1862), 31 Beav. 232; *Bentley v. Blizzard* (1858), 4 Jur. (N. S.) 652. Thus, illegitimate children living at the date of the will can take under a gift to children "legitimate or otherwise" (*Howarth v. Mills* (1866), L. R. 2 Eq. 389), or to "the children of A. by her putative husband or any other person" (*Re Brown's Trust* (1873), L. R. 16 Eq. 239). It is sufficient if the children are referred to by name (*Rivers's Case* (1737), 1 Atk. 410).

(*s*) As to the presumptions in construing gifts to "children" and other relatives, and the cases in which illegitimate relatives may take under such gifts, see p. 735, *post*.

(*t*) *Hill v. Crook* (1873), L. R. 6 H. L. 265, 275, 278, 280, 285; *Crook v. Hill* (1876), 3 Ch. D. 773; *Holt v. Sindrey* (1868), L. R. 7 Eq. 170. As to this rule in the case of deeds, see *Blodwell v. Edwards* (1596), Cro. Eliz. 509, commented on in *Occleston v. Fullalove* (1874), 9 Ch. App. 147, 165, 171; *Ebborn v. Fowler*, [1909] 1 Ch. 578, C. A.

(*u*) *Re Hastie's Trusts* (1887), 35 Ch. D. 728; *In the Estate of Frogley*, [1905] P. 137; *Re Loveland, Loveland v. Loveland*, [1906] 1 Ch. 542.

(*w*) *Re Bolton, Brown v. Bolton* (1886), 31 Ch. D. 542, C. A.; *Re Du Bochet, Mansell v. Allen*, [1901] 2 Ch. 441; overruled, but on the question of construction only, in *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254, C. A. As to children *en ventre sa mère*, see note (*d*), p. 543, *ante*.

(*a*) Reputation in such cases, it appears, means not that of rumour or fame spread by gossip, but that which springs from acknowledgment, conduct and life (*Occleston v. Fullalove*, *supra*, at p. 164).

(*b*) *Metham v. Devon (Duke)*, *supra*; *Occleston v. Fullalove*, *supra*. Evidence can be admitted only for the purpose of ascertaining who had



**1073.** Subject to the above rules, a sufficiently designated illegitimate child who is alive (*c*) or *en ventre sa mère* at the date of the will (*d*), or is alive (*e*) or *en ventre sa mère* at the date of the testator's death (*f*), may take under the will (*g*).

The fact that all the intended donees, including those excluded by these rules, were to take as a class does not prevent the gift taking effect in favour of those who are not excluded (*h*).

SECT. 4.—*Corporations, Institutions, and Societies.*

**1074.** A gift by will (*i*) of land (*k*) to any corporation is voidable (*l*) upon the exercise by the Crown or a mesne lord of a right of entry, unless the gift is authorised by a licence in mortmain from the Crown (*m*) or by a statute (*n*) for the time being in force (*o*).

SECT. 3.  
Illegitimate  
Children.

General rule.  
Gift to class.

Gifts of land  
to corpora-  
tions.

acquired such reputation (*Wilkinson v. Adam* (1813), 1 Ves. & B. 422, 466, 467, affirmed (1823), 12 Price, 470, H. L.; *Swaine v. Kennerley* (1813), 1 Ves. & B. 469).

(*c*) See note (*r*), p. 542, *ante*.

(*d*) *Gordon v. Gordon* (1816), 1 Mer. 141; *Evans v. Massey* (1819), 8 Price, 22 (cases of express gifts to child of a woman was pregnant); *Occleston v. Fullalove* (1874), 9 Ch. App. 147 (gift to children of woman which should be reputed to be testator's); *Re Loveland, Loveland v. Loveland*, [1906] 1 Ch. 542 (gift to children of a woman living at testator's death). In *Earle v. Wilson* (1811), 17 Ves. 528, and *Pratt v. Matthew* (1856), 22 Beav. 328, the descriptions referred to the paternity, and the person concerned was excluded.

(*e*) *Occleston v. Fullalove*, *supra*, overruling on this point *Medworth v. Pope* (1859), 27 Beav. 71, *Howarth v. Mills* (1866), L. R. 2 Eq. 389, and *Lepine v. Bean* (1870), L. R. 10 Eq. 160; *Perkins v. Goodwin*, [1877] W. N. 111.

(*f*) *Crook v. Hill* (1876), 3 Ch. D. 773. It has been said that such a child may acquire the reputation of a certain paternity (*Re Connor* (1845), 2 Jo. & Lat. 456, *per* SUGDEN, L.C., at p. 460; *Pratt v. Mathew*, *supra*, *per* ROMILLY, M.R., at p. 339; but see *Occleston v. Fullalove*, *supra*, *per* Lord SELBORNE, L.C., at p. 153, *per* JAMES, L.J., at p. 158, and *per* MELLISH, L.J., at p. 169; *Re Bolton, Brown v. Bolton* (1886), 31 Ch. D. 542, C. A., *per* FRY, L.J., at pp. 549, 553, where the child was considered to be described by reference to the fact of paternity, and therefore could not take). For a form of will providing for children of a testator not legally married, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 479.

(*g*) So long as the provision is limited to children *in esse* when the document takes effect it is more in accordance with public policy that provision should be made for them than that such a provision should be beyond the scope of the law and the offspring should become a burden on public funds (*Re Loveland, Loveland v. Loveland*, *supra*, *per* SWINFEN EADY, J., at p. 548; *O'Loughlin v. Bellew*, [1906] 1 I. R. 487, 493).

(*h*) *Hill v. Crook* (1873), L. R. 6 H. L. 265, 278; *Ebberrn v. Fowler*, [1909] 1 Ch. 578, C. A., overruling *Re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573, 576.

(*i*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 1, 10 (i.), (ii.). The term "assurance" used in *ibid.*, s. 1, is defined by *ibid.*, s. 10 (i.), (ii.), to include a will or codicil.

(*k*) As to the meaning of "land," see Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3; title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*l*) See title CORPORATIONS, Vol. VIII., pp. 369, 370.

(*m*) *Ibid.* For form of petition for licence, see *Encyclopædia of Forms and Precedents*, Vol. III., p. 434; for the practice on such petitions, see *ibid.*, Vol. XII., p. 579, n.

(*n*) For instances where corporations are expressly authorised by statute to hold land without licence in mortmain, see title CHARITIES, Vol. IV., pp. 137 *et seq.*

(*o*) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1. As



SECT. 4. Corporations, Institutions, and Societies.

Statutory provisions.

How far mortmain licence required.

Gifts of personal property.

**1075.** Devises to certain corporations (*p*) or certain kinds of corporations (*q*) are authorised by special statutes, and the general provisions as to assurances in mortmain (*r*) do not apply to assurances (including wills) of land limited in amount for certain specified purposes (*s*).

The statute enabling devises to be made to charitable uses has not the effect of dispensing with a licence in mortmain in the case of a devise to a charitable corporation (*t*). It follows that land devised to a corporation for charitable uses must be sold unless the corporation is exempt from the mortmain restrictions (*a*).

Where a corporation is empowered to acquire and hold lands in mortmain, it seems that a landowner may alien his land to the corporation without a licence for that purpose (*b*). A devise to a company incorporated under the Companies (Consolidation) Act, 1908 (*c*), by a testator not licensed to alien lands in mortmain is accordingly valid (*d*).

**1076.** Personal property of every kind and to any amount may be bequeathed to corporations (*e*).

to assurances to corporations and the effect of alienation in mortmain generally, see titles CORPORATIONS, Vol. VIII., pp. 367 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 330, 331. The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), repealed the old Mortmain Acts, but as the repeal did not operate retrospectively, testamentary gifts made by testators dying prior to the 13th August, 1888, are subject to the old law, as to which, and as to the history of the mortmain restrictions, see Jarman on Wills, 6th ed., pp. 84 *et seq.*; Shelford, Law of Mortmain; Grant, Law of Corporations; 2 Bl. Com. pp. 268 *et seq.*; Tudor, Law of Charitable Trusts, 4th ed., pp. 428 *et seq.* At common law a corporation may acquire and hold land like a natural person (Grant, Law of Corporations, pp. 98, 626).

(*p*) See, for example, Queen Anne's Bounty Act, 1803 (43 Geo. 3, c. 107), (devises to Queen Anne's Bounty); title CHARITIES, Vol. IV., pp. 137, 138.

(*q*) Namely, institutions to which the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), applies; see title EDUCATION, Vol. XII., p. 121.

(*r*) Namely, those contained in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), Part I.

(*s*) See title CORPORATIONS, Vol. VIII., pp. 368, 369.

(*t*) Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5; see Tudor on Charities, 4th ed., p. 430. As to assurances by will to charities, see title CHARITIES, Vol. IV., pp. 133 *et seq.*

(*a*) See *Re Scovcroft, Ormrod v. Wilkinson*, [1898] 2 Ch. 638 (devise to a corporation sole for charitable purposes). As to sale of lands devised to a charity, see title CHARITIES, Vol. IV., p. 133.

(*b*) Grant, Law of Corporations, pp. 103, 573, note (t); *Re Ovey, Broadbent v. Barrow* (1885), 31 Ch. D. 113, 115, where it was assumed that the testator was capable of devising real estate to a corporation without a licence to alien in mortmain; *Ferring v. Trail* (1874), L. R. 18 Eq. 88. A double licence was formerly considered necessary, namely, a licence for the corporation to acquire and for the landowner to alien; see Jarman on Wills, 6th ed., p. 85.

(*c*) 8 Edw. 7, c. 69.

(*d*) See title COMPANIES, Vol. V., p. 334.

(*e*) *Fulwood's Case* (1591), 4 Co. Rep. 64 b; Com. Dig., tit. Franchises, (F. 15); 1 Bl. Com. 478. Pure personalty cannot as a rule be vested absolutely in a corporation sole and his successors; see title CORPORATIONS, Vol. VIII., p. 377. As to legacy duty in respect of a bequest to a corporation, see title CORPORATIONS, Vol. VIII., p. 378; as to corporation duty,

**1077.** A devise or bequest to a perpetual institution or society, whether corporate or unincorporate, upon a non-charitable trust (*f*) may be rendered void by the rule against perpetuities (*g*), as, for example, where the property is given or becomes subject to a trust which may last for an indefinite period and prevents the members of the institution from disposing of it as they think fit (*h*). A bequest of money to be spent as income is, however, valid (*i*), as also is a gift which is construed as a gift to the individual members (*k*).

A devise of land to a non-charitable unincorporated association consisting of an uncertain number of persons is invalid (*l*).

SECT. 4.  
Corporations, Institutions, and Societies.

Gifts to societies.

## Part V.—Formalities of Will or Codicil Made in England.

SECT. 1.—*Formal Validity in General.*

SUB-SECT. 1.—*Testamentary Form not Essential.*

**1078.** Testamentary form is not necessary to constitute a valid will (*m*) provided that the document is executed in accordance with the provisions of the English law; but the intention of the deceased that the document shall operate after his death must be clear (*n*). Such intention may be proved by parol evidence (*o*).

Testamentary form unnecessary.

see title REVENUE, Vol. XXIV., pp. 734 *et seq.*; *A.-G. v. City of London Corporation*, [1913] 2 K. B. 497, C. A.

(*f*) See title CHARITIES, Vol. IV., p. 174.

(*g*) As to the rule against perpetuities, see title PERPETUITIES, Vol. XXII., p. 302. As to the validity of bequests to non-charitable institutions, see titles CHARITIES, Vol. IV., pp. 119, 120, 174; LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., pp. 195 *et seq.*

(*h*) See *Re Clarke, Clarke v. Clarke*, [1901] 2 Ch. 110; *Langham v. Peterson* (1903), 87 L. T. 744; and title PERPETUITIES, Vol. XXII., p. 298.

(*i*) See *Cocks v. Manners* (1871), L. R. 12 Eq. 574.

(*k*) It seems that a gift to a non-charitable institution is construed as a gift to the individual members, where the members are expressly referred to or indicated in the terms of the gift (*Re Delany's Estate* (1882), 9 L. R. Ir. 226, C. A.; *Henrion v. Bonham* (1844), Drury temp. Sug. 476; *Bradshaw v. Jackman* (1887), 21 L. R. Ir. 12; *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937 (bequest to Franciscans)), but not where the gift is for the benefit of the institution *simpliciter* (*Morrow v. M'Conville* (1883), 11 L. R. Ir. 236; *Re Amos, Carrier v. Price*, [1891] 3 Ch. 159); see, further, title CHARITIES, Vol. IV., pp. 117, 118.

(*l*) *Hogan v. Byrne* (1862), 13 I. C. L. R. 166; *Stewart v. Green* (1871), 5 I. R. Eq. 470. As to devises of land to trade unions, see title TRADE AND TRADE UNIONS, Vol. XXVII., p. 632.

(*m*) *Whyte v. Pollok* (1882), 7 App. Cas. 400, *per* Lord SELBORNE, L.C., at p. 409, citing with approval Jarman on Wills, 3rd ed., p. 13; *Masterman v. Maberly* (1829), 2 Hag. Ecc. 235, 248; *Oldroyd v. Harvey*, [1907] P. 326. The validity of a will as regards movables depends on the law of the domicile of the testator, and as regards immovables on the law of the place where such immovables are situate; see title CONFLICT OF LAWS, Vol. VI., pp. 219, 225. For forms of wills applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. XV., pp. 399 *et seq.*

(*n*) *King's Proctor v. Daines* (1830), 3 Hag. Ecc. 218, 221; *In the Goods of Webb* (1864), 3 Sw. & Tr. 482.

(*o*) *In the Goods of English* (1864), 3 Sw. & Tr. 586; *Cock v. Cooke* (1866),

## SECT. 1.

Formal  
Validity in  
General.Testamentary  
intention.Will in  
form of  
deed.Instructions  
for a will.

**1079.** It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act (*p*). If the intention is that the operation of a document is dependent on the death of the person who executes it, it is testamentary in substance; and if the formalities of execution are complied with, such a document will be admitted to probate (*a*).

**1080.** Where a document bears upon its face a testamentary intention, it is not to be considered as a deed merely because it bears a seal or is in other respects in the form of a deed (*b*); and a deed not intended to have any operation or effect until the settlor's death is testamentary (*c*). On the other hand, a voluntary settlement reserving a life interest to the settlor and containing a power of revocation is not testamentary (*d*). *A fortiori*, an instrument which is not revocable and which comes into operation in the settlor's lifetime is not testamentary (*e*).

**1081.** An instrument duly executed, though apparently intended as preliminary to a more formal document, may be admitted to

L. R. 1 P. & D. 241; *In the Goods of Coles* (1871), L. R. 2 P. & D. 362; see title EXECUTORS and ADMINISTRATORS, Vol. XIV., p. 158. Similarly, evidence may be given that the document was not intended to be testamentary, although in form it appears to be so (*Trevelyan v. Trevelyan* (1810), 1 Phillim. 149; *Nichols v. Nichols* (1814), 2 Phillim. 180; *Lister v. Smith* (1863), 3 Sw. & Tr. 282; *In the Goods of Nosworthy* (1865), 4 Sw. & Tr. 44). A statement in the document that it is not intended to be a will seems to be conclusive (*Ferguson-Davie v. Ferguson-Davie* (1890), 15 P. D. 109).

(*p*) *Milner v. Foden* (1890), 15 P. D. 105, *per* HANNEN, P., at p. 107. Thus, the following instruments have been held to be testamentary: a deed of gift (*Rigden v. Vallier* (1751), 2 Ves. Sen. 252, 258; *Habergham v. Vincent* (1793), 2 Ves. 204; *Thorold v. Thorold* (1809), 1 Phillim. 1; *In the Goods of Morgan* (1866), L. R. 1 P. & D. 214); articles of agreement (*Green v. Froud* (1674), 3 Keb. 310); a draft on a banker (*Bartholomew and Brown v. Henley* (1820), 3 Phillim. 317); a direction for payment by bankers (*Jones v. Nicolay* (1850), 2 Rob. Eccl. 288); an order on a savings bank (*In the Goods of Marsden* (1860), 1 Sw. & Tr. 542); a letter (*Passmore v. Passmore* (1811), 1 Phillim. 216, 218; *Denny v. Barton* (1818), 2 Phillim. 575; *In the Goods of Mundy* (1860), 2 Sw. & Tr. 119); an invalid nomination under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39) (*In the Goods of Baxter*, [1903] P. 12; see title FRIENDLY SOCIETIES, Vol. XV., p. 153); and see the other informal instruments admitted to probate under the old law mentioned in *Masterman v. Maberly* (1829), 2 Hag. Ecc. 235, 247.

(*a*) *Cock v. Cooke* (1866), L. R. 1 P. & D. 241; *Robertson v. Smith* (1870), L. R. 2 P. & D. 43; *In the Goods of Slinn* (1890), 15 P. D. 156.

(*b*) *Marjoribanks v. Hovenden* (1843), Drury temp. Sug. 11, 27.

(*c*) *Foundling Hospital (Governors and Guardians) v. Crane*, [1911] 2 K. B. 367, C. A.; *Rigden v. Vallier*, *supra*, at p. 258; *In the Goods of Morgan*, *supra*; *Fielding v. Walshaw* (1879), 27 W. R. 492; *In the Goods of Colyer* (1889), 14 P. D. 48; *In the Goods of Slinn*, *supra*.

(*d*) *Tompson v. Browne* (1835), 3 My. & K. 32; see p. 510, *ante*. *A.-G. v. Jones and Bartlett* (1817), 3 Price, 368, *contra*, is not law; see *Brown v. Advocate-General* (1852), 1 Macq. 79, 85, H. L.; *Alexander v. Brame* (1855), 7 De G. M. & G. 525, 530, C. A.; *S. C. sub nom. Jeffries v. Alexander* (1860), 8 H. L. Cas. 594.

(*e*) *Thorncroft and Clarke v. Lashmar* (1862), 2 Sw. & Tr. 479; *In the Goods of Halpin* (1873), 8 I. R. Eq. 567.



probate (*f*). A paper, however, which merely expresses an intention to instruct a solicitor to prepare a will for the purpose of leaving a certain legacy is not testamentary (*g*).

SECT. 1.  
Formal  
Validity in  
General.

SUB-SECT. 2.—*Writing*.

**1082.** Every will (*h*) must be in writing and signed (*i*) by or on behalf of (*k*) the testator, and such signature must be made or acknowledged (*l*) in the presence of two witnesses at one time (*m*), except that any soldier on actual military service, or mariner being at sea, may dispose of his personal estate without writing (*n*).

Necessity for  
writing.

**1083.** There are no restrictions as to the materials with which, and upon which, a will may be written (*o*). A will may be made (*p*) or altered in pencil as well as in ink (*q*), though pencil alterations are *primâ facie* deliberative (*r*); and if in a will mainly written in ink blanks are filled up in pencil before execution, the pencil additions are included in the probate (*s*). A printed or lithographed form may be used, or part of such a form may be utilised (*t*).

Methods of  
writing.

SECT. 2.—*Signature*.

SUB-SECT. 1.—*Mode of Signature by Testator*.

**1084.** A will made or revived since 1837 (*a*), to be valid, must be

Signature  
essential.

(*f*) *Mathews v. Warner* (1798), 4 Ves. 186; (1799) 5 Ves. 23 ("plan of a will"); *Bone and Newsam v. Spear* (1811), 1 Phillim. 345 ("heads of a will"); *Hattatt v. Hattatt* (1832), 4 Hag. Ecc. 211 ("memorandum of my intended will"); *Barwick v. Mullings* (1829), 2 Hag. Ecc. 225 ("instructions for a will"); *Torre v. Castle* (1836), 1 Curt. 303; *In the Goods of Fisher* (1869), 20 L. T. 684 (notes for an intended settlement); *Whyte v. Pollok* (1882), 7 App. Cas. 400.

(*g*) *Coventry v. Williams* (1844), 3 Curt. 787; *Hixon v. Wytham* (1675), 1 Cas. in Ch. 248.

(*h*) Special provisions apply to soldiers in actual military service and marines and seamen at sea; see p. 510, *ante*; titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161, 162; ROYAL FORCES, Vol. XXV., pp. 94 *et seq.*; *Stopford v. Stopford* (1903), 19 T. L. R. 185. As to incorporation of documents referred to in a will, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 159. The law as stated in the text applies to modern wills only.

(*i*) See the text, *infra*.

(*k*) See pp. 548, 549, *post*.

(*l*) See pp. 551, 552, *post*.

(*m*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9; see p. 552, *post*.

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161, 162; ROYAL FORCES, Vol. XXV., pp. 94 *et seq.*

(*o*) Swinburne on Wills, Part IV., s. 25, pl. 2.

(*p*) *In the Goods of Osborne* (1909), 25 T. L. R. 519.

(*q*) *Rymes v. Clarkson* (1809), 1 Phillim. 22, 35.

(*r*) *In the Goods of Adams* (1872), L. R. 2 P. & D. 367; *In the Goods of Hall* (1871), L. R. 2 P. & D. 256; and see *In the Goods of Bellamy* (1866), 14 W. R. 501.

(*s*) *Kell v. Charmer* (1856), 23 Beav. 195. So a clause inconsistent with the rest of the will may be omitted from probate if cancelled in pencil (*In the Goods of Tonge* (1891), 66 L. T. 60).

(*t*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20; *In the Goods of Moore*, [1892] P. 378. As to interpretation, see *Re Spencer. Hart v. Manston* (1886), 54 L. T. 597; *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390; p. 633, *post*.

(*a*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34.

SECT. 2.  
Signature.

signed by the testator, or by some other person in his presence and by his direction (b). The signature must be intended by the testator as an act of execution (c).

Methods of  
Signature.

**1085.** A mark or initials (d) are sufficient if intended to represent a signature (e), even though the testator's hand is guided in making it (f), and whether the testator can write or not (g). A stamped signature may be sufficient (h); and sealing a will with a seal bearing the testator's initials has been held sufficient (i), though a mere sealing is not (k). The signature, however, must have been made with the purpose of authenticating the instrument, and accordingly a signature intended merely to guard against other sheets being interpolated in a will is not sufficient (l).

Passing a dry pen over a signature already written is not a good subscription of a will (m); but it may amount to an acknowledgment of his signature by a testator (n).

Assumed  
name.

**1086.** Signature in an erroneous or assumed name, if intended as the name of the testator, is enough (o). Similarly, where a testator puts his mark to a will in which he is wrongly named, the execution is valid (p).

SUB-SECT. 2.—*Signature on Testator's Behalf.*

Signature on  
behalf of the  
testator.

**1087.** A will may be signed on behalf of the testator, but such

(b) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9; see the text, *infra*. As to the place of signature, see pp. 549 *et seq.*, *post*.

(c) *In the Goods of Walker* (1862), 2 Sw. & Tr. 354; *Burke v. Moore*, *In the Goods of Moore* (1875), 9 I. R. Eq. 609.

(d) *In the Goods of Savory* (1851), 15 Jur. 1042. For a form of attestation in such a case, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 660; Vol. XVI., p. 689.

(e) *In the Goods of Bryce* (1839), 2 Curt. 325; *In the Goods of Clarke* (1858), 1 Sw. & Tr. 22; *Hindmarsh v. Charlton* (1861), 8 H. L. Cas. 160; *In the Goods of Blewitt* (1880), 5 P. D. 116; *In the Goods of Emerson* (1882), 9 L. R. Ir. 443.

(f) *Wilson v. Beddard* (1841), 12 Sim. 28.

(g) *Baker v. Dening* (1838), 8 Ad. & El. 94 (decided upon the Statute of Frauds (29 Car. 2, c. 3)); *In the Goods of Bryce*, *supra*.

(h) *Jenkins v. Gaisford and Thring*, *In the Goods of Jenkins* (1863), 3 Sw. & Tr. 93.

(i) *In the Goods of Emerson*, *supra*.

(k) *Smith v. Evans* (1751), 1 Wils. 313; *Grayson v. Atkinson* (1752), 2 Ves. Sen. 454, 459; *Ellis v. Smith* (1754), 1 Ves. 11, 13, 15; *Wright v. Wakeford* (1811), 17 Ves. 454, 459, overruling *Lemayne v. Stanley* (1681), 3 Lev. 1.

(l) *Ewen v. Franklin* (1855), Dea. & Sw. 7; *In the Goods of Dilkes* (1874), L. R. 3 P. & D. 164; *Phipps v. Hale* (1874), L. R. 3 P. & D. 166; *Sweetland v. Sweetland* (1865), 4 Sw. & Tr. 6.

(m) *Playne v. Scriven* (1849), 1 Rob. Eccl. 772; *Kevil v. Lynch* (1874), 9 I. R. Eq. 249; *In the Goods of Maddock* (1874), L. R. 3 P. & D. 169.

(n) *Playne v. Scriven*, *supra*; *Lewis v. Lewis*, [1908] P. 1, 5. For a form of attestation of acknowledgment, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 661.

(o) *In the Goods of Glover* (1847), 5 Notes of Cases, 553; *In the Goods of Redding* (1850), 2 Rob. Eccl. 339; *In the Goods of Clarke*, *supra*.

(p) *In the Goods of Douce* (1862), 2 Sw. & Tr. 593.

signature must be made in his presence and by his direction (*g*). The person so signing may be one of the attesting witnesses (*r*); and a signature of such person's own name expressly on behalf of the testator is sufficient (*s*). The direction to sign may be implied from the conduct of the deceased and from the *res gestæ* (*t*), but the testator must in some way indicate to the two witnesses present that the signature was put there at his request (*a*).

SECT. 2.  
Signature.

SUB-SECT. 3.—*Place of Signature.*

**1088.** It is now provided by statute (*b*) that every will, so far only as regards the position of the signature of the testator or of the person signing for him, is deemed valid if the signature is so placed, at (*c*) or after or following (*d*) or under or beside (*e*) or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*f*). The validity of the will is not affected by the circumstance that the signature does not

Place of  
signature.

(*g*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9. For a form of attestation in such a case, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 660, 661; Vol. XVI., p. 639.

(*r*) *In the Goods of Bailey* (1838), 1 Curt. 914; *Smith v. Harris* (1845), 1 Rob. Eccl. 262.

(*s*) *In the Goods of Clark* (1839), 2 Curt. 329; *Smith v. Harris*, *supra*; *Jenkyns v. Gaisford and Thring* (1863), 11 W. R. 854; and see *In the Goods of Blair* (1848), 6 Notes of Cases, 528.

(*t*) *Parker v. Parker* (1841), Milw. 541.

(*a*) *In the Goods of Marshall* (1866), 13 L. T. 643; see *In the Estate of Holtam, Gillett v. Rogers* (1913), 108 L. T. 732.

(*b*) Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1, amending the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9.

(*c*) *In the Goods of Woodley* (1864), 3 Sw. & Tr. 429 (signature across last two lines). The name of the testator written as the last word of a holograph will may be a signature (*Trott and Trott v. Skidmore* (1860), 2 Sw. & Tr. 12; and see *Lewis v. Lewis*, [1908] P. 1). A signature or mark in the middle of a will is not sufficient (*Margary v. Robinson* (1886), 12 P. D. 8).

(*d*) *In the Goods of Wright* (1865), 4 Sw. & Tr. 35 (signature across third page of a sheet of notepaper).

(*e*) *In the Goods of Jones* (1865), 4 Sw. & Tr. 1 (at side of attestation clause); *In the Goods of Williams* (1865), L. R. 1 P. & D. 4 (opposite last words of will); *In the Goods of Coombs* (1866), L. R. 1 P. & D. 302; *In the Goods of Stoakes* (1874), 31 L. T. 552; *In the Goods of Ainsworth* (1870), L. R. 2 P. & D. 151; *In the Goods of Usborne* (1909), 25 T. L. R. 519 (in margin); but see *In the Goods of Hughes* (1887), 12 P. D. 107.

(*f*) Pursuant to the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1, the signature may be placed in the testimonium clause (*In the Goods of Mann* (1858), 28 L. J. (P. & M.) 19; *In the Goods of Torre* (1862), 8 Jur. (N.S.) 494), or the attestation clause (*In the Goods of Walker* (1862), 2 Sw. & Tr. 354; *In the Goods of Huckvale* (1867), L. R. 1 P. & D. 375; *In the Goods of Casmore* (1869), L. R. 1 P. & D. 653; *In the Goods of Pearn* (1875), 1 P. D. 70; *In the Goods of Moore*, [1901] P. 44), or may follow or be after or under the clause of attestation (*In the Goods of Standley* (1849), 7 Notes of Cases, 69), either with or without a blank space intervening, or follow or be after or under or beside the names or one of the names of the subscribing witnesses; see *In the Goods of Jones*, *supra*; *In the Goods of Puddephatt* (1870), L. R. 2 P. & D. 97 (beneath); *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211 (following page); *In the Goods of Johns*, *otherwise Jones*, [1877] W. N. 10; *Byles v. Cox* (1896), 74 L. T. 222.



SECT. 2. immediately follow the end of the will (*g*); or that a blank space intervenes between the end of the will and the testator's signature (*h*); or that the signature is on a page or side containing no clause, paragraph or disposing part of the will (*i*); or that there is sufficient space in the preceding page to contain the signature (*k*). No signature is operative, however, to give effect to any disposition which is underneath or which follows it (*l*), or to any disposition or direction inserted after the signature has been made (*m*).

Signature constructively at end of will.

**1089.** In some cases, words which are physically beneath—either wholly or partially—the signature have been considered to be above it either by reason of the mode of writing (*n*) or by reason of the use of asterisks or other signs of interpolation (*o*). Where the court is satisfied that the testator's signature really follows the dispositive part of a testamentary paper, though it may occupy a place on the paper literally above the dispositive part, such part may be admitted to probate (*p*). The mere fact that the executed part of the will terminates with an incomplete sentence continued overleaf is not, however, sufficient to justify the admission of the words following the signature to probate (*q*).

Will on several sheets.

**1090.** Where a will consists of several sheets, it is not necessary for the testator to sign all the sheets, but at the time of execution all the sheets must be attached in some way (*r*), though not necessarily mechanically (*s*); and it may be presumed, when witnesses only saw the last sheet of the will, that the whole was in the room (*t*). The presumption, where several sheets constituting a connected disposal of property are found together, is that they all

(*g*) *Page v. Donovan* (1857), 3 Jur. (N. S.) 220, where a notarial certificate intervened.

(*h*) *In the Goods of Fuller*, [1892] P. 377; *In the Goods of Williams* (1865), L. R. 1 P. & D. 4.

(*i*) *In the Goods of Williams*, *supra*.

(*k*) *Ibid.*; *Hunt v. Hunt* (1866), L. R. 1 P. & D. 209; *In the Goods of Archer* (1871), L. R. 2 P. & D. 252.

(*l*) *In the Goods of Greata* (1856), 2 Jur. (N. S.) 1172; *In the Goods of Dallow* (1866), L. R. 1 P. & D. 189; *In the Goods of Woods* (1868), L. R. 1 P. & D. 556; *In the Goods of White*, [1896] 1 I. R. 269.

(*m*) *In the Goods of Arthur* (1871), L. R. 2 P. & D. 273.

(*n*) *In the Goods of Ainsworth* (1870), L. R. 2 P. & D. 151; *In the Goods of Wilkinson* (1881), 6 P. D. 100.

(*o*) *In the Goods of Kimpton* (1864), 3 Sw. & Tr. 427; *In the Goods of Birt* (1871), L. R. 2 P. & D. 214; *In the Goods of Greenwood*, [1892] P. 7; and see *Oldroyd v. Harvey*, [1907] P. 326.

(*p*) *In the Goods of Gilbert* (1898), 78 L. T. 762. As to admitting the dispositive part of a will which precedes the signature to probate, see *In the Goods of Davis* (1843), 3 Curt. 748; *In the Goods of Topham* (1849), 7 Notes of Cases, 272; *Royle v. Harris*, [1895] P. 163; *Milward v. Buswell* (1904), 20 T. L. R. 714. But in such a case no part of the will is admitted to probate if the signature is made for identification purposes only (*Sweetland v. Sweetland* (1865), 4 Sw. & Tr. 6; see p. 548, *ante*).

(*q*) *In the Goods of Gee* (1898), 78 L. T. 843. In such a case probate may be granted of that part of the will which precedes the signature (*In the Goods of Anstee*, [1893] P. 283).

(*r*) *Lewis v. Lewis*, [1908] P. 1, *per* BARGRAVE DEANE, J., at p. 5; *Cook v. Lambert* (1863), 3 Sw. & Tr. 46; *In the Goods of West* (1863), 9 Jur. (N. S.) 1158; *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211.

(*s*) *Gregory v. Queen's Proctor* (1846), 4 Notes of Cases, 620, 639.

(*t*) *Bond v. Seawell* (1765), 3 Burr. 1773.

formed the will of the deceased (*u*) and that any apparent alteration in their order was made before execution (*a*).

SECT. 2.

Signature.

**1091.** Declarations by the testator made both before and after execution are admissible to show what were the constituent parts of the will (*b*).

Extrinsic evidence.

SUB-SECT. 4.—*Acknowledgment of Signature.*

**1092.** A testator must either sign his will or acknowledge his signature in the presence of two or more witnesses present at the same time (*c*). It is not necessary for the testator to say "This is my signature"; acknowledgment may even be by gesture (*d*), and may be made in answer to a question (*e*); but the witnesses must see, or have an opportunity of seeing, the signature of the testator, and if what takes place involves an acknowledgment by the testator that the signature is his, that is enough (*f*). The signature to be acknowledged may be made either by the testator or by another for him (*g*).

Acknow-  
ledgment.

**1093.** In the absence of proof that the witnesses did not see, or could not have seen, the signature of the testator, and in the absence of fraud, the courts presume, where there is a proper attestation clause, or where the evidence shows that the testator knew the law, that the attesting witnesses saw the acknowledged signature (*h*). Even where the attestation clause is informal, the presumption *omnia rite esse acta* is applied if the attesting witnesses identify their signatures and that of the testator, though they have no recollection of the circumstances in which the will was executed (*h*).

Presence of  
witnesses.

**1094.** The production of a will by a testator with his signature upon it, and a request by him, or by someone for him in his presence (*i*), to the witnesses to attest it, is a sufficient acknowledgment of the

Presumption  
that will  
was already  
signed.

(*u*) *Marsh v. Marsh* (1860), 1 Sw. & Tr. 528; *In the Goods of O'Brien*, [1900] P. 208; but see *In the Goods of M'Key* (1876), 11 I. R. Eq. 220, where the evidence was insufficient.

(*a*) *Rees v. Rees* (1873), L. R. 3 P. & D. 84. In *In the Goods of Madden*, [1905] 2 I. R. 612, where the sheets were pinned together and the sheet containing the testator's signature and attestation clause came first, the court concluded that that sheet had inadvertently been misplaced.

(*b*) *Gould v. Lakes* (1880), 6 P. D. 1; *In the Goods of Hutchison* (1902), 18 T. L. R. 706.

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9.

(*d*) *In the Goods of Davies* (1850), 2 Rob. Eccl. 337; *In the Goods of Owston* (1862), 2 Sw. & Tr. 461, where the testator was deaf and dumb.

(*e*) *Kelly v. Keatinge* (1871), 5 I. R. Eq. 174.

(*f*) *In the Goods of Harrison* (1841), 2 Curt. 863; *In the Goods of Gunstan*, *Blake v. Blake* (1882), 7 P. D. 102, C. A., following *Hudson v. Parker* (1844), 1 Rob. Eccl. 14, and dissenting from *Gwillim v. Gwillim* (1859), 3 Sw. & Tr. 200, and *Beckett v. Howe* (1869), L. R. 2 P. & D. 1; *O'Meagher v. O'Meagher* (1883), 11 L. R. Ir. 117; *Clery v. Barry* (1887), 21 L. R. Ir. 152, 164, C. A.; and see *Daintree v. Butcher and Fasulo* (1888), 13 P. D. 102, C. A.; *Whiting v. Turner* (1903), 89 L. T. 71.

(*g*) *In the Goods of Regan* (1838), 1 Curt. 908; *Parker v. Parker* (1841), Milw. 541. But a signature pencilled by a third person to show the place of signature cannot be acknowledged (*Reeves v. Grainger* (1908), 52 Sol. Jo. 355).

(*h*) *Woodhouse v. Balfour* (1887), 13 P. D. 2.

(*i*) *Inglesant v. Inglesant* (1874), L. R. 3 P. & D. 172; *In the Goods of Bishop* (1882), 30 W. R. 567; but see *Morritt v. Douglas* (1872), L. R. 3 P. & D. 1.

SECT. 2.  
Signature.

signature under the statute (*k*); and the court is not bound to have positive affirmative evidence from the subscribing witnesses that the testator's name was signed to the paper before they subscribed it (*l*). The mere circumstance of calling in witnesses who had no opportunity of seeing the testator's signature, without giving them any explanation of the instrument which they are signing, does not, however, amount to an acknowledgment of the signature by a testator (*m*), especially when there is no evidence that the testator's signature was on the will at the time (*n*).

SECT. 3.—Attestation.

SUB-SECT. 1.—Mode of Attestation.

Signature in  
presence  
of both  
witnesses.

**1095.** The signature of the testator must be made or acknowledged in the presence of two witnesses, and such witnesses must attest and subscribe the will in the presence of the testator (*o*). The testator's signature must be made or acknowledged when both the attesting witnesses are actually present at the same time (*p*), and both witnesses must attest and subscribe after the testator's signature has been so made or acknowledged (*q*). Each witness should be able to say with truth that he knows that the testator has signed the document (*r*); and there is no sufficient acknowledgment unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator should expressly declare that the paper to be attested is his will or should state that his signature is inside the will (*s*).

Attestation  
in presence  
of testator.

**1096.** The attestation is in the presence of the testator within the meaning of the statute if he might have seen the witnesses sign had he chosen to look; it is not necessary that he should actually see them sign (*t*). But the testator must be mentally capable of

(*k*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9; see *Pascoe v. Smart* (1901), 17 T. L. R. 595.

(*l*) *Blake v. Knight* (1843), 3 Curt. 547, 564.

(*m*) *Illot v. Genge* (1842), 3 Curt. 160, affirmed (1844), 4 Moo. P. C. C. 265; *Gaze v. Gaze* (1843), 3 Curt. 451; *Keigwin v. Keigwin* (1843), 3 Curt. 607; *In the Goods of Davis* (1843), 3 Curt. 748; *In the Goods of Claridge* (1879), 39 L. T. 612; *In the Goods of Rees* (1865), 34 L. J. (P. M. & A.) 56; *Fischer v. Popham* (1875), L. R. 3 P. & D. 246; *Wright v. Sanderson* (1884), 9 P. D. 149, C. A.; *Daintree v. Butcher and Fasulo* (1888), 13 P. D. 102, C. A.

(*n*) *In the Goods of Swinford* (1869), L. R. 1 P. & D. 630; *Pearson v. Pearson* (1871), L. R. 2 P. & D. 451. On a re-execution of a will, acknowledgment of the original signature is sufficient (*In the Goods of Dewell* (1853), 17 Jur. 1130).

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9; *Betts v. Gannell* (1903), 19 T. L. R. 304.

(*p*) *Wyatt v. Berry*, [1893] P. 5.

(*q*) *Moore v. King* (1842), 3 Curt. 243; *Cooper v. Bockett* (1843), 3 Curt. 648; *Pennant v. Kingscote* (1843), 3 Curt. 642, 647; *Hindmarsh v. Charlton* (1861), 8 H. L. Cas. 160; *Wyatt v. Berry*, *supra*; *Brown v. Skirrow*, [1902] P. 3, 7.

(*r*) *Brown v. Skirrow*, *supra*, at p. 5.

(*s*) *In the Goods of Gunstan*, *Blake v. Blake* (1882), 7 P. D. 102, C. A., following *Hudson v. Parker* (1844), 1 Rob. Eccl. 14, and dissenting from *Beckett v. Howe* (1869), L. R. 2 P. & D. 1, and *Gwillim v. Gwillim* (1859), 3 Sw. & Tr. 200; *In the Goods of Swift* (1901), 17 T. L. R. 16.

(*t*) *Shires v. Glascock* (1688), 2 Salk. 688; *Davy v. Smith* (1693), 3 Salk.



recognising the act which is being done, and conscious of the transaction in which the witnesses are engaged, and if the testator becomes insensible before the witnesses subscribe the attestation is insufficient (*u*).

SECT. 3.  
Attestation.

It is not essential for the attesting witnesses to sign in the presence of each other (*a*), though it is usual for them to do so (*b*).

**1097.** Though no form of attestation is necessary (*c*), yet it is always desirable to have an attestation clause showing that the requirements of the statute have been complied with (*d*). In the absence of such a clause an affidavit of due execution must be obtained from one (*e*) of the attesting witnesses, or from some person who can depose to the facts, before probate can be obtained in the usual way on the executor's oath alone.

Form of attestation.

The attesting witnesses are not required to subscribe their names on any particular part of the will, provided that the signatures are clearly intended to attest the testator's signature (*f*), and it can be shown that their signatures were affixed at a time after any words in the will below such signatures have been written in (*g*). Where, however, the attestation is not on the same sheet of paper as the signature of the testator, the attestation must be on a paper physically connected with that sheet (*h*).

Place of attestation.

**1098.** To make a valid subscription a witness must either

Methods of attestation.

395; *Longford v. Eyre* (1721), 1 P. Wms. 740; *Todd v. Winchelsea* (Earl) (1826), Mood. & M. 12; *In the Goods of Newman* (1838), 1 Curt. 914; *In the Goods of Ellis* (1840), 2 Curt. 395; *In the Goods of Colman* (1842), 3 Curt. 118; *Jenner v. Finch* (1879), 5 P. D. 106; *Carter v. Seaton* (1901), 85 L. T. 76.

(*u*) *Right d. Cater v. Price* (1779), 1 Doug. (K. B.) 241.

(*a*) *Faulds v. Jackson* (1845), 6 Notes of Cases, Supplement, i.; *In the Goods of Webb* (1855), Dea. & Sw. 1, disapproving the *dictum* to the contrary in *Casement v. Fullon* (1845), 5 Moo. P. C. C. 130, 140; *Sullivan v. Sullivan* (1879), 3 L. R. Ir. 299, followed in *O'Meagher v. O'Meagher* (1883), 11 L. R. Ir. 117; *Brown v. Skirrow*, [1902] P. 3, 5.

(*b*) See *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 660 *et seq.*

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 9. This means that no clause of attestation stating that the requirements of the Act have been carried out need be appended to the will (*Bryan v. White* (1850), 14 Jur. 919). An attestation clause is not strictly part of the testator's will (*In the Goods of Atkinson* (1883), 8 P. D. 165).

(*d*) For the ordinary form of attestation clause, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 399. For forms applicable to wills acknowledged or signed by mark or by another on behalf of the testator, see *ibid.*, pp. 660 *et seq.*; Vol. XVI., p. 689.

(*e*) See *Non-contentious Probate Rule*, 14th January, 1871; *Belbin v. Skeats* (1858), 1 Sw. & Tr. 148.

(*f*) *In the Goods of Davis* (1843), 3 Curt. 748; *In the Goods of Chamney* (1849), 1 Rob. Eccl. 757; *In the Goods of Braddock* (1876), 1 P. D. 433; *In the Goods of Fuller*, [1892] P. 377; *In the Goods of Ellison*, [1907] 2 I. R. 480, following *In the Goods of Streatley*, [1891] P. 172; but see *Mason v. Bishop* (1883), Cab. & El. 21, where a signature purporting to attest the signatures of the witnesses was held sufficient to attest the execution by the testator.

(*g*) *In the Goods of Jones* (1842), 1 Notes of Cases, 396; *Byles v. Cox* (1896), 74 L. T. 222.

(*h*) *In the Goods of Braddock* (1876), 1 P. D. 433.

SECT. 3.  
Attestation.  
—

Description  
of witness.

Intention to  
attest.

write his name or make some mark (*i*) intended to represent his name (*k*). A will may be subscribed by marks even though the witnesses are capable of writing (*l*). Initials of an attesting witness are a sufficient subscription (*m*), unless placed on the will presumably for the purpose of identifying alterations (*n*).

A witness may subscribe a will in any mode which sufficiently identifies him as the person attesting the will (*o*). Thus, a sufficient description of the witness without his name (*p*) or signature in a wrong name (*q*), where the signature is intended to represent the person signing and not some other person as being the actual witness (*r*), is a valid subscription. Signing part of his name by a witness is not sufficient unless the part signed was intended to be a complete signature (*s*); and a mere acknowledgment of an existing signature, as by passing a dry pen over it (*t*), is also insufficient (*a*), though the pen may be guided for a witness unable to write (*b*).

**1099.** The court must be satisfied that the names of the witnesses were subscribed on the will for the purpose of attesting the testator's signature (*c*); where the court is satisfied that a signature has been added without any intention to attest the execution, it excludes such signature from the probate (*d*).

(*i*) *Harrison v. Harrison* (1803), 8 Ves. 185; *Addy v. Grix* (1803), 8 Ves. 504; *In the Goods of Ashmore* (1843), 3 Curt. 756; and see *Clarke v. Clarke* (1879), 5 L. R. Ir. 47, C. A.

(*k*) *Hindmarsh v. Charlton* (1861), 8 H. L. Cas. 160, 169.

(*l*) *In the Goods of Amiss* (1849), 2 Rob. Eccl. 116.

(*m*) *In the Goods of Christian* (1849), 2 Rob. Eccl. 110; *In the Goods of Blewitt* (1880), 5 P. D. 116; *In the Goods of Streatley*, [1891] P. 172 (initials in margin).

(*n*) *In the Goods of Christian*, *supra*; *In the Goods of Cunningham* (1860), 29 L. J. (P. & M.) 71.

(*o*) *In the Goods of Sperling* (1863), 3 Sw. & Tr. 272; *In the Goods of Eynon* (1873), L. R. 3 P. & D. 92.

(*p*) *In the Goods of Sperling*, *supra*.

(*q*) *In the Goods of Olliver* (1854), 2 Ecc. & Ad. 57.

(*r*) *Pryor v. Pryor* (1860), 29 L. J. (P. M. & A.) 114; *In the Goods of Leverington* (1886), 11 P. D. 80. Thus, neither a husband (*In the Goods of White* (1843), 2 Notes of Cases, 461), nor a wife (*In the Goods of Duggins* (1870), 39 L. J. (P. & M.) 24; *Pryor v. Pryor*, *supra*; *In the Goods of Leverington*, *supra*; *In the Goods of Cope* (1850), 2 Rob. Eccl. 335), can subscribe on behalf of the other in the other's name.

(*s*) *In the Goods of Maddock* (1874), L. R. 3 P. & D. 169.

(*t*) *Ibid.*; *In the Goods of Cunningham*, *supra*.

(*a*) *Hindmarsh v. Charlton*, *supra*, at p. 169; *Horne v. Featherstone* (1895), 73 L. T. 32; *Playne v. Scriven* (1849), 1 Rob. Eccl. 772. The addition of the date (*Hindmarsh v. Charlton*, *supra*), or of the witness's address (*In the Goods of Trevanion* (1850), 2 Rob. Eccl. 311), or the correction of a letter in the existing signature (*Hindmarsh v. Charlton*, *supra*; *In the Goods of Maddock*, *supra*), merely constitute an acknowledgment of the existing signature.

(*b*) *In the Goods of Lewis* (1861), 7 Jur. (N. S.) 688; *Harrison v. Elvin* (1842), 3 Q. B. 117; *In the Goods of Firth* (1858), 4 Jur. (N. S.) 288.

(*c*) *In the Goods of Wilson* (1866), L. R. 1 P. & D. 269; *In the Goods of Sharman* (1869), L. R. 1 P. & D. 661; *Griffiths v. Griffiths* (1871), L. R. 2 P. & D. 300; *In the Goods of Braddock* (1876), 1 P. D. 433; *In the Goods of Streatley*, [1891] P. 172; and see note (*f*), p. 553, *ante*.

(*d*) *In the Goods of Sharman*, *supra*, followed in *In the Goods of Purssglove*

**1100.** There is a presumption of due execution where there is a proper attestation clause (*e*), even though the witnesses have no recollection of having witnessed the will (*f*). In the absence of an attestation clause a will which on its face appears to have been duly executed is assumed to have been duly executed although no evidence of its due execution is forthcoming (*g*). The presumption of due execution applies as well where the testator's name has been affixed by his direction as where he has himself written his name (*h*). This presumption may be rebutted by evidence of the attesting witnesses, but the evidence as to some defect in execution must be clear, positive and reliable (*i*), since the court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause and signed by the testator, was not duly executed (*k*).

SECT. 3.

Attestation.

Presumption of due execution.

In cases in which the presumption is opposed to testimony it is the duty of the court not to allow undue weight to the circumstances on which the presumption is founded on the one hand, and, on the other, not to lose sight of them (*l*). The burden of proving due execution, whether by presumption or by positive evidence, rests on the person setting up the will (*m*).

Proof of due execution.

## SUB-SECT. 2.—Capacity of Witnesses.

**1101.** A will is not invalid because at the time of the execution or at any time afterwards any person attesting the execution is incompetent (*n*) to be admitted a witness to prove its execution (*o*), and executors (*p*), creditors and their wives or husbands (*q*), and

Who may be witnesses.

(1872), 26 L. T. 405, and *In the Goods of Murphy* (1873), 8 I. R. Eq. 300; but see *Mason v. Bishop* (1883), Cab. & El. 21.

(*e*) *Lloyd v. Roberts* (1858), 12 Moo. P. C. C. 158; *Wright v. Sanderson* (1884), 9 P. D. 149, C. A.; *Wright v. Rogers* (1869), L. R. 1 P. & D. 678, 682.

(*f*) *Woodhouse v. Balfour* (1887), 13 P. D. 2; *Byles v. Cox* (1896), 74 L. T. 222.

(*g*) *In the Goods of Peverett*, [1902] P. 205; *Vinnicombe v. Butler* (1864), 3 Sw. & Tr. 580; *Clarke v. Clarke* (1879), 5 L. R. Ir. 47, C. A.; *In the Goods of Malins* (1887), 19 L. R. Ir. 231; *Marsh v. Marsh* (1860), 1 Sw. & Tr. 528.

(*h*) *Clery v. Barry* (1886), 21 L. R. Ir. 152, C. A.

(*i*) *Gloner v. Smith* (1886), 57 L. T. 60; *Wyatt v. Berry*, [1893] P. 5; *Pilkington v. Gray*, [1899] A. C. 401, P. C.; *In the Goods of Moore*, [1901] P. 44. In *Dayman v. Dayman* (1894), 71 L. T. 699, the presumption prevailed against the testimony of both the attesting witnesses; and in *Wilson v. Beddard* (1841), 12 Sim. 28, 34, SHADWELL, V.-C., suggested that the evidence of witnesses denying a solemn act which they had attested ought to receive the slightest possible attention, a suggestion cited apparently with approval by Lord BROUGHAM in *McGregor v. Topham* (1850), 3 H. L. Cas. 132, at p. 156.

(*k*) *Wright v. Rogers*, *supra*, at p. 682; *O' Meagher v. O' Meagher* (1883), 11 L. R. Ir. 117; *Whiting v. Turner* (1903), 89 L. T. 71; and see *Goodisson v. Goodisson*, [1913] 1 I. R. 31, 218, C. A.

(*l*) *Cooper v. Bockett* (1846), 4 Moo. P. C. C. 419, 439.

(*m*) *Clery v. Barry*, *supra*, at p. 155, n.

(*n*) As to competency of witnesses, see title EVIDENCE, Vol. XIII., pp. 569, 570.

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 14.

(*p*) *Ibid.*, s. 17. An executor attesting a will cannot, however, take any beneficial interest thereunder (*In the Goods of Clark* (1839), 2 Curt. 329, 330); see p. 556, *post*.

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 16.



SECT. 3.  
Attestation.

beneficiaries and their wives or husbands (*r*), are all admissible witnesses to prove the execution of a will or the validity or invalidity thereof.

SUB-SECT. 3.—*Effect of Gifts by Will or Codicil to Witness.*

Gift to witnesses.

**1102.** Any beneficial (*s*) devise, legacy, estate, interest, gift, or appointment, other than charges or directions for the payment of debts, so far as it concerns any person attesting the execution of any will by which it is given, or the wife or husband of such person, or any person claiming under such person, or wife or husband, is null and void (*t*). Where there is a joint tenancy under a will and one of the joint tenants attests the will, the other takes the whole (*a*).

Trust gifts.

A gift to a witness merely as trustee is valid (*b*); but where by means of a parol trust a beneficial interest is attempted to be conferred upon an attesting witness the gift is, it seems, void (*c*), unless perhaps where the witness at the time of attestation is unaware of the secret trust in his favour (*d*).

Gift by codicil.

**1103.** A gift by will to a legatee is not forfeited by his attesting a codicil confirming the will (*e*), unless he receives a benefit by codicil, as, for instance, if the codicil makes a contingent gift absolute (*f*); but the fact that the codicil, by revoking gifts in the will, increases the residue of which he gets a share is not such a benefit (*g*). Conversely, a codicil duly executed confirming a will containing a gift to an attesting witness to the will renders the gift valid (*h*), and the validity so acquired is not destroyed by the

(*r*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.

(*s*) A power in a will enabling a solicitor-trustee to charge profit costs against the estate is such a beneficial interest (*Re Barber, Burgess v. Vinnicombe* (1886), 31 Ch. D. 665; *Re Pooley* (1888), 40 Ch. D. 1, C. A.).

(*t*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15. This provision does not, however, affect questions of construction; thus, where a testator by a will to which his daughter's husband was an attesting witness gave all his real and personal estate to his wife for life, to be equally divided between such of his children as should be living at her death, and in the event of any of his daughters being married at his wife's decease, such proportion as they might be entitled to should be left to them and their children, it was held that the daughter's children were not to be disappointed by her disability, but took an immediate interest in her share as tenants in common (*Re Clark, Clark v. Randall* (1885), 31 Ch. D. 72); and see *Re Townsend's Estate, Townsend v. Townsend* (1886), 34 Ch. D. 357; *Aplin v. Stone*, [1904] 1 Ch. 543.

(*a*) *Young v. Davies* (1863), 2 Drew. & Sm. 167; and see *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594.

(*b*) *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69.

(*c*) *Re Fleetwood, Sidgreaves v. Brewer, supra*, at p. 609.

(*d*) *O'Brien v. Condon*, [1905] 1 I. R. 51, where PORTER, M.R., declined to follow *Re Fleetwood, Sidgreaves v. Brewer, supra*; and see *Sullivan v. Sullivan*, [1903] 1 I. R. 193.

(*e*) *Re Fleetwood, Sidgreaves v. Brewer, supra*; *Gurney v. Gurney* (1855), 3 Drew. 208; *Tempest v. Tempest* (1856), 2 K. & J. 635; *Re Marcus, Marcus v. Marcus* (1887), 56 L. J. (CH.) 830.

(*f*) *Gaskin v. Rogers* (1866), L. R. 2 Eq. 284.

(*g*) *Gurney v. Gurney, supra*.

(*h*) *Anderson v. Anderson* (1872), L. R. 13 Eq. 381; *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764; *Re Elcom, Layborn v. Grover Wright*, [1894] 1 Ch. 303.

legatee attesting a subsequent codicil (*i*). The gift is only avoided where the witness has attested the instrument under which he takes (*k*), and a gift in a will consisting of separate sheets of paper separately attested may be good if the legatee has not attested the sheet on which his gift appears (*l*).

SECT. 3.  
Attestation.  
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**1104.** The marriage of a devisee to an attesting witness after attestation does not affect the validity of the devise (*m*).

Subsequent marriage of witness.

**1105.** If more persons than are necessary sign their names to a will, the presumption is that they did so as witnesses; and consequently legacies thereby given to them or their spouses are void. If more than two persons appear to be attesting witnesses, some of them being legatees, all the names may be included in the probate, so that the question whether the legatees did or did not sign as witnesses may be decided in a court of equity (*n*). In some cases, however, the Court of Probate has itself dealt with this question, and has omitted the names from the probate (*o*). If after execution is complete a third person adds his name, the court does not without cogent evidence conclude that the third person signed as a witness (*o*).

Superfluous attestation.

#### SECT. 4.—*Will by which Power is Exercised.*

**1106.** No appointment made by will in exercise of any power is valid unless executed in the manner required for the due execution of a will; and every will so executed, so far as respects execution and attestation, is valid as an exercise of a power of appointment by will although other solemnities required by the instrument creating the power are not observed (*p*).

Exercise of power by will.

**1107.** A will appointing personal property is not effective until admitted to probate (*q*). Any document recognised as a valid testamentary instrument by the Probate Division is capable of

Probate.

(*i*) *Thorpe v. Bestwick* (1881), 6 Q. B. D. 311.

(*k*) *Re Trotter, Trotter v. Trotter*, [1899] 1 Ch. 764.

(*l*) *Re Craven, Crewdson v. Craven* (1908), 99 L. T. 390.

(*m*) *Thorpe v. Bestwick*, *supra*.

(*n*) *Wigan v. Rowland* (1853), 11 Hare, 157; *Cozens v. Crout* (1873), 42 L. J. (CH.) 840; *In the Goods of Mitchell* (1841), 2 Curt. 916; *In the Goods of Forest* (1861), 2 Sw. & Tr. 334; *In the Goods of Raine* (1865), 11 Jur. (N. S.) 587.

(*o*) *Randfield v. Randfield* (1860), 8 H. L. Cas. 225, 228, note (c); *In the Goods of Sharman* (1869), L. R. 1 P. & D. 661; *In the Goods of Murphy* (1873), 8 I. R. Eq. 300; *In the Goods of Smith* (1889), 15 P. D. 2.

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 10; see, further, titles CONFLICT OF LAWS, Vol. VI., pp. 228, 229; POWERS, Vol. XXIII., pp. 18 *et seq.*, 26, 27; *Wrigley v. Lowndes*, [1908] P. 348.

(*q*) *Ross v. Ewer* (1744), 3 Atk. 156, 160; *Re Vallance, Ex parte Limehouse Board of Works* (1883), 24 Ch. D. 177. The rule, however, appears to be different in Ireland, where money has been ordered to be paid out of court without requiring the English probate of the will exercising the power to be resealed in Ireland (*Trustee Act and Smyth's Trusts* (1906), 40 I. L. T. 70); see Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 22, which makes a probate receivable in evidence in all courts of the United Kingdom without further proof thereof; and compare *Re Tootal's Trusts* (1883), 23 Ch. D. 532 (Shanghai probate).

**SECT. 4.**  
**Will by**  
**which**  
**Power is**  
**Exercised.**

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operating as an execution of a power of appointment by will over personal estate (*r*), and the probate of an English will made by a domiciled Englishman is sufficient evidence of the due execution of the power so far as formalities are concerned (*s*). In the case of a will of a donee of a power domiciled abroad probate may be granted in England though the will is invalid by English law, if valid according to the law of the testator's domicile (*t*), or though the will is invalid by the law of the domicile if valid according to English law (*u*); but in the latter case administration with the will annexed is usually granted instead of probate (*a*).

## Part VI.—Formalities of Will Made Abroad.

### SECT. 1.—Immovables.

English land. **1108.** The law applicable to immovable (*b*) property, namely, land of any tenure, is the *lex loci rei sitæ*, and therefore the formalities required for the devise or bequest of immovables, whether realty or personalty, and the validity of a will of lands in England are governed by the ordinary testamentary law of England (*c*).

Foreign land. **1109.** The devolution of immovables situate in a foreign country is determined in accordance with the *lex situs* or law of such foreign country (*d*). The English courts have no jurisdiction to determine the validity of a will dealing with foreign immovables (*e*), but the proceeds of sale of land abroad must be considered in an English administration as answering to the description of pure personalty (*f*).

### SECT. 2.—Movables.

Disposition of movables. **1110.** The law of the country in which the deceased was domiciled at the time of his death regulates the decision as to what constitutes his last will, and as to whether and how far it is valid,

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(*r*) *Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560, following *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

(*s*) *Ward v. Ward* (1848), 11 Beav. 377.

(*t*) *Barretto v. Young*, [1900] 2 Ch. 339.

(*u*) *In the Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209; *Murphy v. Deichler*, [1909] A. C. 446.

(*a*) *In the Goods of Tréfond*, [1899] P. 247; *In the Goods of Vannini*, [1901] P. 330.

(*b*) As to what property is immovable, see title CONFLICT OF LAWS, Vol. VI., pp. 196 *et seq.*

(*c*) See *ibid.*, pp. 219 *et seq.*, where the subject is fully dealt with. As to probate of foreign wills, and of wills dealing with foreign property, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 163 *et seq.*

(*d*) *In the Goods of Gentili* (1875), 9 I. R. Eq. 541.

(*e*) See title CONFLICT OF LAWS, Vol. VI., p. 199.

(*f*) *Beaumont v. Oliveira* (1868), L. R. 6 Eq. 534; (1869), 4 Ch. App. 309; *Rea v. Rea*, [1902] 1 I. R. 451, 462; and see title CONFLICT OF LAWS, Vol. VI., pp. 198, 199.



without regard to the place of his birth or of his death, or to the situation of his movable property (*g*).

SECT. 2.  
Movables.

The burden of proving that a will ought not to be admitted to probate lies upon the party impeaching it; but where the party impeaching the will establishes the fact that a testator had lost his English domicil, having gained another elsewhere, and died in the acquired domicil, the burden of proof is in such circumstances shifted, and it lies upon the party propounding the will to prove that the law of the acquired domicil is such as to authorise a will in the form propounded (*h*).

Foreign  
domicil.

## Part VII.—Alterations and Erasures.

**1111.** No obliteration, interlineation, or other alteration made in a will after execution is valid unless duly executed (*i*), except so far as the words or effect of the will before such alteration shall not be apparent (*k*). Alterations.

“Apparent” means apparent on an inspection of the instrument, not apparent by extrinsic evidence (*l*). Words are apparent if experts using magnifying glasses when necessary can decipher them and satisfy the court that they have done so (*m*); but it is not allowable to resort to any physical interference with the document so as to render clearer what may have been written upon it (*n*). Where, by reason of obliteration or erasure, words are not apparent, there is entire destruction *pro tanto* of the will, and therefore so far a revocation (*o*). “Apparent.”

(*g*) *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 306; *Whicker v. Hume* (1858), 7 H. L. Cas. 124; *Enohin v. Wylie* (1862), 10 H. L. Cas. 1; *Crispin v. Doglioni* (1863), 3 Sw. & Tr. 96, 99; and see title CONFLICT OF LAWS, Vol. VI., pp. 225 *et seq.* As to the formalities required in the case of a will by a British subject executed abroad, see *ibid.*, p. 226; as to probate of wills of foreigners, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 163 *et seq.* As to the execution of powers by foreign wills, see titles CONFLICT OF LAWS, Vol. VI., pp. 228, 229; POWERS, Vol. XXIII., p. 19.

(*h*) *Bremer v. Freeman*, *supra*, at p. 357.

(*i*) As to the form of execution of alterations, see p. 561, *post*. As to unexecuted alterations in a will prior to the 1st January, 1838, see *Pechell v. Jenkinson* (1839), 2 Curt. 273; *In the Goods of Streaker* (1859), 4 Sw. & Tr. 192; and compare *Banks v. Thornton* (1853), 11 Hare, 176, 180; *Benson v. Benson* (1870), L. R. 2 P. & D. 172. As to admitting codicils containing erasures to probate without an action, see *In the Goods of O'Brien*, [1900] P. 208.

(*k*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 21.

(*l*) *In the Goods of Ibbetson* (1839), 2 Curt. 337; *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211; *Efrench v. Combe*, [1894] P. 191; *In the Goods of McCabe* (1873), L. R. 3 P. & D. 94, 96.

(*m*) *Efrench v. Combe*, *supra*; *In the Goods of Brasier*, [1899] P. 36.

(*n*) *In the Goods of Horsford*, *supra*. But paper pasted over the amount of a legacy has been removed by order of the court (*ibid.*); and in *In the Goods of Gilbert*, [1893] P. 183, the court ordered the removal of blank paper which had been pasted over the back of a testamentary paper, to see whether what had been written amounted to a revocation.

(*o*) *Townley v. Watson* (1844), 3 Curt. 761; see p. 569, *post*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 168.

PART VII.  
Alterations  
and  
Erasures.

Time of  
alteration.

Evidence.

**1112.** The burden is upon the person who seeks to rely upon an alteration in a will to adduce some evidence that the alteration was made before the will was executed (*p*). In the absence of evidence the presumption is that alterations, interlineations, and erasures were made after execution (*q*); and if the original words are not apparent the probate is granted in blank as to those words (*a*), or if they are apparent, the probate contains the original words (*b*). Very slight affirmative evidence is, however, sufficient to rebut this presumption (*c*) unless the alterations are important (*d*).

The presumption may be rebutted by evidence of declarations of testamentary intention made before or at the time of execution (*e*), or by evidence of other persons that the alterations were made before execution (*f*). Internal evidence furnished by the document itself may be considered, and the circumstance that a clause would be perfectly meaningless without the interlineation is material (*g*). Any evidence which, having regard to the circumstances, reasonably leads to the conclusion that the alterations were made before execution is sufficient (*h*). Thus, where alterations are necessary to supply blanks left in a will, such as for the names of legatees or the amounts of legacies, and these blanks are afterwards filled in, the presumption is that they were inserted before execution; and an interlineation which appears to have been written with the same ink and the same pen as the rest of the will, and which supplies a blank in the sense, is presumed to have been written before execution (*i*).

(*p*) *Cooper v. Bockett* (1846), 4 Moo. P. C. C. 419; *Simmons v. Rudall* (1851), 1 Sim. (N. S.) 115, 137; *Gann v. Gregory* (1854), 3 De G. M. & G. 777, 780, where probate had been granted with the alterations; *Greville v. Tylee* (1851), 7 Moo. P. C. C. 320; *In the Goods of James* (1858), 1 Sw. & Tr. 238; *Oldroyd v. Harvey*, [1907] P. 326, where the signature of a second codicil validated an interlineation in a first codicil on the same page.

(*q*) See the cases cited in note (*p*), *supra*.

(*a*) *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747; *In the Goods of Ibbetson* (1839), 2 Curt. 337.

(*b*) *In the Goods of Beavan* (1840), 2 Curt. 369; *In the Goods of Martin* (1849), 1 Rob. Eccl. 712; *Re Gaussen* (1867), 16 W. R. 212.

(*c*) *Williams v. Ashton* (1860), 1 John. & H. 115; *In the Goods of Duffy* (1871), 5 I. R. Eq. 506.

(*d*) *Keigwin v. Keigwin* (1843), 3 Curt. 607; and see *In the Goods of Hindmarch* (1866), L. R. 1 P. & D. 307.

(*e*) *In the Goods of Sykes* (1873), L. R. 3 P. & D. 26, 27; *In the Goods of Adamson* (1875), L. R. 3 P. & D. 253; *Doe d. Shallcross v. Palmer*, *supra*; *Dench v. Dench* (1877), 2 P. D. 60. In *Woodward v. Goulstone* (1886), 11 App. Cas. 469, the House of Lords declined to express an opinion as to whether evidence of post-testamentary declarations had been rightly received in *Sugden v. St. Leonards (Lord)* (1876), 1 P. D. 154, C. A.

(*f*) *Tyler v. Merchant Taylors' Co.* (1890), 15 P. D. 216; see *In the Goods of Greenwood*, [1892] P. 7.

(*g*) *In the Goods of Heath*, [1892] P. 253; *In the Goods of Cadge* (1868), L. R. 1 P. & D. 543; *Dench v. Dench*, *supra*; and see *Doherty v. Dwyer* (1890), 25 L. R. Ir. 297, where the attestation clause referred generally to a "few erasures and alterations"; *In the Goods of Treeby* (1875), L. R. 3 P. & D. 242; and see *Re Hay*, *Kerr v. Stinnear*, [1904] 1 Ch. 317, 321).

(*h*) *Moore v. Moore* (1872), 6 I. R. Eq. 166.

(*i*) *In the Goods of Cadge* (1868), L. R. 1 P. & D. 543. This is so even when the blank is filled in in pencil (*Kell v. Charmer* (1856), 23 Beav. 195). A clause inconsistent with the rest of the will, and struck out in pencil, was

**1113.** Where the testator indicates, as, for instance, by asterisks, the place in the will where matter written before execution is intended to come in, such matter may be regarded as a valid interlineation (*k*); but words following the executed part of a will cannot be treated as an interlineation merely because they complete an otherwise incomplete sentence in the executed part (*l*).

PART VII.  
Alterations  
and  
Erasures.

Interlineations.

**1114.** Alterations made in a will after it is signed may be validated by a due acknowledgment of his signature subsequently made by the testator (*m*), or by the signatures of the testator and the witnesses in the margin or in some other part of the will opposite or near to such alterations (*n*). The initials of the testator and the witnesses are (*o*), but the initials of the witnesses alone are not (*p*), sufficient for this purpose. The testator and witnesses do not, however, fulfil the statutory requirement by merely going over their signatures with a dry pen. There must either be an execution of the alteration or a re-execution of the will (*q*).

Subsequent alterations.

**1115.** Unattested alterations in a will are validated by a subsequent codicil confirming the will (*r*), unless it appears from the codicil or otherwise that the alterations were merely deliberative (*s*), because a codicil is a republication of a will and validates it at the time of execution of the codicil (*t*). If the codicil takes no notice of alterations, the presumption is that they were made after the date of the codicil, but this may be rebutted by evidence (*a*).

Effect of codicil on alterations.

**1116.** A will altered after the testator's death must, if possible, be restored to the state in which it was at the deceased's death, and probate is given without such alteration (*b*).

Alterations by stranger.

ignored in *In the Goods of Tonge* (1891), 66 L. T. 60; and see *Birch v. Birch* (1848), 1 Rob. Eccl. 675.

(*k*) *In the Goods of Birt* (1871), L. R. 2 P. & D. 214; *In the Goods of Greenwood*, [1892] P. 7; *In the Goods of White* (1860), 6 Jur. (N. S.) 808; *In the Goods of Malen* (1885), 54 L. J. (P.) 91; see *Leonard v. Leonard*, [1902] P. 243, 244, where two new interpolated sheets were held not to be alterations within the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 21.

(*l*) *In the Goods of Anstee*, [1893] P. 283; and see *In the Goods of White*, [1896] 1 I. R. 269; *In the Goods of Gee* (1898), 78 L. T. 843; p. 550, *ante*.

(*m*) *In the Goods of Dewell* (1853), 17 Jur. 1130.

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 21. As to the question whether more than one such alteration can be attested by a single marginal execution, see *In the Goods of Wilkinson* (1881), 6 P. D. 100; *In the Goods of Treeby* (1875), L. R. 3 P. & D. 242.

(*o*) *In the Goods of Blewitt* (1880), 5 P. D. 116.

(*p*) *In the Goods of Shearn* (1880), 50 L. J. (P.) 15; *In the Goods of Cunningham* (1860), 4 Sw. & Tr. 194; see *In the Goods of Dewell*, *supra*.

(*q*) See the cases cited in note (*p*), *supra*. For the form of attestation of an altered will, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 662.

(*r*) *In the Goods of Hall* (1871), L. R. 2 P. & D. 256, 257; *Oldroyd v. Harvey*, [1907] P. 326 (second codicil).

(*s*) *In the Goods of Heath*, [1892] P. 253; *Tyler v. Merchant Taylors' Co.* (1890), 15 P. D. 216; see *Re Hay*, *Kerr v. Stinnear*, [1904] 1 Ch. 317.

(*t*) See pp. 577 *et seq.*, *post*.

(*a*) *Lushington v. Onslow* (1848), 6 Notes of Cases, 183; *In the Goods of Sykes* (1873), L. R. 3 P. & D. 26, 27; *Christmas and Christmas v. Whinyates* (1863), 3 Sw. & Tr. 81, 89 (mutilation).

(*b*) *In the Goods of Rolfe* (1846), 4 Notes of Cases, 406.



## Part VIII.—Revocation and Revival.

### SECT. 1.

#### Revocation by Marriage.

#### Marriage.

#### Foreign marriage.

### SECT. 1.—Revocation by Marriage.

**1117.** Every will made after the 31st December, 1837 (*c*), by a man or woman, except a will made in certain circumstances in exercise of a power (*d*), is revoked by his or her marriage (*e*), even though the will is made in actual contemplation of the marriage (*f*).

Such revocation takes effect as regards movables where the testator or testatrix is domiciled in England at the moment of the marriage (*g*), and the domicile of a wife becomes at the moment of marriage the same as the domicile of her husband (*h*). The English courts determine the effect of marriage, as regards the revocation of a will of movables previously made, by the law of the country where the testator or testatrix is domiciled at the moment of the marriage (*g*). Where, however, by the law of the domicile, marriage does not revoke a testamentary disposition, a subsequent change of domicile does not affect its validity (*i*).

#### Will in exercise of power of appointment.

**1118.** A will exercising a power of appointment is not revoked by the testator's subsequent marriage unless the persons to take in default of appointment take in the capacity of the testator's heir, customary heir, executor or administrator, or next of kin under the Statute of Distributions (*k*). The reason for this exception is that

(*c*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34. As to wills made before 1838, see *Marston v. Roe* d. *Fox* (1838), 8 Ad. & El. 14, Ex. Ch.; *Israell v. Rodon* (1839), 2 Moo. P. C. C. 51, 62; *In the Goods of Shirley* (1841), 2 Curt. 657.

(*d*) See the text, *infra*.

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18. The marriage must be a lawful marriage (*Mette v. Mette* (1859), 1 Sw. & Tr. 416; *Warter v. Warter* (1890), 15 P. D. 152). As to marriages with a deceased wife's sister, see title HUSBAND AND WIFE, Vol. XVI., pp. 284, 285.

(*f*) *In the Goods of Cadywold* (1858), 1 Sw. & Tr. 34; *Otway v. Sadleir* (1858), 4 Ir. Jur. (N. S.) 97. For a form of attestation of a will made on the same day as but after the testator's marriage, see Moore, *Practical Forms*, 5th ed., p. 52. For a form of revival after marriage of a will revoked by marriage, see Kelly's *Conveyancing Draftsman*, 5th ed., p. 352.

(*g*) *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, C. A.; see title CONFLICT OF LAWS, Vol. VI., p. 227. Where an English testatrix marries a Scotsman and thus acquires a Scottish domicile, her will is not thereby revoked (*Westerman v. Schwab* (1905), 13 Scots Law Times, 594). As to proof of the matrimonial law on this point, see *Re Martin, Loustalan v. Loustalan*, *supra*.

(*h*) *Re Martin, Loustalan v. Loustalan*, *supra*.

(*i*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3; *In the Goods of Reid* (1866), L. R. 1 P. & D. 74; *In the Estate of Groos*, [1904] P. 269.

(*k*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 18. The fact that the persons to take in default of appointment are the statutory next of kin of the appointor does not prevent the exception applying if the gift in default of appointment is to them in another capacity, such as, for instance, as children of the appointor (*In the Goods of Fitzroy* (1858), 1 Sw. & Tr. 133; *In the Goods of Worthington* (1871), 20 W. R. 260). Where freeholds were in default of appointment limited to the testatrix, her heirs and assigns, her marriage revoked her will exercising a power, the exception in the statutory provision not applying (*Vaughan v. Vanderstegen* (1853), 2 Drew. 165, 194); but the exception applies to a case where

the new family of the testator can derive no benefit from such revocation, because revocation of the appointment only operates in favour of those entitled to take in default of appointment (*l*).

SECT. 1.  
Revocation  
by Marriage.

**1119.** A will comprising property not subject to a power of appointment and also property subject to appointment by the testator, but falling within the exception in the section, is revoked by the subsequent marriage of the testator *quâ* the property not subject to the power, while holding good as an appointment under the power (*m*).

Partial  
revocation by  
marriage.

## SECT. 2.—*Voluntary Revocation.*

### SUB-SECT. 1.—*In General.*

**1120.** A will is of its own nature revocable, and therefore though a man should make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable (*n*).

Revocation.

**1121.** To effect a revocation there must be an intention to revoke (*o*). If anything is done by the testator or by his direction which, if there was an intention to revoke, would amount to a revocation, the presumption of law from such act is in favour of the existence of the *animus revocandi*, but this presumption may be rebutted by evidence showing that the *animus revocandi* did not exist (*p*). An act done without such intention is wholly ineffectual (*q*), even if such act results in the destruction of the will (*a*). Thus, where a testator destroys the will through inadvertence (*b*), or under the belief that it is useless (*c*) or invalid (*d*), or has already been revoked (*e*), or where he is drunk at the time

Intention.

the gift in default of appointment is to the next of kin as distinguished from statutory next of kin of the appointor (*In the Goods of McVicar* (1869), L. R. 1 P. & D. 671). As to the meaning of "next of kin," see pp. 755, 756, *post*.

(*l*) *In the Goods of Fenwick* (1867), L. R. 1 P. & D. 319; *In the Goods of Worthington* (1871), 20 W. R. 260.

(*m*) *In the Goods of Russell* (1890), 15 P. D. 111, where a grant of administration with the will annexed limited to the appointed property was made to the widow.

(*n*) *Vynior's Case* (1610), 8 Co. Rep. 81 b; see pp. 509, 510, *ante*. As to the effect of contracts not to revoke a will, see pp. 514, 515, *ante*; as to revocation of joint and mutual wills, see pp. 516, 517, *ante*.

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20; and see p. 564, *post*. A will is not revoked by any presumption of intention based on an alteration of circumstances (Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 19; see *Re Wells' Trusts*, *Hardisty v. Wells* (1889), 42 Ch. D. 646).

(*p*) *Onions v. Tyrer* (1717), 1 P. Wms. 343, 344; *Burtenshaw v. Gilbert* (1774), 1 Cowp. 49, 52; and see pp. 564, 572 *et seq.*, *post*.

(*q*) *Clarkson v. Clarkson* (1862), 2 Sw. & Tr. 497; *In the Goods of Thornton* (1889), 14 P. D. 82.

(*a*) *James v. Shrimpton* (1876), 1 P. D. 431; *Cheese v. Lovejoy* (1877), 2 P. D. 251, 253, C. A.; *Clarkson v. Clarkson*, *supra*.

(*b*) *Burtenshaw v. Gilbert*, *supra*, per Lord MANFIELD, C.J., at p. 52.

(*c*) *Beardsley v. Lacey* (1897), 73 L. T. 25; *James v. Shrimpton*, *supra*.

(*d*) *Giles v. Warren* (1872), L. R. 2 P. & D. 401; *In the Goods of Thornton*, *supra*.

(*e*) *Scott v. Scott* (1859), 1 Sw. & Tr. 258; *Clarkson v. Clarkson*, *supra*.

SECT. 2.  
Voluntary  
Revocation.

Proof of  
intention.

of an alleged revocation (*f*), or insane though he may afterwards recover (*g*), no revocation results.

**1122.** The intention to revoke must be as clear and free from doubt as the original intention to bequeath or devise (*h*), and must be shown with reasonable certainty (*i*). It must be a present intention, the expression of an intention to revoke at some future time or by some future instrument not being sufficient (*k*); but a revocation accompanied by the expression of intention to make a new will which is not in fact made is nevertheless an effective revocation (*l*).

The intention to revoke may be evidenced by the declarations of the testator, especially if such declarations were contemporaneous with the act of revocation (*m*), or such intention may be inferred from the nature of the act done (*n*).

Once due execution of a will is proved, the burden of showing that it has been revoked lies upon those who set up revocation; and in the absence of proof revocation is not presumed (*o*).

Modes of  
revocation.

**1123.** Voluntary revocation (*p*) of a will can now only be effected in one or other of the following modes, namely (*q*):—(1) By another will or codicil (*r*) duly executed (*s*); or (2) by some writing (*t*) declaring an intention to revoke the same and duly executed as a will (*s*); or (3) by burning, tearing or otherwise destroying (*a*) the will, by the testator, or by some person in his presence and by his direction, with intention of revoking the same, but no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as the statute

(*f*) *In the Goods of Brassington*, [1902] P. 1.

(*g*) *Scruby v. Fordham* (1822), 1 Add. 74; *Borlase v. Borlase* (1845), 4 Notes of Cases, 106, 139; *In the Goods of Shaw* (1838), 1 Curt. 905; *In the Goods of Downer* (1853), 18 Jur. 66; *Brunt v. Brunt* (1873), L. R. 3 P. & D. 37; *In the Goods of Hine*, [1893] P. 282.

(*h*) *Kellett v. Kellett* (1868), L. R. 3 H. L. 160, 167; *Re Wilcock, Kay v. Dewhirst*, [1898] 1 Ch. 95, 98; *Doe d. Hearle v. Hicks* (1832), 1 Cl. & Fin. 20, 24, H. L.; *In the Goods of Ince* (1877), 2 P. D. 111; *Re Freeman, Hope v. Freeman*, [1910] 1 Ch. 681, C. A.

(*i*) *Randfield v. Randfield* (1860), 8 H. L. Cas. 225, 235; *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658, 694.

(*k*) *Cleoburey v. Beckett* (1851), 14 Beav. 583; see *Burton v. Gowell* (1593), Cro. Eliz. 306 (a case under the old law); *Thomas d. Jones v. Evans* (1802), 2 East, 488.

(*l*) *Toomer v. Sobinska*, [1907] P. 106.

(*m*) *Clarke v. Scripps* (1852), 2 Rob. Eccl. 563; *Johnston v. Johnston* (1817), 1 Phillim. 447, 469; *Stride v. Cooper* (1811), 1 Phillim. 334, 338; *O'Connell v. Butler* (1819), Milw. 97, 118; *Maguire v. Marshall* (1833), Milw. 307, 311.

(*n*) *Clarke v. Scripps*, *supra*; *North v. North* (1909), 25 T. L. R. 322.

(*o*) *Harris v. Berrall* (1858), 1 Sw. & Tr. 153; *Sprigge v. Sprigge* (1868), L. R. 1 P. & D. 608; *Benson v. Benson* (1870), L. R. 2 P. & D. 172.

(*p*) As to revocation by marriage, see p. 562, *ante*.

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20.

(*r*) See pp. 565 *et seq.*, *post*.

(*s*) See pp. 547 *et seq.*, *ante*.

(*t*) See p. 568, *post*.

(*a*) See pp. 569 *et seq.*, *post*.



prescribes, prevents the operation of the will with respect to such estate or interest in such real or personal estate as the testator has power to dispose of by will at the time of his death (*b*).

SECT. 2.  
**Voluntary  
Revocation.**

**1124.** As a will speaks from the testator's death (*c*), and can only be revoked in one or other of the prescribed modes (*d*), a testator cannot delegate the power to revoke his will after his death (*e*).

Delegation  
of power of  
revocation.

**1125.** A will is not revoked or the construction thereof altered by reason of any subsequent change of domicile of the testator (*f*).

Change of  
domicil.

SUB-SECT. 2.—*By Later Will or Codicil.*

**1126.** An earlier will is revoked by a later will or codicil expressly revoking such earlier will or all former wills (*g*), and no particular form of words is required for the purpose of effecting such revocation (*h*). An express clause of revocation is not essential (*i*), but if inserted in general terms operates as a rule to revoke all testamentary instruments previously executed by the testator (*k*), including testamentary appointments (*l*). Such a clause is not, however, conclusive evidence of an intention to effect a complete revocation (*m*), and may be shown to have been inserted by mistake and without the approval of the testator (*n*).

Revocation  
by will or  
codicil.

Express  
revocation.

(*b*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20. The result of this provision is that the earlier cases in which it was formerly held that a will was revoked by an alteration of the estate of the testator are no longer law (*Forde v. De Pontès* (1861), 30 Beav. 572, 593). The provision refers to an interest of the testator remaining in the property, and does not apply to cases where the thing meant to be given is gone (*Moor v. Raisbeck* (1841), 12 Sim. 123, 139; *Blake v. Blake* (1880), 15 Ch. D. 481, 487, following *Gale v. Gale* (1856), 21 Beav. 349). As to ademption by alteration of estate, see p. 603, *post*; as to a change in the nature of the property subject to a power exercised by will, see title POWERS, Vol. XXIII., pp. 42, 43.

(*c*) See p. 506, *ante*; pp. 691, 692, *post*.

(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 18, 20.

(*e*) *Stockwell v. Ritherdon* (1848), 1 Rob. Eccl. 661.

(*f*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3; *In the Goods of Reid* (1866), L. R. 1 P. & D. 74; and see *In the Estate of Groos*, [1904] P. 269.

(*g*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20. For precedents of express clauses of revocation, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 399, 400.

(*h*) *Birks v. Birks* (1865), 4 Sw. & Tr. 23, 30; *Cottrell v. Cottrell* (1872), L. R. 2 P. & D. 397. The insertion in the attestation clause of words purporting to revoke a previous will has no effect (*In the Goods of Atkinson (M. E. J.)* (1883), 8 P. D. 165).

(*i*) *Dempsey v. Lawson* (1877), 2 P. D. 98, 107.

(*k*) *Sotheran v. Denning* (1881), 20 Ch. D. 99; *Cottrell v. Cottrell*, *supra*.

(*l*) *Sotheran v. Denning*, *supra*; *Re Kingdon*, *Wilkins v. Pryer* (1886), 32 Ch. D. 604, where a testamentary appointment under a special power was held to be revoked by a general revocatory clause; see *Cadell v. Wilcocks*, [1898] P. 21, 26.

(*m*) *Denny v. Barton* (1818), 2 Phillim. 575; *O'Leary v. Douglass* (1878), 1 L. R. Ir. 45, 50; and see *Methuen v. Methuen* (1817), 2 Phillim. 416, 426; *Gladstone v. Tempest* (1840), 2 Curt. 650; *Dempsey v. Lawson*, *supra*; *Robinson v. Clarke* (1877), 2 P. D. 269.

(*n*) *Powell v. Mouchett*, *Lichfield v. Mouchett* (1821), Madd. & G. 216; *In the Goods of Oswald* (1874), L. R. 3 P. & D. 162. It seems that a mere

SECT. 2.  
**Voluntary  
 Revocation.**  
 Last will.

The mere insertion in a will of the words "last and only will" does not necessarily work a revocation of all previous testamentary instruments (*o*); but where it is clear from the general tenor of the last will that the testator did not intend an earlier will to remain in force, the earlier will is revoked (*p*).

Partial  
 revocation.

**1127.** Part only of a will may be revoked (*q*). The *animus revocandi* must govern the extent and measure of operation to be attributed to an act of revocation which may be done with the intention of revoking the whole or part only of a will (*r*). Where revocation of part makes the rest of the will unintelligible, total revocation results (*s*).

Subsequent  
 inconsistent  
 will.

**1128.** Where a later unambiguous will deals with the testator's entire property, it revokes all earlier wills, even though it contains no clause of revocation (*t*); and if the later will practically covers the same ground as an earlier one, it must be taken as being in substitution for it, and probate of the later will alone is granted (*u*). Even where the later will does not completely cover the whole subject-matter of an earlier one, if it can be collected from the language of the testator that he intended to dispose of his property in a different manner from that in which he disposed of it by the earlier will, the earlier instrument is revoked (*w*). The mere fact of making a subsequent testamentary disposition does not, however,

misunderstanding by the testator as to the effect of the insertion of a clause of revocation is not sufficient to justify the omission of the clause from the probate (*Collins v. Elstone*, [1893] P. 1).

(*o*) *Simpson v. Foxon*, [1907] P. 54, following *Lemage v. Goodban* (1865), L. R. 1 P. & D. 57; see *Loftus v. Stoney* (1867), 17 I. Ch. R. 178, where two wills, one described as "last" and the other "duplicate," were admitted to probate, and the court of construction held that the will marked "last" was the real will. So the express confirmation in a third codicil of a will and one of two previous codicils does not of itself operate to revoke the other codicil (*Follett v. Pettman* (1883), 23 Ch. D. 337).

(*p*) *In the Goods of Howard* (1869), L. R. 1 P. & D. 636; and see *In the Goods of Petchell* (1874), L. R. 3 P. & D. 153, 156; *In the Goods of De la Saussaye* (1873), L. R. 3 P. & D. 42; *Pepper v. Pepper* (1870), 5 I. R. Eq. 85; *Cutto v. Gilbert* (1854), 9 Moo. P. C. C. 131 (personal estate), overruling on this point *Plenty v. West* (1845), 1 Rob. Eccl. 264; *Freeman v. Freeman* (1854), 5 De G. M. & G. 704, C. A. (real estate); *Dempsey v. Lawson* (1877), 2 P. D. 98; *Leslie v. Leslie* (1872), 6 I. R. Eq. 332; *In the Goods of O'Connor* (1884), 13 L. R. Ir. 406.

(*q*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20. For forms of codicils revoking part of will, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 545, 546.

(*r*) *Re White* (1879), 3 L. R. Ir. 413, 416, C. A. But a mere recital of the testator's object in revoking a gift does not, it seems, limit the operation of an absolute revocation (*Holder v. Howell* (1803), 8 Ves. 97).

(*s*) *Leonard v. Leonard*, [1902] P. 243.

(*t*) *In the Goods of Palmer*, *Palmer v. Peat* (1889), 58 L. J. (P.) 44; *Cadell v. Wilcocks*, [1898] P. 21; *In the Estate of Bryan*, [1907] P. 125.

(*u*) *O'Leary v. Douglass* (1878), 3 L. R. Ir. 323, C. A.; *Dempsey v. Lawson*, *supra*; *In the Goods of Turnour* (1886), 56 L. T. 671; *In the Goods of Palmer*, *Palmer v. Peat*, *supra*; *M'Ara v. M'Cay* (1889), 23 L. R. Ir. 138; *Cadell v. Wilcocks*, *supra*; and see *Chichester v. Quatrefages*, [1895] P. 186 (codicils).

(*w*) *Dempsey v. Lawson*, *supra*, at p. 105; *In the Estate of Bryan*, *supra*, at p. 129.

work a total revocation of a prior will, unless the latter expressly or in effect revokes the former, or the two are incapable of standing together (*x*).

SECT. 2.  
Voluntary  
Revocation.

If there are two wholly inconsistent testamentary documents of the same date, or undated, and it cannot be ascertained which of them was executed first, neither document can be admitted to probate (*a*); but in the absence of express revocation, a later inconsistent disposition which is not valid in itself does not revoke an earlier disposition (*b*).

**1129.** Where a subsequent will is not forthcoming, the burden of showing that it revoked an earlier will is on the person alleging revocation, and there must be proof of a difference of disposition (*c*). Accordingly, where a testator makes two wills and the later is lost or destroyed, unless there is evidence to show that it expressly or impliedly revoked the earlier will, in which case the result is an intestacy (*d*), the earlier will is entitled to probate (*e*). Lost subsequent will.

**1130.** Where there are several testamentary instruments which are not wholly inconsistent, they are considered, so far as they can be read together, as constituting the last will of the testator (*f*); for any number of testamentary instruments, whatever be their relative date or in whatever form they may be, can be admitted to probate as together constituting the last will of the deceased (*g*). The established rule is not to disturb the prior disposition further than is absolutely necessary for the purpose of giving effect to the later one (*h*); and the presumption against implied revocation is strengthened where the testator uses words showing an intention not to alter his testamentary disposition except in certain specific respects (*i*). The question is, what disposition did the testator Partly inconsistent wills.

(*x*) *Lemage v. Goodban* (1865), L. R. 1 P. & D. 57; *In the Goods of Petchell* (1874), L. R. 3 P. & D. 153; *In the Goods of Summers* (1901), 84 L. T. 271; *Townsend v. Moore*, [1905] P. 66, C. A.; *Simpson v. Foxon*, [1907] P. 54; *Reeves v. Reeves*, [1909] 2 I. R. 521.

(*a*) *Phipps v. Anglesey (Earl)* (1751), 7 Bro. Parl. Cas. 443; *Townsend v. Moore*, [1905] P. 66, C. A.; *Loftus v. Stoney* (1867), 17 I. Ch. R. 178.

(*b*) *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Duguid v. Fraser* (1886), 31 Ch. D. 449; and compare *Morley v. Kennoldson*, [1895] 1 Ch. 449, C. A.; but see *Baker v. Story* (1874), 23 W. R. 147.

(*c*) *Cutto v. Gilbert* (1854), 9 Moo. P. C. C. 131, 147; *Goodright d. Rolfe v. Harwood* (1775), 7 Bro. Parl. Cas. 489; and see *In the Goods of Debac, Sanger v. Hart* (1897), 77 L. T. 374; *Wood v. Wood* (1867), L. R. 1 P. & D. 309, following *Brown v. Brown* (1858), 8 E. & B. 876, 886.

(*d*) *Wood v. Wood*, *supra*.

(*e*) *Hellier v. Hellier* (1884), 9 P. D. 237; *Hitchins v. Basset* (1693), 2 Salk. 592; *Dickinson v. Stidolph* (1861), 11 C. B. (N. S.) 341.

(*f*) *In the Goods of Budd* (1862), 3 Sw. & Tr. 196; *Birks v. Birks* (1865), 4 Sw. & Tr. 23; *Lemage v. Goodban*, *supra*; *In the Goods of Fenwick* (1867), L. R. 1 P. & D. 319; *In the Goods of Griffith* (1872), L. R. 2 P. & D. 457; *In the Goods of Petchell*, *supra*; *In the Goods of Hartley* (1880), 50 L. J. (P.) 1; *In the Goods of Hodgkinson* (1893), 69 L. T. 150.

(*g*) *Lemage v. Goodban*, *supra*; *Townsend v. Moore*, *supra*.

(*h*) *Farrer v. St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19.

(*i*) *Follett v. Pettman* (1883), 23 Ch. D. 337.



SECT. 2. intend, not which or what number of papers did he desire or expect  
 Voluntary to be admitted to probate (*k*); consequently the presumption of  
 Revocation. revocation, arising from apparent inconsistency of testamentary instruments, may be rebutted by parol evidence that the testator did not intend revocation, where there is some ambiguity on the face of the documents as to whether the deceased meant the particular disposition to be part of his will (*l*), or by extrinsic evidence of surrounding circumstances (*m*). If, however, there is no ambiguity on the face of the papers, parol evidence cannot be admitted to show that revocation was not intended (*a*).

Codicils.

**1131.** Where a will is revoked by a subsequent codicil, the question whether an intermediate codicil is also revoked is one of construction. If the revoking codicil distinguishes between the will and subsequent codicils, as, for instance, by date, the latter are not revoked (*b*).

The revocation of a will does not now revoke a codicil to it by implication (*c*), for a properly executed testamentary paper can only be revoked by the methods prescribed by statute (*d*); but upon proof that a testator by cutting off his signature to his will intends to revoke a codicil to it written on the same piece of paper, the codicil may also be revoked (*e*).

Instrument  
 of revocation.

**1132.** A writing declaring an intention to revoke (*f*) a will must, to be effectual, be executed in the manner in which a will is required to be executed (*g*). Such a writing is not, however, admitted to probate (*h*) unless itself of a testamentary character (*i*).

(*k*) *Dempsey v. Lawson* (1877), 2 P. D. 98, 107.

(*l*) *Busteed v. Eager* (1834), Milw. 345, 348; *Fawcett v. Jones* (1810), 3 Phillim. 434, 478; *Blackwood v. Damer* (1783), 3 Phillim. 458, n.

(*m*) *Jenner v. Ffinch* (1879), 5 P. D. 106; *Paton v. Ormerod*, [1892] P. 247; *In the Estate of Bryan*, [1907] P. 125.

(*a*) *Thorne v. Rooke* (1841), 2 Curt. 799; and see *Collins v. Elstone*, [1893] P. 1; *In the Goods of Chapman* (1844), 1 Rob. Eccl. 1; *Hale v. Tokelove* (1850), 2 Rob. Eccl. 318.

(*b*) *Farrer v. St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19; see *Pratt v. Pratt* (1844), 14 Sim. 129.

(*c*) *Black v. Jobling* (1869), L. R. 1 P. & D. 685, disapproving *Clogstoun v. Walcott* (1847), 5 Notes of Cases, 623, and *Grimwood v. Cozens* (1860), 2 Sw. & Tr. 364; and see *In the Goods of Savage* (1870), L. R. 2 P. & D. 78; *In the Goods of Turner* (1872), L. R. 2 P. & D. 403; *Farrer v. St. Catharine's College, Cambridge*, *supra*; *Tagart v. Hooper* (1836), 1 Curt. 289; *In the Goods of Halliwell* (1846), 4 Notes of Cases, 400; *In the Goods of Dutton* (1863), 3 Sw. & Tr. 66; *In the Goods of Ellice* (1863), 12 W. R. 353; *In the Goods of Coulthard* (1865), 11 Jur. (N. S.) 184; *Gardiner v. Courthope* (1886), 12 P. D. 14; *In the Goods of Clements*, [1892] P. 254; *Paige v. Brooks* (1896), 75 L. T. 455.

(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 18, 20.

(*e*) *In the Goods of Bleckley* (1883), 8 P. D. 169.

(*f*) As to what amounts to such a declaration, see *In the Goods of Gosling* (1886), 11 P. D. 79.

(*g*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20; see p. 547, *ante*.

(*h*) *In the Goods of Fraser* (1869), L. R. 2 P. & D. 40; *In the Goods of Eyre*, [1905] 2 I. R. 540. As to the form of grant of administration in such a case, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 195.

(*i*) *In the Goods of Durance* (1872), L. R. 2 P. & D. 406, where a letter signed by the testator and duly attested directing his brother to obtain his

SUB-SECT. 3.—*By Destruction.*

## SECT. 2.

Voluntary  
Revocation.

## Destruction.

**1133.** A will may be revoked by burning, tearing (*k*), or otherwise destroying it, by the testator or by some person in his presence and by his direction, with the intention of revoking it (*l*). For this purpose there must be both an act of destruction (*m*) and an intention (*n*) to revoke, and the will must be actually injured (*o*). A symbolical destruction is not sufficient (*m*). Nor is a will revoked by being destroyed by mistake (*p*) or in a fit of madness (*q*), since all the destroying in the world without intention does not revoke a will (*r*).

The intention to revoke a will wholly or in part may be evidenced by proof of the expressed intention of the testator in doing the act, or of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself (*s*). Evidence of intention.

**1134.** The destruction *animo revocandi* of one part of a will executed in duplicate amounts to a revocation, whether both parts, or only one part, was in the possession of the testator (*t*); and the presumption generally is that by such destruction the testator intended complete revocation. This presumption is not so strong where the testator destroys one of two duplicates both in his own possession, especially if he has previously made alterations on the part so destroyed (*a*). Destruction of duplicate.

will and burn it unread was held sufficient to revoke the will; *In the Goods of Hubbard* (1865), L. R. 1 P. & D. 53; *In the Goods of Hicks* (1869), L. R. 1 P. & D. 683.

(*k*) This includes "cutting" (*Hobbs v. Knight* (1838), 1 Curt. 768; *In the Goods of Cooke* (1847), 5 Notes of Cases, 390).

(*l*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20.

(*m*) *Cheese v. Lovejoy* (1877), 2 P. D. 251, 253, C. A.; *Andrew v. Molley* (1862), 12 C. B. (N. S.) 514.

(*n*) *Powell v. Powell* (1866), L. R. 1 P. & D. 209, 212.

(*o*) *Giles v. Warren* (1872), L. R. 2 P. & D. 401. The object of the Statute of Frauds (29 Car. 2, c. 3), and of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), was to prevent the proof of revocation depending on parol evidence (*Doe d. Reed v. Harris* (1837), 6 Ad. & El. 209).

(*p*) *Giles v. Warren*, *supra*; *In the Goods of Thornton* (1889), 14 P. D. 82; *Beardsley v. Lacey* (1897), 67 L. J. (P.) 35.

(*q*) *Brunt v. Brunt* (1873), L. R. 3 P. & D. 37; and see p. 564, *ante*.

(*r*) *Cheese v. Lovejoy*, *supra*, per JAMES, L.J., at p. 253; and see *In the Goods of King* (1851), 2 Rob. Eccl. 403; *In the Goods of Coleman* (1861), 2 Sw. & Tr. 314; *Clarkson v. Clarkson* (1862), 2 Sw. & Tr. 497; *In the Goods of Thornton*, *supra*; *In the Goods of Brassington*, [1902] P. 1.

(*s*) *Clarke v. Scripps* (1852), 2 Rob. Eccl. 563, 567; *In the Goods of Maley* (1887), 12 P. D. 134; *Christmas and Christmas v. Whynates* (1863), 3 Sw. & Tr. 81; *Treloar v. Lean* (1889), 14 P. D. 49.

(*t*) *Onions v. Tyrer* (1717), 1 P. Wms. 343, 356; *Burtenshaw v. Gilbert* (1774), 1 Cowp. 49; *Boughey v. Moreton* (1758), 2 Lee, 532; *Rickards v. Mumford* (1812), 2 Phillim. 23; *Colvin v. Fraser* (1829), 2 Hag. Ecc. 266; *In the Goods of Slade (Lady)* (1869), 20 L. T. 330; *Jones v. Harding* (1887), 58 L. T. 60; *Paige v. Brooks* (1896), 75 L. T. 455; *Pemberton v. Pemberton* (1807), 13 Ves. 290.

(*a*) *Pemberton v. Pemberton*, *supra*, per Lord ERSKINE, L.C., at p. 310; *In the Goods of Hains* (1847), 5 Notes of Cases, 621.

## SECT. 2.

Voluntary  
Revocation.Incomplete  
destruction.

**1135.** If a testator leaves unfinished the work of destruction which he had commenced, either in consequence of the remonstrance or interference of a third person or by his own voluntary change of purpose, the will is unrevoked, the intention to revoke being itself revoked before the act was complete (*b*). Similarly, probate is granted of a will the signature to which has been partially erased and rewritten (*c*), or where the testator has cut out but replaced the part containing the signatures of the witnesses (*d*), but not where the testator's signature has been cut out and pasted on in the previous position (*e*).

Destruction  
by stranger.

**1136.** Destruction by a third person in the presence and by the direction of the testator is effectual (*f*). On the other hand, destruction by the testator's direction, but not in his presence, is ineffectual (*g*); nor can the testator revoke his will by subsequent ratification of a previous unauthorised act of destruction by a third person (*h*). A testator may, however, adopt his own previous act of destruction (*i*).

Extent of  
destruction.

**1137.** There must be such an injury, with intent to revoke, as destroys the entirety of the will (*k*); but it is sufficient if its essence as a will, though not the materials of which it is composed, are destroyed (*l*). Thus, cutting off the testator's signature (*m*) or scratching it out (*n*), unless done under a mistaken belief (*o*), or cutting off by the testator of the signature of attesting witnesses, if done *animo revocandi*, works a revocation (*p*) unless otherwise explained (*q*), but

(*b*) *Doe d. Perkes v. Perkes* (1820), 3 B. & Ald. 489; and see *In the Goods of Colberg* (1841), 2 Curt. 832; *Elms v. Elms* (1858), 1 Sw. & Tr. 155; *Cheese v. Lovejoy* (1877), 2 P. D. 251, C. A.; *Andrew v. Motley* (1862), 12 C. B. (N. S.) 514.

(*c*) *In the Goods of Kennett* (1863), 2 New Rep. 461.

(*d*) *In the Goods of Eeles* (1862), 2 Sw. & Tr. 600; and see *In the Goods of de Bode (Baron)* (1847), 5 Notes of Cases, 189.

(*e*) *Bell v. Fothergill* (1870), L. R. 2 P. & D. 148; *Magnesi v. Hazelton* (1881), 44 L. T. 586.

(*f*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20.

(*g*) *In the Goods of Dadds* (1857), Dea. & Sw. 290.

(*h*) *Gill v. Gill*, [1909] P. 157; and see *Mills v. Millward* (1889), 15 P. D. 20.

(*i*) *James v. Shrimpton* (1876), 1 P. D. 431.

(*k*) *Price v. Powell* (1858), 3 H. & N. 341; *Doe d. Reed v. Harris* (1837), 6 Ad. & El. 209.

(*l*) *Hobbs v. Knight* (1838), 1 Curt. 768, 779, 780.

(*m*) *In the Goods of Gullan* (1858), 1 Sw. & Tr. 23; *In the Goods of Lewis* (1858), 1 Sw. & Tr. 31; *In the Goods of Simpson* (1859), 5 Jur. (N. S.) 1366; *Hobbs v. Knight*, *supra*; *Walker v. Armstrong* (1856), 4 W. R. 770; *Bell v. Fothergill*, *supra*.

(*n*) *In the Goods of Morton* (1887), 12 P. D. 141. But where the signature is legible the will is valid (*In the Goods of Godfrey* (1893), 69 L. T. 22).

(*o*) *Stamford v. White*, [1901] P. 46.

(*p*) *Williams v. Tyley* (1858), John. 530; *In the Goods of Dallow, Evans v. Dallow* (1862), 31 L. J. (P. M. & A.) 128.

(*q*) *In the Goods of Wheeler* (1879), 49 L. J. (P.) 29; and see *Re White* (1879), 3 L. R. Ir. 413, C. A. The accidental cutting through of a witness's signature is not a revocation (*In the Goods of Taylor* (1890), 63 L. T. 230).



the erasure by the witnesses of their own signatures does not revoke the will (r).

SECT. 2.  
Voluntary  
Revocation.  
Partial  
destruction.

Where a portion of a will not necessary to its validity as a testamentary instrument is destroyed, the question is whether the portion destroyed is so important as to raise the presumption that the rest cannot have been intended to stand without it, or whether it is unimportant and independent of the rest of the will(s). Where a testator destroys some sheets of a will and substitutes others, but does not re-execute the whole will, there is a revocation (t); but merely tearing off part of the commencement of a will (a), or a clause containing legacies (b) or appointing executors (c), does not necessarily revoke the rest of the will.

**1138.** A will is not destroyed by being struck through with a pen (d), even though done *animo revocandi* (e), for cancelling is not now one of the modes of revocation (f). Cancelling.

**1139.** Declarations by the testator that he had destroyed his will are not admissible to prove the fact of destruction, but they are admissible to prove his intention to revoke it, from which the fact of destruction may be inferred (g). Evidence of  
revocation.

**1140.** Where a will is found destroyed or mutilated, in a place in which the testator would naturally put it, the presumption is that the testator destroyed it, and that the destruction was done *animo revocandi* (h), and if there is a codicil, after the execution of the codicil (i); but this presumption is only *primâ facie* and may be Presumption  
of intention.

(r) *Margary v. Robinson* (1886), 12 P. D. 8; and see *In the Goods of Greenwood*, [1892] P. 7.

(s) *Clarke v. Scripps* (1852), 2 Rob. Eccl. 563; *Re White* (1879), 3 L. R. Ir. 413, C. A.; *Leonard v. Leonard*, [1902] P. 243, 248, where the last threesheets of a will were unintelligible without the first two sheets, which had been destroyed, and the whole was held to be revoked.

(t) *Treloar v. Lean* (1889), 14 P. D. 49; and see *Gullan v. Grove* (1858), 26 Beav. 64.

(a) *In the Goods of Woodward (John)* (1871), L. R. 2 P. & D. 206.

(b) *In the Goods of Nelson* (1872), 6 L. R. Eq. 569; and see *Christmas and Whinyates v. Whinyates* (1863), 3 Sw. & Tr. 81.

(c) *In the Goods of Leach* (1890), 63 L. T. 111; *In the Goods of Maley* (1887), 12 P. D. 134.

(d) *Stephens v. Taprell* (1840), 2 Curt. 458, 465. As to revoking a bequest by pasting paper over the name of the legatee or the amount of the legacy, see *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211.

(e) *In the Goods of Brewster* (1859), 6 Jur. (N. S.) 56; *In the Goods of Rose* (1845), 4 Notes of Cases, 101; *Benson v. Benson* (1870), L. R. 2 P. & D. 172.

(f) "Otherwise destroying" in the Wills Act, 1837 (1 Will. 4 & 1 Vict. c. 26), s. 20, means destroying by some method *ejusdem generis* with those described in that provision (*Stephens v. Taprell, supra*).

(g) *Keen v. Keen* (1873), L. R. 3 P. & D. 105, *per* Sir J. HANNEN, at p. 107; *In the Goods of Sykes* (1873), L. R. 3 P. & D. 26; *In the Goods of Maley, supra*.

(h) *Davies v. Davies* (1753), 1 Lee, 444; *Lambell v. Lambell* (1831), 3 Hag. Ecc. 568; *In the Goods of Lewis* (1858), 1 Sw. & Tr. 31; *Elms v. Elms* (1858), 1 Sw. & Tr. 155; *Magnesi v. Hazelton* (1881), 44 L. T. 586. In *Abbott and Bearman v. Willstead* (1885), 2 T. L. R. 23, a blank sheet of paper was found substituted for the will.

(i) *Christmas and Christmas v. Whinyates, supra*.

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rebutted (*k*). Similarly, if a will was last traced to the possession of the testator and is not forthcoming at his decease (*k*), there is a *prima facie* presumption, in the absence of circumstances tending to a contrary conclusion, that the testator destroyed it *animo revocandi* (*l*). This does not, however, involve a presumed intention to revoke duly executed codicils to such will which are forthcoming at the testator's death, even though such codicils contain references to the will (*m*) and the will is known to have been destroyed by the testator (*n*); and the presumption may be rebutted by evidence, which, however, must be clear and satisfactory (*o*). Recent declarations by a testator of satisfaction at having settled his affairs (*p*) or of good-will towards the persons benefited by the will, or of adherence to the will and to the contents of the will itself (*q*), may be used for this purpose. A declaration by the testator of adherence to a will may be answered by his declarations to a contrary effect (*r*). The presumption may, it seems, also be rebutted by a consideration of the contents of the will itself (*s*), or by showing that the testator had no opportunity of destroying the will, or that it had been lost or destroyed without his privity or consent (*t*).

Burden of  
proof.

**1141.** Where there is proof that the will was duly executed by a testator who afterwards became insane, and it is mutilated or not forthcoming, the burden of showing that it had been mutilated or destroyed by the testator when of sound mind is on the party alleging revocation (*a*).

SUB-SECT. 4.—Conditional Revocation.

Conditional  
revocation in  
general.

**1142.** Revocation by destruction, or obliteration, or by subsequent will or codicil, may be conditional, and if the condition in question is unfulfilled the revocation fails and the will, as made before such revocation, remains operative.

In all cases of revocation by destruction or obliteration, the

(*k*) *Patten v. Poulton* (1858), 1 Sw. & Tr. 55.

(*l*) *Welch v. Phillips* (1836), 1 Moo. P. C. C. 299; *Eckersley v. Platt* (1866), L. R. 1 P. & D. 281; *Sugden v. St. Leonards* (Lord) (1876), 1 P. D. 154, 217, C. A.; *In the Goods of Shaw* (1858), 1 Sw. & Tr. 62; *In the Goods of Brown* (1858), 1 Sw. & Tr. 32; *In the Goods of Debae*, *Sanger v. Hart* (1897), 77 L. T. 374; *Allan v. Morrison*, [1900] A. C. 604, P. C.; *In the Goods of Paget* (1913), 47 I. L. T. 284.

(*m*) *Black v. Jobling* (1869), L. R. 1 P. & D. 685; *Gardiner v. Courthope* (1886), 12 P. D. 14.

(*n*) *In the Goods of Turner* (1872), L. R. 2 P. & D. 403.

(*o*) *Eckersley v. Platt*, *supra*; *Battyll v. Lyles* (1858), 4 Jur. (N. S.) 718.

(*p*) *Whiteley v. King* (1864), 17 C. B. (N. S.) 756.

(*q*) *Keen v. Keen* (1873), L. R. 3 P. & D. 105, 107; *Patten v. Poulton*, *supra*; *Saunders v. Saunders* (1848), 6 Notes of Cases, 518; *In the Estate of Mackenzie*, [1909] P. 305.

(*r*) *Keen v. Keen*, *supra*; *Re Sykes*, *Drake v. Sykes* (1907), 23 T. L. R. 747, C. A.

(*s*) *Sugden v. St. Leonards* (Lord), *supra*.

(*t*) *Lillie v. Lillie* (1829), 3 Hag. Ecc. 184; *Finch v. Finch* (1867), L. R. 1 P. & D. 371; and see *Allan v. Morrison*, *supra*.

(*a*) *Harris v. Berrall* (1858), 1 Sw. & Tr. 153; *Sprigge v. Sprigge* (1868), L. R. 1 P. & D. 608; *Benson v. Benson* (1870), L. R. 2 P. & D. 172, 176; *In the Goods of Hine*, [1893] P. 282; *Allan v. Morrison*, *supra*.

question whether revocation is conditional is a question of fact (*b*), to be considered in connexion with the circumstances in which revocation occurred and the declarations of the testator with which it may have been accompanied (*c*), which are accordingly admissible in evidence (*d*).

In cases, however, of revocation by subsequent will or codicil, the question is a question of construction (*e*); revocation is not conditional unless it appears to be such on the face of the subsequent will or codicil (*f*). The circumstances of the case must be considered (*g*), but extrinsic evidence of the testator's intention to make the revocation conditionally is inadmissible (*h*).

**1143.** In particular, revocation may be relative to another disposition which has already been made or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect (*i*). Such a revocation is known as a dependent relative revocation, and if from any cause (*k*) the other disposition fails to take effect, the will remains operative as it was before the revocation (*l*).

The question may thus arise in the case of destruction of a will as part of the act of making a fresh will, which is not in fact

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Revocation  
by subse-  
quent will  
or codicil.

Dependent  
relative  
revocation.

Instances.

(*b*) See *Dixon v. Treasury Solicitor*, [1905] P. 42 (question left to the jury).

(*c*) *Powell v. Powell* (1866), L. R. 1 P. & D. 209, *per* Sir J. P. WILDE, at p. 212; *Cossey v. Cossey* (1900), 82 L. T. 203, 204; *Brooke v. Kent* (1840), 3 Moo. P. C. C. 334, 350.

(*d*) Questions of the kind in the High Court of Justice come before the Probate, Divorce and Admiralty Division; as to such evidence in ambiguous cases in a Court of Probate, see pp. 511, 571, *ante*. An act of revocation by the means mentioned in the text is an equivocal act; see *Burtenshaw v. Gilbert* (1774), 1 Cowp. 49, *per* Lord MANSFIELD, C.J., at p. 52; *Powell v. Powell*, *supra*.

(*e*) *A.-G. v. Lloyd* (1747), 1 Ves. Sen. 32, 34; *Freel v. Robinson* (1909), 18 Ontario Law Reports, 651, 654, 655.

(*f*) Thus, where another donee is substituted, the revoked disposition is not set up by the fact that that donee fails to come into existence (*Nevill v. Boddam* (1860), 28 Beav. 554, 558) or has not the capacity to take a benefit, as in the case of a devise to a charity before the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5 (*French's Case* (1587), 1 Roll. Abr. 614, tit. Devise (O.) 4; *Roper v. Radcliffe* (1715), 10 Mod. Rep. 230, 233, H. L.; *Tupper v. Tupper* (1855), 1 K. & J. 665, 669; *Quinn v. Butler* (1868), L. R. 6 Eq. 225, 227).

(*g*) *In the Goods of Gentry* (1873), L. R. 3 P. & D. 80, 83.

(*h*) *Newton v. Newton* (1861), 12 I. Ch. R. 118, 128.

(*i*) See *Ex parte Ilchester (Earl)* (1803), 7 Ves. 348, *per* Lord ALVANLEY, C.J., at pp. 372, 373.

(*k*) *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594, 609 (failure by non-disclosure of trusts); and see the text, *infra*. The suggestion which has sometimes been made (see *Tupper v. Tupper*, *supra*, *per* WOOD, V.-C., at p. 669) that there is a distinction, and the principle is not applied, where the substituted gift fails because of the want of capacity of the substituted donee, is founded on the cases of express revocation by subsequent will or codicil, in which the question what was the intention of the testator (see *Quinn v. Butler*, *supra*, at pp. 227, 228), is a matter of construction; see the text, *supra*.

(*l*) In such a case "the *animus revocandi* has only a conditional existence; the condition being the validity of the disposition intended to be substituted" (*Powell v. Powell*, *supra*, *per* Sir J. P. WILDE, at p. 212).



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made (*m*), or is ineffectually made for want of due execution (*n*), or destruction in order to set up a prior will which needs revival (*o*), or obliteration of the amount of a legacy, and the substitution, without proper formalities, of a different amount (*p*), or obliteration and substitution, in a similar manner, of a different donee (*q*) or other person (*r*), or of a different event upon which the gift is to take effect (*s*).

In all these and other cases, however, the question is whether the disposition revoked is intended not to operate whatever happens, or is only to be destroyed if the provisions of the substituted instrument operate in its stead (*t*). The court must be satisfied that the testator did not intend to revoke the original will except conditionally, in so far as the other disposition could be set up (*u*).

Mistake.

**1144.** A revocation which is shown (*w*) to be made upon a mistake either of fact (*x*) or of law (*y*), and is considered by the court not

(*m*) *In the Goods of Appelbee* (1828), 1 Hag. Ecc. 143; *In the Goods of Eeles* (1862), 2 Sw. & Tr. 600; *Dixon v. Treasury Solicitor*, [1905] P. 42.

(*n*) *Hyde v. Hyde* (1708), 1 Eq. Cas. Abr. 409; *Onions v. Tyrer* (1717), 1 P. Wms. 343, 345; *Hide v. Mason* (1734), 8 Vin. Abr. 140, tit. Devise (R. 2), pl. 17; *Dancer v. Crabb* (1873), L. R. 3 P. & D. 98; *In the Estate of Irvin* (1908), 25 T. L. R. 41.

(*o*) *Dickinson v. Swatman* (1860), 6 Jur. (N. S.) 831; *Powell v. Powell* (1866), L. R. 1 P. & D. 209; *In the Goods of Weston* (1869), L. R. 1 P. & D. 633; *Welch v. Gardner* (1887), 51 J. P. 760; *Cossey v. Cossey* (1900), 82 L. T. 203.

(*p*) *Winsor v. Pratt* (1821), 2 Brod. & Bing. 650; *Kirke v. Kirke* (1828), 4 Russ. 435; *Brooke v. Kent* (1840), 3 Moo. P. C. C. 334, 350; *Soar v. Dolman* (1842), 3 Curt. 121; *In the Goods of Nelson* (1872), 6 L. R. Eq. 569; *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211. Obliteration of part of the words describing the amount of the legacy may, however, be effectual; see *In the Goods of Nelson, supra* (legacy of "one hundred and fifty pounds," obliteration of "one hundred and").

(*q*) *Short d. Gastrell v. Smith* (1803), 4 East, 419; *Locke v. James* (1843), 11 M. & W. 901; *In the Goods of McCabe* (1873), L. R. 3 P. & D. 94.

(*r*) As where the person changed is the executor (*In the Goods of Parr* (1859), 6 Jur. (N. S.) 56; *In the Goods of Harris* (1860), 1 Sw. & Tr. 536).

(*s*) *Sturton v. Whellock* (1883), 31 W. R. 382 (gift to children at twenty-one changed to gift at twenty-five).

(*t*) *Dancer v. Crabb, supra*, at p. 104; *Welch v. Gardner, supra*.

(*u*) *Dickinson v. Swatman, supra*, as explained in *Powell v. Powell, supra*, at p. 213; *In the Goods of Mitcheson* (1863), 9 Jur. (N. S.) 360. As to the weight given to the evidence, see *Eckersley v. Platt* (1866), L. R. 1 P. & D. 281 (witness interested in setting up earlier will); *In the Goods of Weston, supra* (testator's declarations not made at time of destruction).

(*w*) As to evidence in such cases, see p. 573, *ante*.

(*x*) *Campbell v. French* (1797), 3 Ves. 321 (belief that donee was dead); *Doe d. Evans v. Evans* (1839), 10 Ad. & El. 228 (belief that A. died without issue); *Thomas v. Howell* (1874), L. R. 18 Eq. 198 (belief that estate was of specified value).

(*y*) As, for instance, that the prior will destroyed is no longer of use (*Scott v. Scott* (1859), 1 Sw. & Tr. 258; *Beardsley v. Lacey* (1897), 67 L. J. (P. M. & A.) 35), or is inoperative (*Giles v. Warren* (1872), L. R. 2 P. & D. 401; *James v. Shrimpton* (1876), 1 P. D. 431; *In the Goods of Thornton* (1889), 14 P. D. 82; *Thynne (Lord John) v. Stanhope* (1822), 1 Add. 52. 53), or has already been revoked (*Clarkson v. Clarkson* (1862), 2 Sw. & Tr. 497, 500); compare *Perrott v. Perrott* (1811), 14 East, 423, 440 (appoint-

to be intended by the testator except conditionally on the mistaken assumption being correct (*a*), is inoperative.

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SECT. 3.—*Revival.*

**1145.** The only mode in which a revoked will or codicil can be revived since the 31st December, 1837 (*b*), is either by re-execution (*c*) or by a codicil duly executed showing an intention to revive it; and where a will has been first partly revoked and afterwards wholly revoked, a codicil reviving the will does not extend to so much as was partially revoked unless an intention to the contrary is shown (*d*). Modes of  
revival.

For the purpose of reviving a will no precise form of words is necessary, nor need the reviving instrument be annexed to or indorsed on the will (*e*). Form

**1146.** The testator's intention must be expressed, not implied (*f*); and consequently a codicil, to revive a will, must show an intention to do so. This intention must appear on the face of the codicil, either expressly or by a disposition of the testator's property inconsistent with any other intention (*g*). A codicil may revive in its altered state a will, or a previous codicil, to which unattested additions have been made (*h*). A will or codicil, though not revived, or part of a revoked will may be given validity by incorporation in a valid testamentary disposition (*i*). Express  
intention.

**1147.** Where a codicil confirms a will, the will, with all previous Confirmation  
by codicil

ment by deed). Where the mistake is that another instrument is substituted for the destroyed instrument, the case is identical with that of dependent relative revocation, as to which, see p. 573, *ante*; see also *In the Goods of Middleton* (1864), 3 Sw. & Tr. 583 (mistake as to substituted will); *Stamford v. White*, [1901] P. 46 (mistake as to effect of earlier settlement).

(*a*) *Re Faris, Goddard v. Overend* (No. 2), [1911] 1 I. R. 469; *A.-G. v. Lloyd* (1747), 1 Ves. Sen. 32, questioned in *Thomas v. Howell* (1874), L. R. 18 Eq. 198, *per* MALINS, V.-C., at p. 212. In *A.-G. v. Ward* (1797), 3 Ves. 327, and in *Re Faris, Goddard v. Overend*, *supra*, the revocation was held not to be conditional in this respect, but absolute.

(*b*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34.

(*c*) As to pasting on a signature previously cut out of the will, see p. 570, *ante*.

(*d*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 22; *Skinner v. Ogle* (1845), 9 Jur. 432. Under the old law one will revoked by another will was revived by the revocation of the revoking will (*Harwood v. Goodright d. Rolfe* (1774), 1 Cowp. 92; *Usticke v. Bawden* (1824), 2 Add. 116); but the above provision has altered the law in this respect (*In the Goods of Brown* (1858), 1 Sw. & Tr. 32; *In the Goods of Hodgkinson*, [1893] P. 339, C. A.). For form of codicil reviving a revoked will, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 548.

(*e*) *Potter v. Potter* (1750), 1 Ves. Sen. 437, 442.

(*f*) *Skinner v. Odle* (1845), 1 Rob. Eccl. 363, *per* Sir H. J. FUST, at p. 364.

(*g*) *In the Goods of Steele* (1868), L. R. 1 P. & D. 575.

(*h*) *In the Goods of Tegg* (1846), 4 Notes of Cases, 531; *In the Goods of Wollaston* (1845), 3 Notes of Cases, 599; *In the Goods of Barke* (1845), 4 Notes of Cases, 44; *In the Goods of Heath*, [1892] P. 253.

(*i*) *Jorden v. Jorden* (1843), 2 Notes of Cases, 388; *Birkhead v. Bowdoin* (1842), 2 Notes of Cases, 66; *Lindsay, deceased* (1892), 8 T. L. R. 507; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 159.

SECT. 3.  
Revival.

codicils, is taken to be confirmed (*k*) unless a contrary intention appears (*l*), and the mere fact that a testator describes his will by reference to its original date does not exclude the inference that the will thus referred to is the will as modified by a previous codicil; but in order to set up an invalid codicil there must be a distinct reference to it (*m*).

Reference to  
will by date.

If a codicil refers by date to an existing will, and refers to some of its terms (*n*), or expressly confirms it (*o*), that is evidence of an intention to revive and reinstate the will even though the codicil itself is contingent (*p*) and the contingency may not have happened at the death of the testator (*q*). There must, however, be a distinct intention expressed in the codicil to revive the former will (*r*), and mere physical annexation of a codicil to a revoked will (*s*) or a mere reference by recital to such will by date is not sufficient to revive it (*t*).

Though a reference simply to the date of an earlier document is not sufficient to restrict the confirmation to a particular document, yet other words and surrounding circumstances may convey such an intention (*a*).

Mistake in  
reference.

A codicil has been held to revive a revoked will although the reference, by date, to the revived will was inserted by mistake, where it was proved that it was not a mere mistake as to the date, but that the mind of the draftsman (which must be treated as that of the testator) was actually applied to the provisions of the wrong document (*b*). Intrinsic evidence may show that the reference by

(*k*) *Crosbie v. Macdoul* (1799), 4 Ves. 610; *Green v. Tribe* (1878), 9 Ch. D. 231, explaining *Burton v. Newbery* (1875), 1 Ch. D. 234; *In the Goods of De la Saussaye* (1873), L. R. 3 P. & D. 42. As to the effect of confirmation by codicil see pp. 580 *et seq.*, *post*.

(*l*) *Lemage v. Goodban* (1865), L. R. 1 P. & D. 57; *French v. Hoey*, [1899] 2 I. R. 472; and see *In the Goods of Carritt* (1892), 66 L. T. 379.

(*m*) *Burton v. Newbery*, *supra*, dissenting from *Gordon v. Reay* (Lord) (1832), 5 Sim. 274.

(*n*) *In the Goods of Steele* (1868), L. R. 1 P. & D. 575; *In the Goods of Stedham* (1881), 6 P. D. 205; *In the Goods of Dyke* (1881), 6 P. D. 207; *In the Goods of Edge* (1882), 9 L. R. Ir. 516.

(*o*) *In the Goods of Chilcott*, [1897] P. 223.

(*p*) *In the Goods of Da Silva* (1861), 2 Sw. & Tr. 315; *In the Goods of Colley* (1879), 3 L. R. Ir. 243.

(*q*) *In the Goods of Bangham* (1876), 1 P. D. 429.

(*r*) *In the Goods of Ince* (1877), 2 P. D. 111; *In the Goods of Gordon (Lady Isabella)*, [1892] P. 228; *In the Goods of Reynolds* (1873), L. R. 3 P. & D. 35.

(*s*) *Marsh v. Marsh* (1860), 1 Sw. & Tr. 528; *McLeod v. McNab*, [1891] A. C. 471, P. C.

(*t*) *In the Goods of Steele*, *supra*; *In the Goods of Dennis*, [1891] P. 326. It is permissible to show that the reference to the date is inserted by mistake (*In the Goods of Wilson* (1868), L. R. 1 P. & D. 582; *In the Goods of Anderson* (1870), 39 L. J. (P.) 55).

(*a*) *McLeod v. McNab*, *supra*; *French v. Hoey*, *supra*, at p. 485; and see *In the Goods of Reynolds*, *supra*; *In the Goods of Brown, Quincey v. Quincey* (1847), 11 Jur. 111; *In the Goods of Snowden* (1896), 75 L. T. 279.

(*b*) *In the Goods of Stedham*, *supra*; *In the Goods of Dyke*, *supra*; *In the Goods of Chilcott*, *supra*; *In the Goods of Ince*, *supra*.



date was made erroneously (*c*), but parol evidence for this purpose is inadmissible (*d*).

SECT. 3.  
Revival.

**1148.** Where an earlier will is revoked by a later will, and the earlier will is destroyed, and a subsequent codicil purports to revive the earlier will, the question whether the later will is revoked by the codicil depends on whether or not the codicil contains dispositions inconsistent with the later will (*e*). If it does the later will is revoked (*f*), otherwise not. The mere fact that a codicil is described as a codicil to an earlier will does not impliedly revoke a later one (*f*), but in the circumstances may have that effect (*g*). On the other hand, the revival of a will expressly revoking all other wills does not necessarily revoke an intermediate codicil; and parol evidence is admissible to show *quo animo* the revival was made (*h*).

Revival by  
codicil.

**1149.** A will actually destroyed cannot be revived, since no reference to a non-existent will can give it any vitality (*i*).

Destroyed  
will.

#### SECT. 4.—Republication.

**1150.** The distinction between revival and republication is that the former restores a revoked will or codicil, while the latter merely confirms an unrevoked testamentary instrument so as to make it operate as if executed on the date of republication (*k*).

Republication  
defined.

**1151.** Republication may be either express or constructive (*l*). The former takes place when a testator re-executes his will, with the

Modes of  
republication.

(*c*) *In the Goods of Wilson* (1868), L. R. 1 P. & D. 582.

(*d*) *In the Goods of Chapman* (1844), 1 Rob. Eccl. 1; *Payne and Meredith v. Trappes* (1847), 1 Rob. Eccl. 583.

(*e*) *In the Goods of Steele* (1868), L. R. 1 P. & D. 575, 578; see *Hale v. Tokelove* (1850), 2 Rob. Eccl. 318; *Rogers and Andrews v. Goodenough and Rogers* (1862), 2 Sw. & Tr. 342; *Newton v. Newton* (1861), 12 I. Ch. R. 118.

(*f*) *In the Goods of Stedham* (1881), 6 P. D. 205; *In the Goods of Dyke* (1881), 6 P. D. 207; *In the Goods of Edge* (1882), 9 L. R. Ir. 516; *In the Goods of Chilcott*, [1897] P. 223, where all three documents were admitted to probate.

(*g*) See *Walpole (Lord) v. Orford (Lord)* 3 Ves. 402, 422; *Payne and Meredith v. Trappes*, *supra*; *In the Goods of Reynolds* (1873), L. R. 3 P. & D. 35.

(*h*) *Upfill v. Marshall* (1843), 3 Curt. 636, followed in *In the Goods of Rawlings* (1879), 41 L. T. 559, where the attestation clause showed that the will was re-executed to give effect to alterations; and see *Wade v. Nazer* (1848), 6 Notes of Cases, 46.

(*i*) *Hale v. Tokelove*, *supra*; *Newton v. Newton* (1861), 12 I. Ch. R. 118; *Rogers and Andrews v. Goodenough and Rogers*, *supra*; *In the Goods of Steele*, *supra*; *In the Goods of Reade*, [1902] P. 75.

(*k*) As to the effect of republication of a will in various cases before the 1st January, 1837, see 8 Bac. Abr., tit. Wills and Testaments (D.) 3, 7th ed., pp. 456 *et seq.* Except that republication of a will by a codicil may validate a gift in the will to an attesting witness (see p. 556, *ante*), republication as distinct from revival has now little practical effect. It was of course of importance in enabling testators to obtain the benefit of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), by re-publishing their wills made before that date; see *Brooke v. Kent* (1840), 3 Moo. P. C. C. 334; *Andrews v. Turner* (1842), 3 Q. B. 177; *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Winter v. Winter* (1846), 5 Hare, 306.

(*l*) *Duppa v. Mayo* (1670), 1 Wms. Saund. 275 d; *Re Smith, Bilke v. Roper* (1890), 45 Ch. D. 632, 636.

SECT. 4.  
 Republi-  
 cation.

necessary formalities (*m*), for the express purpose of republishing it. Constructive republication occurs when a testator makes a codicil to his will or some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will. No precise form of words is necessary (*n*), nor need the codicil expressly republish the will (*o*). Thus, if the instrument is described as "a codicil to my will" (*p*), or if the codicil is written on the same paper as the will and refers to "my executors above named," it operates as a republication of the will (*q*).

A reference sufficient to revive a revoked instrument is sufficient to republish an earlier unrevoked instrument so as to shift its date, but the converse does not hold, for a codicil described as a codicil to a will republishes it, though it may not revive the will if it has been revoked (*r*).

Effect of  
 republication.

**1152.** The effect of republishing a will is for many purposes to shift its date to the date of the republishing instrument (*s*), as if the testator at that date had made a will in the words of the will so republished (*t*). Republication does not, however, necessarily make the will operate for all purposes as if it had originally been made at the date of the republishing instrument; a contrary intention may be shown (*u*).

Effect on  
 legacies.

The rule is subject to the limitation that the intention of the testator is not to be defeated thereby (*a*); and republication does not revive a legacy which has been revoked, adeemed, or satisfied (*b*) in

(*m*) See pp. 547 *et seq.*, 552 *et seq.*, *ante*. In the absence of intention, however, re-execution need not amount to republication (*Dunn v. Dunn* (1866), L. R. 1 P. & D. 277).

(*n*) *Potter v. Potter* (1750), 1 Ves. Sen. 437, 442.

(*o*) *Barnes v. Crowe* (1792), 1 Ves. 486; *Pigott v. Waller* (1802), 7 Ves. 98, 120.

(*p*) See *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, C. A.; and the cases cited in note (*r*), *infra*; *Re Taylor, Whitby v. Highton* (1888), 57 L. J. (CH.) 430.

(*q*) *Serocold v. Hemming* (1758), 2 Lee, 490; and see *In the Goods of Terrible* (1858), 1 Sw. & Tr. 140, where a will had been revoked by a second marriage, and was revived by a memorandum substituting the name of the second wife for that of the first as a legatee.

(*r*) *Re Champion, Dudley v. Champion*, *supra*, at p. 109, following *Barnes v. Crowe* (1792), 1 Ves. 486; *Yarnold v. Wallis* (1840), 4 Y. & C. (EX.) 160; *Doe d. York v. Walker* (1844), 12 M. & W. 591; and see *Rowley v. Eyton* (1817), 2 Mer. 128 (in which case the codicil referred to the will, although the report does not so state; see *Re Smith, Bilke v. Roper* (1890), 45 Ch. D. 632, 637); *Acherley v. Vernon* (1726), 3 Bro. Parl. Cas. 85, 91; *Skinner v. Ogle* (1845), 1 Rob. Eccl. 363.

(*s*) *Doe d. York v. Walker*, *supra*, at p. 600. As to confirmation by codicil, see pp. 575, 576, *ante*, pp. 580, 581, *post*.

(*t*) *Rogers v. Pittis* (1822), 1 Add. 30, 38; *Winter v. Winter* (1846), 5 Hare, 306; *Hamilton v. Carroll* (1839), 1 I. Eq. R. 175; *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, C. A.

(*u*) *Re Champion, Dudley v. Champion*, *supra*, at p. 109; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728; *Mountcashell (Earl) v. Smyth*, [1895] 1 I. R. 346, C. A.

(*a*) *Doe d. Biddulph v. Hole* (1850), 15 Q. B. 848, 858; and see *Re Moore, Long v. Moore*, [1907] 1 I. R. 315.

(*b*) *Powys v. Mansfield* (1837), 3 My. & Cr. 359, 376; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728.

the interim, nor does it revive a lapsed gift (*c*) or substitute a new legatee (*d*).

The republication of a will does not necessarily revoke any intermediate will or codicil (*e*).

SECT. 4.  
Republica-  
tion.

Effect on  
intermediate  
wills.

## Part IX.—Codicils.

**1153.** A codicil (*f*) takes effect as annexed to a will (*g*); the will and all the codicils thereto are construed together as one testamentary disposition (*h*), though not as one document (*i*), and the same principles in general apply to the construction of a codicil as of a will (*k*). Thus, for the purpose of explaining the will or any codicil, the court may and is bound to look at the will and at all the other codicils (*l*). The court may, for example, look at a recital of a will contained in a codicil, and may alter the construction of the will by it (*m*) if the recital is not obviously erroneous (*n*). Dispositions by a prior will or codicil are not affected by a later will or codicil further than is necessary to give effect to the intentions of the testator shown by the will and codicils taken as a whole (*o*).

Construction  
and effect in  
general.

(*c*) *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128.

(*d*) *Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623, 626; *Doe d. Turner v. Kett* (1792), 4 Term Rep. 601; see *Perkins v. Micklethwaite* (1715), 1 P. Wms. 274, 275; and note (*h*), p. 581, *post*.

(*e*) See the cases cited in note (*b*), p. 576, *ante*; and compare *Browne v. Browne*, [1912] 1 I. R. 272; but see *Rogers v. Pittis* (1822), 1 Add. 30, 38 (a case before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 20).

(*f*) As to the form and execution of codicils, see pp. 545 *et seq.*, *ante*.

(*g*) See p. 506, *ante*. For various forms of codicils, see *Encyclopædia of Forms and Precedents*, Vol. XV., pp. 545 *et seq.*

(*h*) *Phipps v. Anglesey (Earl)* (1751), 7 Bro. Parl. Cas. 443, 452; *Re Wilcock, Kay v. Dewhurst*, [1898] 1 Ch. 95; *Morley v. Rennoldson*, [1895] 1 Ch. 449, C. A.

(*i*) A codicil is not, as a general rule, to be taken as part of a will for all intents and purposes (*Re Towry's Settled Estate, Dallas v. Towry* (1889), 41 Ch. D. 64, 74, C. A.; compare *Pratt v. Pratt* (1844), 14 Sim. 129). A reference in a subsequent codicil to persons or matters mentioned in the will does not *primâ facie* include similar persons or matters mentioned in intermediate codicils (*Bonner v. Bonner* (1807), 13 Ves. 379; *Henwood v. Overend* (1815), 1 Mer. 23; *Hall v. Severne* (1839), 9 Sim. 515, dissenting from *Sherer v. Bishop* (1792), 4 Bro. C. C. 55).

(*k*) As to the general principles, see pp. 651 *et seq.*, *post*. As to legacies given by a codicil in addition to or in substitution for those given by a will, see p. 784, *post*.

(*l*) *Hartley v. Tribber* (1853), 16 Beav. 510, 515; *Re Townley, Townley v. Townley* (1884), 50 L. T. 394, 396.

(*m*) *Re Venn, Lindon v. Ingram*, [1904] 2 Ch. 52, 55, following *Darley v. Martin* (1853), 13 C. B. 683; *Grover v. Raper* (1856), 5 W. R. 134.

(*n*) *Skerratt v. Oakley* (1798), 7 Term Rep. 492; and see *Bamfield v. Popham* (1703), 1 P. Wms. 54; *Re Arnold's Estate* (1863), 33 Beav. 163; *Re Smith* (1862), 2 John. & H. 594.

(*o*) *Doe d. Hearle v. Hicks* (1832), 1 Cl. & Fin. 20, 24, H. L.; *Young v. Hassard* (1841), 1 Dr. & War. 638, 644; *Doe d. Evers v. Ward* (1852), 18 Q. B. 197, 223; *Williams v. Evans* (1853), 1 E. & B. 727, 740; *Wallace v.*



## PART IX.

## Codicils.

Confirmation  
of will by  
codicil.

**1154.** The effect of a confirmation of the will (*p*), by a subsequent codicil is for many purposes (*q*), subject to any contrary intention being shown (*r*), and without prejudice to the original effect of the will and intermediate codicils (*s*), to bring the dispositions of the will down to the date of the codicil and to effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils (*t*), except such codicils as are inoperative without being themselves expressly confirmed or incorporated (*u*), or are expressly or impliedly revoked (*w*). Particularly, generic (*x*) descriptions of property are *primâ facie*

*Seymour* (1872), 6 I. R. C. L. 219, 343, 344, Ex. Ch. As to revocation by subsequent will or codicil, see pp. 565 *et seq.*, *ante*.

(*p*) Such confirmation amounts for this purpose to republication of the will; see Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34; and p. 578, *ante*. As to the express mention of the will only, or the will and some only of the previous codicils, see p. 579, *ante*. The confirmation does not, however, operate as a re-execution of the will, so as to make the will itself, as an instrument of a certain date, bear the date of the codicil (*Re Elcom, Layborn v. Grover-Wright*, [1894] 1 Ch. 303 (will made before Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), and codicil made after that Act); *Re Moore, Long v. Moore*, [1907] 1 I. R. 315 (confirmation within three months of death did not invalidate charitable devise); but see *A.-G. v. Heartwell* (1764), Amb. 451).

(*q*) *Doe d. Biddulph v. Hole* (1850), 15 Q. B. 848, 858. As to the effect of unattested alterations to a will, see p. 561, *ante*; as to the effect of a confirming codicil incorporating documents not in existence at the date of a will, but referred to in the will as if in existence, and actually so at the date of the codicil, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 159; *In the Goods of Rendle* (1899), 68 L. J. (P.) 125. As to the death of a child before the date of the codicil, see *Skinner v. Ogle* (1845), 1 Rob. Eccl. 363; *Winter v. Winter* (1846), 5 Hare, 306, in which cases the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 34, was rendered applicable by a codicil made after the Act. Confirmation of a will attested by a legatee or his wife, by a codicil not subject to the objection, renders his legacy valid; see p. 556, *ante*. As to the exercise of a special power conferred after the date of the will, see *Cowper v. Mantell* (No. 1) (1856), 22 Beav. 223, 230, where the power was held not executed; and as to a power already conferred, but exercisable on an event after the date of the will, *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 75, where the power was held executed; and see title POWERS, Vol. XXIII., p. 43.

(*r*) *Bowes v. Bowes* (1801), 2 Bos. & P. 500, H. L. ("the said lands"); *Goodtitle d. Woodhouse v. Meredith* (1813), 2 M. & S. 5, 14; *Doe d. Biddulph v. Hole*, *supra*; *Re Farrer's Estate* (1858), 8 I. C. L. R. 370.

(*s*) The rule "does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it . . . you do republish it so as to make it operate from that other later time, and if there be any legal effect that is brought to operate by what has taken place in the meantime you have the benefit of that" (*Stilwell v. Mellersh* (1851), 20 L. J. (CH.) 356, *per Lord CRANWORTH, V.-C.*, at p. 361); and see *Re Moore, Long v. Moore*, *supra*.

(*t*) *Winter v. Winter*, *supra*, at p. 312; *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, 734, C. A.; *Re Taylor, Dale v. Dale*, [1909] W. N. 59.

(*u*) See notes (*k*), (*m*), p. 576, *ante*.

(*w*) *McLeod v. McNab*, [1891] A. C. 471, P. C.

(*x*) That is to say, not identifying any specific thing and that only, but describing a class of objects capable of increase or diminution; see p. 692, *post*. Where the description identifies a specific thing, the confirmation

referred not to the date of the will (*y*), but to the date of the codicil (*a*), so as to pass all the testator's interest (*b*) in the property then so described (*c*), unless the gift in the meantime lapses (*d*), or is revoked (*e*), or, under the presumptions against double portions, is adeemed or satisfied (*f*); but such confirmation, it seems, need not affect the conditions of a gift (*g*), or the donee where the description may apply to different persons at different times (*h*).

by codicil has no effect in altering a description or substituting a new subject-matter where the original subject-matter is adeemed (*Sidney v. Sidney* (1873), L. R. 17 Eq. 65).

(*y*) It is assumed that the rule of construction in the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24, referring descriptions of property to the death of the testator (see p. 691, *post*), is excluded, or is otherwise not applicable.

(*a*) *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Langdale (Lady) v. Briggs* (1855), 3 Sm. & G. 246, 252; *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, C. A.; *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, 734, C. A.; see, however, *Re Edwards, Rowland v. Edwards* (1890), 63 L. T. 481.

(*b*) As, for instance, the purchase-money of property which since the date of the will became subject to an option to purchase (*Emuss v. Smith* (1848), 2 De G. & Sm. 722; *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724; *Steele v. Steele*, [1913] 1 I. R. 292, C. A.).

(*c*) Thus, under a general devise of lands in a will, lands purchased subsequently to the date of the will and before the date of the confirming codicil, pass (*Acherley v. Vernon* (1726), 3 Bro. Parl. Cas. 85; *Goodtitle d. Woodhouse v. Meredith* (1813), 2 M. & S. 5; *Hulme v. Heygate* (1816), 1 Mer. 285; compare note (*q*), p. 517, *ante*; *Doe d. York v. Walker, supra*; and see note (*t*), p. 580, *ante*). The principle of *falsa demonstratio* was not applied in *Pattison v. Pattison* (1832), 1 My. & K. 12; *Macdonald v. Irvine* (1878), 8 Ch. D. 101, 108, C. A., where the descriptions were accurate at the date of the will, and the legacies were adeemed.

(*d*) *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128; *Doe d. Turner v. Kett* (1792), 4 Term Rep. 601; *Winter v. Winter* (1846), 5 Hare, 306; see note (*q*), p. 580, *ante*.

(*e*) See p. 578, *ante*.

(*f*) The codicil, therefore, does not revive a legacy already adeemed or satisfied by a portion (*Izard v. Hurst* (1698), Freem. (CH.) 224; *Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623, 626; *Monck v. Monck (Lord)* (1810), 1 Ball & B. 298; *Booker v. Allen* (1831), 2 Russ. & M. 270; *Powys v. Mansfield* (1837), 3 My. & Cr. 359, 376; *Montague v. Montague* (1852), 15 Beav. 565; *Cowper v. Mantell* (No. 1) (1856), 22 Beav. 223; *Hopwood v. Hopwood* (1859), 7 H. L. Cas. 728; *Sidney v. Sidney* (1873), L. R. 17 Eq. 65. But if it is doubtful whether the doctrine of ademption is to be applied, the fact of there being a codicil is important (*Re Aynsley, Kyrle v. Turner* (1914), 30 T. L. R. 664).

(*g*) *Stilwell v. Mellersh* (1851), 20 L. J. (CH.) 356 (hotchpot of advances which testator had "already" made; advance made after date of will was held not affected; see p. 582, *post*); *Re Park, Bott v. Chester*, [1910] 2 Ch. 322, 327, 328 (condition as to marriage with consent); but see *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685 (direction that annuities were to be free of deduction except legacy duty and income tax; held that effect of confirmation was that annuitants bore duties substituted for legacy duty by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), passed before the codicil); *Wedgwood v. Denton* (1871), L. R. 12 Eq. 290 (condition relating to residence during specified lease; renewal of lease before confirmation); *Re Taylor, Dale v. Dale*, [1909] W. N. 59 (effect on gift over to issue of deceased children). A confirmation by codicil does not give any effect to a condition shown to be dispensed with (see p. 591, *post*) by the testator before the date of the codicil (*Violet v. Brookman* (1857), 26 L. J. (CH.) 308; compare *Cooper v. Cooper* (1856), 6 I. Ch. R. 217, 223); see also *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496.

(*h*) *Stilwell v. Mellersh, supra*, per Lord CRANWORTH, V.-C., at pp. 361, 362; *Re Park, Bott v. Chester, supra*, per PARKER, J., at p. 328; see also



PART IX.  
Codicils.

Revocation  
by codicil of  
share of  
residue.

The codicil has no such effect where it is executed for a limited purpose only, and does not purport to confirm the will or bring its terms down to the date of the codicil (*i*). The date of original execution of the will remains as a factor for determining the construction, for example, when it is necessary to determine the date to which expressions of time occurring in the will are referable (*k*).

If by a will a residuary estate is given to a number of persons as individuals and not as a class (*l*), and as tenants in common, and by a codicil the share of one of such persons is revoked, then that share devolves as on the testator's intestacy (*m*), unless it is otherwise disposed of (*n*). The intention that the others of the named persons should take may be shown by a direction that that share should fall into residue (*o*) or by other means (*p*), including, it appears, the mere confirmation of the will in other respects (*q*). If the named

*Wilkinson v. Adam* (1813), 1 Ves. & B. 422, affirmed (1823), 12 Price, 470, H. L. (married man's gift to his children by a single woman, republished by codicil after wife's death, not confined to possible legitimate children); and *Anon.* (undated), cited in *Pattison v. Pattison* (1832), 1 My. & K. 12, per PEMBERTON, *arguendo*, at p. 14 (bequest to testator's six children: one died, but another was born before confirmation; the last child was held to be excluded). The contrary, however, was held in *Perkins v. Micklethwaite* (1715), 1 P. Wms. 274, 275 to "youngest son J.": J. died in life of testator, but another son J. was born afterwards before the codicil and was held to take; and in *Re Donald, Moore v. Somerset* (1909), 53 Sol. Jo. 673 ("to whom I have given legacies," applied to legatees by codicil), WARRINGTON, J., saw no distinction between references to the subject-matter and to objects of a gift in this respect, and declined to follow *Anon.*, *supra*, which case, however, was treated as the only authority.

(*i*) *Bowes v. Bowes* (1801), 2 Bos. & P. 500, H. L.; *Hughes v. Turner* (1835), 3 My. & K. 666; *Monypenny v. Bristow* (1832), 2 Russ. & M. 117; *Ashley v. Waugh* (1839), 4 Jur. 572; *Re Taylor, Whitby v. Highton* (1888), 58 L. T. 842; and compare *Re Smith, Bilke v. Roper* (1890), 45 Ch. D. 632.

(*k*) *Mountcashell (Earl) v. Smyth*, [1895] 1 I. R. 346, 360, C. A.; *Re Moore, Long v. Moore*, [1907] 1 I. R. 315, 320.

(*l*) As to what descriptions are those of classes, see p. 614, *post*.

(*m*) *Creswell v. Cheslyn* (1762), 2 Eden, 123, affirmed, *sub nom. Cheslyn v. Cresswell* (1763), 3 Bro. Parl. Cas. 246, approved in *Shaw v. M'Mahon* (1843), 4 Dr. & War. 431, per SUGDEN, L.C., at p. 438, in spite of the doubts of Serjeant HILL in 2 Eden, 125, n.; *Ramsay v. Shelmerdine* (1865), L. R. 1 Eq. 129, dissented from in *Re Dunster, Brown v. Heywood*, [1909] 1 Ch. 103, where, however, the gift was a class gift; *Sykes v. Sykes* (1868), 3 Ch. App. 301.

(*n*) *Re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369, C. A., per LINDLEY, L.J., at pp. 372, 373.

(*o*) *Ibid.*, overruling on this ground *Humble v. Shore* (1847), 7 Hare, 247 (better reported 1 Hem. & M. 550, n.; affirmed (1848) by Lord COTTENHAM, L.C., on grounds which do not appear; see *Re Palmer, Palmer v. Answorth*, *supra*, at p. 372), and followed in *Re Allan, Dow v. Cassaigne*, [1903] 1 Ch. 276, C. A. (similar direction as to lapsed share), and *Re Wand, Escrib v. Wand*, [1907] 1 Ch. 391 (share forfeited under a clause of forfeiture).

(*p*) *Vaudrey v. Howard* (1853), 2 W. R. 32; *Re Radcliffe, Young v. Beale* (1903), 51 W. R. 409 (survivorship clause).

(*q*) *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1. But this was considered insufficient for the purpose in *Humble v. Shore*, *supra*, as reported 1 Hem. & M. 550, 551, n. (apparently not affected on this ground by *Re Palmer, Palmer v. Answorth*, *supra*, where also the will was confirmed by the codicil, but no reference was made to this in the judgments); and in *Cheslyn v. Cresswell*, *supra*, where the point was raised, but



persons are to take as a class (*r*) or as joint tenants (*s*), the others of them take the revoked share.

PART IX.  
Codicils.

## Part X.—Legal Incidents of a Gift by Will.

### SECT. 1.—*Paramount Title of the Personal Representatives.*

**1155.** Under all bequests of chattels, whenever made (*a*), and by statute (*b*) under all devises of any real estate (*c*), with one exception (*d*), in wills of testators dying after the 31st December, 1897, the property devolves, notwithstanding the testamentary dispositions of the testator, on his personal representatives for the purpose of administration of the testator's estate; the bequeathed chattel only vests in the legatee on the assent of the personal representatives, and the devised real estate only vests in the devisee on assent or conveyance by the personal representatives (*e*).

Title of  
testator's  
personal  
representa-  
tives.

### SECT. 2.—*Conditions.*

#### SUB-SECT. 1.—*In General.*

**1156.** A testator may by his will (*f*) freely attach conditions to his gifts (*g*), subject to the restrictions that a condition may be void as a matter of law by being contrary to public policy (*h*), or repugnant

Validity of  
conditions  
generally.

“perhaps too little attention was paid” to it (*Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1, *per* JOYCE, J., at p. 7); see also *Sykes v. Sykes* (1868), 3 Ch. App. 301 (corrected from the record in *Re Whiting, Ormond v. De Launay, supra, per* ROLT, *arguendo*, at p. 3); *Re Wood's (Mary) Will* (1861), 29 Beav. 236.

(*r*) *Shaw v. M'Mahon* (1843), 4 Dr. & War. 431; *Clark v. Phillips* (1853), 17 Jur. 886; *M'Kay v. M'Kay*, [1900] 1 I. R. 213; *Re Dunster, Brown v. Heywood*, [1909] 1 Ch. 103.

(*s*) *Humphrey v. Tayleur* (1752), Amb. 136; see p. 613, *post*.

(*a*) *Wind v. Jekyl and Albone* (1719), 1 P. Wms. 572; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq*.

(*b*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(*c*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 4 *et seq*.

(*d*) Namely, copyholds and customary freeholds, where admission or an act on the part of the lord of the manor is required (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4)).

(*e*) As to assent of personal representatives, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 265 *et seq*.

(*f*) Conditions contained in another document may fail to take effect unless that document is admissible in evidence (*Yates v. University College, London* (1875), L. R. 7 H. L. 438; *Re Williams, Taylor v. University of Wales* (1908), 24 T. L. R. 716); and see p. 634, *post*. As to conditions undertaken by the donee by agreement with the testator, see p. 648, *post*; and title TRUSTS AND TRUSTEES, p. 21, *ante*.

(*g*) As to conditional fees and other modified fees, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 168 *et seq*; as to wills entirely conditional in their operation, see p. 510, *ante*; as to the construction of conditions generally, see p. 792, *post*. For form of devise subject to a condition, see Encyclopædia of Forms and Precedents, Vol. XV., p. 574.

(*h*) See pp. 585, 586, *post*. As to public policy generally, compare title

SECT. 2.  
Conditions.

to the interest given to the donee (*i*), or repugnant to other gifts in the will (*a*), or otherwise illegal (*b*); or it may be void as a matter of construction by being inconsistent with the rest of the will (*c*) or too uncertain for the court to ascertain its meaning (*d*); or it may fail to take effect because the court declines to investigate whether

CONTRACT, Vol. VII., pp. 394 *et seq.* A similarity between wills and contracts in this respect was suggested in *Cooke v. Turner* (1846), 15 M. & W. 727, *per* ROLFE, B., at p. 735: "a proviso good by way of contract must also be good by way of condition"; and in *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, *per* POLLOCK, C.B., at p. 150. For examples of gifts held not to be contrary to public policy, see *Re Dickson's Trust* (1850), 1 Sim. (N. S.) 37 (in case daughter became a nun); *Cooke v. Turner*, *supra*, and *Evanturel v. Evanturel* (1874), L. R. 6 P. C. 1, 29 (condition against disputing the will or disputing legitimacy); *Hodgson v. Halford* (1879), 11 Ch. D. 959 (forfeiture on marrying a Christian, or forsaking Jewish religion); *Wainwright v. Miller*, [1897] 2 Ch. 255 (if not a Roman Catholic).

(i) As to repugnant conditions, see title GIFTS, Vol. XV., p. 422.

(a) A gift over is bad which defeats or abridges an estate in fee by altering the course of its devolution, and is to take effect at the moment of devolution and at no other time, or which is to defeat an estate and to take effect on the exercise of any of the rights incident to that estate (*Shaw v. Ford* (1877), 7 Ch. D. 669, *per* FRY, J., at pp. 673, 674). Thus a gift over cannot be made to defeat a prior gift on alienation by the prior donee (see title GIFTS, Vol. XV., p. 422; as to gifts of life interests determinable (by way of limitation and not of condition) on alienation, see title SETTLEMENTS, Vol. XXV., pp. 570 *et seq.*); or on partition between two or more prior donees (*Shaw v. Ford*, *supra*); or on non-alienation (*ibid.*; *Re Beetlestone*, *Beetlestone v. Hall* (1907), 122 L. T. Jo. 367), such as intestacy (see title GIFTS, Vol. XV., p. 422); or on escheat (*Mildmay v. Mildmay* (1602), Moore (K. B.), 632, 633; *Carte v. Carte* (1745), 3 Atk. 174, 180); or on forfeiture to the Crown (*Re Wilcocks' Settlement* (1875), 1 Ch. D. 229).

(b) See title GIFTS, Vol. XV., p. 424. A condition amounting to a trust is also subject to the restriction that the object for whose benefit the trust is imposed must be capable of taking; see p. 536, *ante*; and title TRUSTS AND TRUSTEES, p. 25, *ante*. It does not appear that there is a like restriction where the condition does not amount to a trust, but binds the donee to do acts which may benefit such an object incapable of taking; see *Lloyd v. Lloyd* (1852), 2 Sim. (N. S.) 255 (repair of a tomb); *Roche v. M'Dermott*, [1901] 1 I. R. 394 (donee to give executors bond for repair of tomb; it was suggested, however, that the condition was unenforceable); and compare *Goodman v. Saltash Corporation* (1882), 7 App. Cas. 633.

(c) As to inconsistency, see p. 674, *post*.

(d) *Fillingham v. Bromley* (1823), Turn. & R. 530 ("live and reside"; but see *Dunne v. Dunne* (1856), 7 De G. M. & G. 207 ("dwell and reside")); *Wynne v. Fletcher* (1857), 24 Beav. 430 ("usual place of abode"); *Clavering v. Ellison* (1859), 7 H. L. Cas. 707 (being "educated abroad"); *Duddy v. Gresham* (1878), 2 L. R. Ir. 442, C. A. (retire to a convent etc.); *Re Exmouth (Viscount)*, *Exmouth (Viscount) v. Praed* (1883), 23 Ch. D. 158; *Jeffreys v. Jeffreys* (1901), 84 L. T. 417 (not to associate, correspond with, or visit certain persons); *Re Gassiot*, *Brougham v. Rose-Gassiot* (1907), 51 Sol. Jo. 570 (as to taking name); *Re Sandbrook*, *Noel v. Sandbrook*, [1912] 2 Ch. 471. For examples of conditions held to be not uncertain, but such as the court enforces, see *Tattersall v. Howell* (1816), 2 Mer. 26 (donee to give up low company etc.); *Maud v. Maud* (1860), 27 Beav. 615 ("should she follow the paths of virtue" etc.); *Evanturel v. Evanturel*, *supra* (not to dispute will); *Re Moore's Trusts*, *Lewis v. Moore* (1906), 96 L. T. 44 (donee to marry person of ample fortune to maintain her in comfort and affluence). A gift to trustees upon trust for a person if he behaves well, and to their satisfaction, may sometimes be construed as giving them only a discretion to deprive him of the gift as a condition subsequent (see *Kingsman v. Kingsman* (1706), 2 Vern. 559; *Re Coe's Trust* (1858), 4 K. & J. 199).

it has been or will be complied with (*e*), or because the donee has a right to take the gift and disregard the condition (*f*), or because the donee is excused in the circumstances from performance of the condition (*g*).

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Conditions.

**1157.** A condition, according to the construction of the will (*h*), is either a condition precedent, that is to say such that there is no gift intended at all unless and until the condition is fulfilled (*i*), or a condition subsequent, that is to say such that the condition is intended to put an end to the gift (*k*), or to prevent the gift from ever taking effect (*l*).

Conditions precedent and subsequent.

**1158.** Where an interest is contingent on any event, it is in effect a condition precedent to the gift that such event should happen. A vested or contingent interest may be subject to be divested on any specified event; the gift is then in effect subject to a condition subsequent (*m*).

Vested and contingent interests.

SUB-SECT. 2.—*Validity in Certain Cases.*

**1159.** Conditions against public policy are those conditions as to which the State has or may have an interest that they should remain unperformed or unfulfilled (*n*). The determination of what is contrary to public policy varies from time to time (*o*).

Public policy.

Examples of conditions void as contrary to public policy are conditions inciting the donee to commit a crime (*p*), to use corruption (*q*) or to do any act prohibited by law (*r*); or inciting the donee to exert private or political party influence in any matter or act of state (*s*), such as obtaining a title of honour (*t*); or tending

Void conditions.

(*e*) *W*——*v. B*—— (1849), 11 Beav. 621 (condition relating to cohabitation), as explained in *Cooke v. Cooke* (1864), 11 Jur. (N. S.) 533, *per* WOOD, V.-C., at p. 535; compare *Potter v. Richards* (1855), 1 Jur. (N. S.) 462; *Poole v. Bott* (1853), 11 Hare, 33, 39 (condition as to illegal cohabitation).

(*f*) As to such conditions, see pp. 588, 591, *post*.

(*g*) See p. 591, *post*.

(*h*) As to construction with regard to conditions in general, see pp. 792 *et seq.*, *post*.

(*i*) *Wood v. Southampton (Duke)* (1690), Show. Parl. Cas. 85; *Wood v. Webb* (1690), Show. Parl. Cas. 87; *Harvy v. Aston* (1740), Com. 726, 744; *Reynish v. Martin* (1746), 3 Atk. 330, 332; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 74.

(*k*) Compare title GIFTS, Vol. XV., p. 422.

(*l*) The event to which a condition subsequent refers need not be subsequent to the event upon which the gift becomes vested (*Egerton v. Brownlow (Earl)*, *supra*).

(*m*) As to vested and contingent remainders, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 218 *et seq.*; as to the rules of law restricting the suspension of vesting, see title PERPETUITIES, Vol. XXII., pp. 300 *et seq.*

(*n*) *Cooke v. Turner* (1846), 15 M. & W. 727, 735, 736.

(*o*) *Evanturel v. Evanturel* (1874), L. R. 6 P. C. 1, 29.

(*p*) *Mitchel v. Reynolds* (1712), 1 P. Wms. 181, 189; *Shrewsbury (Earl) v. Hope Scott* (1859), 6 Jur. (N. S.) 452, 456; Shep. Touch. (ed. Preston) 132 (to kill a man); 2 Bl. Com. 156.

(*q*) *Egerton v. Brownlow (Earl)*, *supra*, at pp. 69, 99, 172.

(*r*) *Mitchel v. Reynolds*, *supra*.

(*s*) *Egerton v. Brownlow (Earl)*, *supra*, at pp. 142, 150, 163, 196.

(*t*) *Ibid.*; *Kingston (Earl) v. Pierepont (Lady E.)* (1681), 1 Vern. 5. It appears, however, that a gift may be made to a person conditionally on his claim to a title being sustained, or conditionally on his success or failure in a certain suit (*Fingal (Earl) v. Blake* (1829), 2 Moll. 50, 78); compare



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Conditions.

to produce a future separation of an unseparated husband and wife (*a*); forbidding the service of the donee in the defence of the realm (*b*); or forbidding the performance by him of any other public duty (*c*); or unreasonably (*d*) restraining marriage (*e*), trade (*f*) or industry (*g*); or any other conditions tending to such results (*h*).

General  
restraint of  
marriage.

**1160.** With regard to gifts of real estate or of legacies charged on real estate, the intention to restrain marriage is not shown merely by a proviso defeating a previous gift on the marriage of the donee (*i*); but with regard to legacies payable out of personal estate (*k*), with or without the proceeds of sale of real estate directed to be converted (*l*), such a proviso does show that intention and is accordingly void.

the usual shifting clause in settlements on succession to a title or to family estates, as to which see title SETTLEMENTS, Vol. XXV., pp. 693 *et seq.*

(*a*) See title HUSBAND AND WIFE, Vol. XVI., pp. 439 *et seq.* But a gift to a woman already separated, with a gift over if she rejoins her husband, is not necessarily invalid (*Re Charleton, Bracey v. Sherwin* (1911), 55 Sol. Jo. 330); and see *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470. The condition is valid, however, where it merely refers to the state of circumstances existing at the testator's death and cannot influence the conduct of the persons in question (*Shewell v. Dwaris* (1858), John. 172). It appears that a condition forbidding two sisters to reside together, if not uncertain, is not in itself illegal (*Ridgway v. Woodhouse* (1844), 7 Beav. 437, 443; compare note (*d*), p. 584, *ante*).

(*b*) *Re Beard, Reversionary and General Securities Co., Ltd. v. Hall, Re Beard, Beard v. Hall*, [1908] 1 Ch. 383; *Re Adair*, [1909] 1 I. R. 311.

(*c*) *Re Morgan, Dowson v. Davey* (1910), 26 T. L. R. 398 (condition requiring children not to live with their father if separated from his wife); *Re Sandbrook, Noel v. Sandbrook*, [1912] 2 Ch. 471 (condition forfeiting benefits if donees should live with or be under the control of their father); compare *Colston v. Morris* (1821), Madd. & G. 89 (condition not to interfere with daughter's education enforced). A condition requiring adult children to keep away from their parent may be valid (*McDonald v. Trustees, Executors and Agency Co., Ltd.* (1902), 28 Victorian Law Reports, 442); and see note (*a*), *supra*.

(*d*) See, generally, *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535; and note (*n*), p. 587, *post*.

(*e*) *Kelly v. Monck* (1795), 3 Ridg. Parl. Rep. 205 (compare, however, with this case *Fitzgerald v. Ryan*, [1899] 2 I. R. 637); *Lloyd v. Lloyd* (1852), 2 Sim. (N. S.) 255, 263; *Morley v. Rennoldson*, [1895] 1 Ch. 449, C. A.; *Long v. Dennis* (1767), 4 Burr. 2052, 2055, 2057; *Hartley v. Rice* (1808), 10 East, 22, 24; and see, further, the text, *infra*.

(*f*) *Cooke v. Turner* (1846), 15 M. & W. 727, 736; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 18, n.; compare, however, *Jones v. Bromley* (1821), Madd. & G. 137, where only the construction of the condition was considered. As to restraint of trade, see titles MASTER AND SERVANT, Vol. XX., pp. 88 *et seq.*; TRADE AND TRADE UNIONS, Vol. XXVII., pp. 548 *et seq.*

(*g*) *Cooke v. Turner, supra*, at p. 736 (donee to leave his land uncultivated); *Egerton v. Brownlow (Earl), supra*, at pp. 144, 241.

(*h*) *Egerton v. Brownlow (Earl), supra* (gift over if donee did not obtain title); *Wilkinson v. Wilkinson* (1871), L. R. 12 Eq. 604 (condition relating to residence of a married woman).

(*i*) *Jones v. Jones* (1876), 1 Q. B. D. 279, 282. The doctrine as to personal legacies does not apply to real estate (*Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510, 513; see also *Fitchet v. Adams* (1740), 2 Stra. 1128).

(*k*) *Morley v. Rennoldson, Morley v. Linkson* (1843), 2 Hare, 570; S. C., [1895] 1 Ch. 449, C. A.; *Re Bellamy, Pickard v. Holroyd* (1883), 48 L. T. 212; *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231, 237.

(*l*) *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510, following *Lloyd v. Lloyd*

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restraint of  
marriage.

Subject to the doctrine with regard to conditions *in terrorem* (*m*), conditions which are in partial restraint of marriage, and such that the restraint is reasonable in the circumstances (*n*), are valid; such are conditions against marrying a particular person (*o*), or a member of a particular class of persons (*p*), or a person of a particular religion (*q*); or forbidding marriage under a specified and reasonable age (*r*); or forbidding marriage without consent of some person at any age (*s*); or forbidding the remarriage of a widow (*t*) or a widower (*a*); or, it seems, prescribing the ceremonies and place of a marriage (*b*). Further, an interest may be given conditionally on the donee marrying a particular person (*c*) or one of a class of persons (*d*).

(1852), 2 Sim. (N. S.) 255. As to cases of a mixed fund without a direction for conversion, see note (*i*), p. 588, *post*.

(*m*) See p. 588, *post*. Where the doctrine does not apply, the validity of the condition is independent of whether there is a gift over or not.

(*n*) *Keily v. Monck* (1795), 3 Ridg. Parl. Rep. 205, *per* FITZGIBBON, L.C., at p. 261; *Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Hare, 570, 579; *Younge v. Furse* (1857), 8 De G. M. & G. 756, 759. It has been suggested that a condition in restraint of marriage is valid where the court can gather that the testator's object is not to promote celibacy as such, but to induce the donee to remain single for the good of her children, or unless she marries a husband who is able to provide for her, or for some other reason personal to herself, or where the testator had an interest in the donee remaining unmarried (*Carrodus v. Carrodus*, [1913] Victorian Law Reports, 1, *per* A'BECKETT, J., at p. 6; compare *Lloyd v. Lloyd* (1852), 2 Sim. (N. S.) 255, 263; *Newton v. Marsden* (1862), 2 John. & H. 356, 367 (testator there put himself *in loco parentis* to donee's children); *Allen v. Jackson* (1875), 1 Ch. D. 399, 406, C. A.; *Jones v. Jones* (1876), 1 Q. B. D. 279, 281, 282, 284).

(*o*) *Jarvis v. Duke* (1681), 1 Vern. 19; *Lester v. Garland* (1808), 15 Ves. 248.

(*p*) *Perrin v. Lyon* (1807), 9 East, 170 (Scotsman); *Jenner v. Turner* (1880), 16 Ch. D. 188 (domestic servant); *Greene v. Kirkwood*, [1895] 1 I. R. 130 (legatee marrying beneath her).

(*q*) *Duggan v. Kelly* (1848), 10 I. Eq. R. 295, 473 (Papist); *Hodgson v. Halford* (1879), 11 Ch. D. 959 ("not a Jew"); *In the Goods of Knox* (1889), 23 L. R. Ir. 542 ("not a Protestant").

(*r*) *Stackpoole v. Beaumont* (1796), 3 Ves. 89, 97 (twenty-one); *Younge v. Furse*, *supra* (twenty-eight); and see *Scott v. Tyler* (1788), 2 Bro. C. C. 431, *per* Lord THURLOW, L.C., at p. 488.

(*s*) *Aston v. Aston* (1703), 2 Vern. 452; *Lloyd v. Branton* (1817), 3 Mer. 108, 116; *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96, C. A., explaining *Dashwood v. Bulkeley* (Lord) (1804), 10 Ves. 230, as also having decided the point; see also pp. 589, 593, 596, 597, *post*.

(*t*) *Barton v. Barton* (1694), 2 Vern. 308; *Scott v. Tyler*, *supra*, at p. 487; *Morley v. Rennoldson*, *Morley v. Linkson*, *supra*, at p. 580; *Lloyd v. Lloyd*, *supra*, at p. 263; *Newton v. Marsden*, *supra*; *Evans v. Rosser* (1864), 2 Hem. & M. 190; see, further, *Hampden v. Brewer* (1666), 1 Cas. in Ch. 77; *Pyle v. Price* (1802), 6 Ves. 779; *Re Rutter, Donaldson v. Rutter*, [1907] 2 Ch. 592 (forfeiture by marriage in false name). Such a condition may be imposed not merely by the husband, but by anyone else (*Newton v. Marsden*, *supra*; *Allen v. Jackson*, *supra*, at pp. 406, 408).

(*a*) *Allen v. Jackson*, *supra*; compare *Kidd v. Kidds* (1863), 2 Macph. (Ct. of Sess.) 227.

(*b*) *Scott v. Tyler*, *supra*; *Haughton v. Haughton* (1824), 1 Mol. 611 (marriage "contrary to the order and established rules" of Quakers); *Renaud v. Lamothé* (1902), 32 Canada Supreme Court Reports, 357 (the laws and rites of the Catholic Church).

(*c*) *Falkland (Viscount) v. Bertie* (1697), 2 Vern. 333; *Davis v. Angel* (1862), 4 De G. F. & J. 524; *Kiersey v. Flahavan*, [1905] 1 I. R. 45.

(*d*) See *Hodgson v. Halford*, *supra*.

## SECT. 2.

## Conditions.

Limitations  
depending on  
marriage.

Conditions  
voidable by  
the donee.

Conditions  
*in terrorem*.

These considerations as to marriage apply only to conditions, and not to words merely describing the interest created (*e*). An interest may be given to endure so long as the donee remains unmarried (*f*), and generally marriage may be made the ground of a gift ceasing or commencing (*g*).

**1161.** A condition may be ineffectual against the donee. Thus, where there is a direction that a donee is not to enjoy a vested gift in full until he attains a particular age, then unless there is in the will or some codicil to it a clear indication of intention not only that the donee is not to have the enjoyment of the gift until attaining that age, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the donee up to the time of attaining that age as to induce the court to hold that as to the previous income there is an intestacy, the court on the application of the donee, if he is entitled to give a discharge for the gift, or the persons deriving title under him, will strike that direction out of the will (*h*).

**1162.** Certain conditions, if attached to a legacy of specific personal estate, or a legacy charged on personal estate only (*i*), may be void against the donee as made *in terrorem*, that is to say, as a mere idle threat to induce the donee to comply with the condition, but not to affect the bequest (*k*), unless the testator shows that his intention was not merely to threaten or enjoin the donee by the condition (*l*), but to make a different disposition of the subject of the gift in the event of non-compliance with the condition. The

(*e*) The question in each case is whether the words constitute a limitation or a condition (*Heath v. Lewis* (1853), 3 De G. M. & G. 954, 957; *Re King's Trusts* (1892), 29 L. R. Ir. 401, 408; *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116, 129, 132, C. A.).

(*f*) *Heath v. Lewis*, *supra*; *Potter v. Richards* (1855), 1 Jur. (N. S.) 462; and see *In the Estate of M'Loughlin* (1878), 1 L. R. Ir. 421, C. A.

(*g*) *Webb v. Grace* (1848), 2 Ph. 701, 702; *Re Mason, Mason v. Mason*, [1910] 1 Ch. 695.

(*h*) *Gosling v. Gosling* (1859), John. 265, *per* WOOD, V.-C., at p. 272, adopted in *Wharton v. Masterman*, [1895] A. C. 186, *per* Lord HERSHELL, L.C., at p. 192; *Saunders v. Vautier* (1841), Cr. & Ph. 240; *Re Thompson, Griffith v. Thompson* (1896), 44 W. R. 582; *Re Couturier, Couturier v. Shea*, [1907] 1 Ch. 470, 473; *In the Will of Hendy, Hayes v. Hendy*, [1913] Victorian Law Reports, 559.

(*i*) The rule was derived from the civil law, as administered by the ecclesiastical courts, and adopted by the courts of equity with modifications; see *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510, 515, 516, where the analogy with the rules as to vesting (see p. 810, *post*) is pointed out; *Re Whiting's Settlement, Whiting v. De Rutzen*, [1905] 1 Ch. 96, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 115. In case of a mixed gift of real and personal estate, without any trust for conversion, or in case of a legacy charged on such a mixed fund, different rules are applied according to the property concerned (*Reynish v. Martin* (1746), 3 Atk. 330, 335; *Duddy v. Gresham* (1878), 2 L. R. Ir. 442, C. A., *per* BALL, L.C., at p. 458; but see *ibid.*, *per* CHRISTIAN, L.J., at pp. 466, 467, apparently followed in *Re Pettifer, Pettifer v. Pettifer*, [1900] W. N. 182).

(*k*) *Re Dickson's Trust* (1850), 1 Sim. (N. S.) 37, 43; *Duddy v. Gresham*, *supra*, at p. 464 ("a mere threat, that the legatee was at liberty to disregard").

(*l*) As to how far the application of the rule depends on construction in this respect, see *Harvey v. Aston* (1737), 1 Atk. 361, *per* WILLES, C.J., at pp. 377, 378; *Bellairs v. Bellairs*, *supra*, *per* JESSEL, M.R., at p. 516.



conditions to which this doctrine is ordinarily applied (*m*) are conditions requiring a consent to the marriage of the donee (*n*) or forbidding the donee to dispute the will (*o*). SECT. 2.  
Conditions.

In cases where such a condition is a condition subsequent, a gift over on non-compliance with the condition is essential to (*p*) and sufficient for (*q*) the validity of the condition. Such a gift over may be made by a direction that on such non-compliance the gift is to fall into residue (*r*), but not by a mere residuary gift without more (*s*), nor by a separate provision for the donee on non-compliance with the condition (*t*). Validity of such conditions where subsequent.

In cases where such a condition is a condition precedent, the testator may show that the condition is not *in terrorem* by a gift over on non-compliance with the condition (*a*) or a mere residuary bequest (*b*), or by providing for the donee in both events, whether Validity of such conditions where precedent.

(*m*) Conditions in general restraint of marriage were considered as subject to this rule in *Marples v. Bainbridge* (1816), 1 Madd. 590, and *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; but in this respect there is the general ground of public policy on which these decisions ought to be based; see the criticism in *Duddy v. Gresham* (1878), 2 L. R. Ir. 442, C. A., *per* CHRISTIAN, L.J., at p. 468. A gift over does not render valid a condition in general restraint of marriage (*Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Hare, 570; *Lloyd v. Lloyd* (1852), 2 Sim. (N. S.) 255). In *Re Dickson's Trust* (1850), 1 Sim. (N. S.) 37, 43, 45, the rule was explained as based on public policy; conditions against alienation of a life estate were there said to be void as *in terrorem* unless there was a gift over, but the case is not now accepted as laying down the true rule as to such conditions (*Rockford v. Hackman* (1852), 9 Hare, 475, 481). It appears, at all events, that the doctrine does not ordinarily apply to other conditions not contravening any rule of public policy (*Re Dickson's Trust*, *supra* (forfeiture if donee became a nun)), and such other conditions do not become *in terrorem*, or otherwise invalid, by the mere want of a gift over (*ibid.*, at p. 43; *Re Catt's Trust* (1864), 2 Hem. & M. 46, 52). On the construction of particular wills, however, other conditions may be construed as inducements or threats addressed to the donee personally, and as not affecting the gift, if the context requires it; see *Byng v. Strafford* (Lord) (1843), 5 Beav. 558, 571, 572, affirmed, *sub nom. Hoare v. Byng* (1844), 10 Cl. & Fin. 508, H. L.; *Re Meagher, Trustees, Executors and Agency Co., Ltd. v. Meagher*, [1910] Victorian Law Reports, 407 (donee to acquire and learn a profession).

(*n*) *Bellasis v. Ermine* (1663), 1 Cas. in Ch. 22; *Jarvis v. Duke* (1681), 1 Vern. 19, 20; *Semphill v. Bayly* (1721), Prec. Ch. 562; and see the cases cited in notes (*d*), (*e*), p. 590, *post*.

(*o*) See pp. 630 *et seq.*, *post*.

(*p*) *Lloyd v. Branton* (1817), 3 Mer. 108, 117, where the effect of the gift over is explained either as an expression of contrary intention, or as making the prior gift a conditional limitation, namely, a limitation to endure until the condition is broken.

(*q*) *Stratton v. Grymes* (1698), 2 Vern. 357; *Aston v. Aston* (1703), 2 Vern. 452, 453; *Daley v. Desbouverie* (1738), 2 Atk. 261; *Chauncy v. Graydon* (1743), 2 Atk. 616; *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96, C. A.

(*r*) *Lloyd v. Branton*, *supra*; compare, however, *Pullen v. Ready* (1743), 2 Atk. 587, 590.

(*s*) *Wheeler v. Bingham* (1746), 3 Atk. 364.

(*t*) *Bellasis v. Ermine*, *supra*; *Garret v. Pritty* (1693), 2 Vern. 293.

(*a*) *Malcolm v. O'Callaghan* (1817), 2 Madd. 349; *Gardiner v. Slater* (1858), 25 Beav. 509. In the case of a gift conditional on marriage with consent, a gift over on death before twenty-one or marriage with consent is not sufficient for this purpose; see *Gray v. Gray* (1889), 23 L. R. Ir. 399.

(*b*) *Amos v. Horner* (1699), 1 Eq. Cas. Abr. 112, pl. 9; *Harvey v. Aston* (1737), 1 Atk. 361; and see *Creagh v. Wilson* (1706), 2 Vern. 572; S. C. 1 Eq. Cas. Abr. 111, pl. 5; *Gray v. Gray*, *supra* (gift itself residuary).

SECT. 2.  
Conditions.

Application  
of doctrine to  
real estate etc.

Impossible  
conditions.

Effect of  
impossibility.

the condition is performed or not (c). If property is given on marriage with consent as a condition precedent, and the condition is *in terrorem*, the gift takes effect on marriage even without consent (d), but not until marriage (e).

This doctrine as to conditions *in terrorem* does not apply to devises of real estate (f), or to bequests of legacies charged on real estate (g), or charged on personalty directed to be laid out in the purchase of real estate (h).

**1163.** A condition may be one which is intended to be performed in a presumed state of facts which do not or cannot exist; according to the intention shown the condition then either operates conditionally on that state of facts existing, and therefore, in the circumstances, does not take effect at all (i), or else operates in any event, but is impossible to perform (k).

If a condition, intended to be operative in any event, is precedent, and is originally impossible to perform, or is possible of performance at the date of the will, but afterwards becomes impossible by the act of God or circumstances over which neither the donee nor the testator had any control (l), the performance of the condition is not excused, and accordingly the gift does not vest (a);

(c) *Creagh v. Wilson* (1706), 2 Vern. 572; *Re Nourse, Hampton v. Nourse*, [1899] 1 Ch. 63, 71; *Gillet v. Wray* (1715), 1 P. Wms. 284; and see *Holmes v. Lysaght* (1733), 2 Bro. Parl. Cas. 261.

(d) *Underwood v. Morris* (1741), 2 Atk. 184, the actual decision in which case was dissented from, however, on account of the devise over, in *Hemmings v. Munkley* (1783), 1 Bro. C. C. 303, *per* Lord LOUGHBOROUGH, L.C.; at p. 304, and in *Scott v. Tyler* (1788), 2 Bro. C. C. 431, *per* Lord THURLOW, L.C., at p. 488.

(e) *Garbut v. Hilton* (1739), 1 Atk. 381; *Elton v. Elton* (1747), 3 Atk. 504; *Gray v. Gray* (1889), 23 L. R. Ir. 399.

(f) *Duddy v. Gresham* (1878), 2 L. R. Ir. 442, 457, 465, C. A.; *Jenner v. Turner* (1880), 16 Ch. D. 188, *per* BACON, V.-C., at p. 196. As to mixed funds, see note (i), p. 588, *ante*.

(g) *Reynish v. Martin* (1746), 3 Atk. 330, 335.

(h) *Pullen v. Ready* (1743), 2 Atk. 587, 590.

(i) *Yates v. University College, London* (1873), 8 Ch. App. 454, 461, affirmed (1875), L. R. 7 H. L. 438, on the ground that there was no condition at all. As to a rule said to be derived from the civil law, and to make the validity of an impossible condition depend on the motive and knowledge of the testator, see *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116, 128, C. A.; compare pp. 591, 777, *post*. It appears that a condition originally impossible may in some cases be regarded as repugnant to the gift, and in such cases the gift takes effect free from the condition even where the latter is a condition precedent (*Lowther v. Cavendish* (1758), 1 Eden, 99, 117 ("si mare ebiberit, si cælum digito attigerit"), affirmed, *sub nom. Cavendish (Lord Charles) v. Lowther* (1759), 3 Bro. Parl. Cas. 186).

(k) *Shep. Touch.* (ed. Preston) 132; *Re Knox, Von Scheffler v. Shuldham*, [1912] 1 I. R. 288, where a condition as to naturalisation was not impossible because a private Act of Parliament might have been obtained; *Re Williams, Taylor v. Wales (University)* (1908), 24 T. L. R. 716; *Re Robinson, Wright v. Tugwell*, [1892] 1 Ch. 95; S. C., [1897] 1 Ch. 85, 93, C. A. (use of black gown in pulpit, not impossible). As to the effect of changing circumstances rendering a condition once considered impossible now possible, see *Re Hollis Hospital (Trustees) and Hague's Contract*, [1899] 2 Ch. 540, *per* BYRNE, J., at p. 533, commenting on *Shep. Touch.* (ed. Preston) 133 (condition of going to Rome in three days).

(l) *Re Croxon, Croxon v. Ferrers*, [1904] 1 Ch. 252.

(a) Co. Litt. 206 a; Com. Dig., tit. Condition (D. 1); *Roundel v. Currer* (1786), 2 Bro. C. C. 67; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 120; *Priestley v. Holgate* (1857), 3 K. & J. 286 (gift con-



where, however, the condition is subsequent in such a case, the gift takes effect free from the condition (*b*). The impossibility in these cases must be in the nature of things (*c*); a condition is not void merely because its performance is highly improbable (*d*), or because it is out of the power of the donee, or even out of any human power (*e*), to ensure its performance.

SECT. 2.  
Conditions.

**1164.** In general, if a condition is void as contrary to public policy, repugnant to a prior gift, illegal, or uncertain, the effect on the gift is that if the condition is precedent the gift fails (*f*), and that if the condition is subsequent the gift takes effect free from the condition (*g*).

Effect of  
invalidity  
in general.

If a condition is voidable and avoided by the donee, or repugnant to the gift to which it is attached, or fails to operate on the gift as being *in terrorem* or otherwise, then the gift takes effect free from the condition, whether the condition is precedent or subsequent (*h*).

**1165.** The donee may not be bound by (*i*) a condition imposed by the will on account of the acts of the testator or other events, subsequent to the date of the will, where the effect is that, substantially, the condition is performed or nullified in the testator's lifetime, or that, substantially, the testator has dispensed with the condition or has put performance out of the power of the donee (*k*).

Conditions  
nullified or  
dispensed  
with by  
testator.

ditional on return to England; shipwreck of donee); *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 753, *per* JESSEL, M.R., at p. 755; and see *Shrewsbury (Earl) v. Hope-Scott* (1859), 6 Jur. (N. S.) 452, 462.

(*b*) *Thomas v. Howell* (1694), 1 Salk. 170; *Graydon v. Hicks* (1740), 2 Atk. 16, 18; *Bunbury v. Doran* (1875), 9 I. R. C. L. 284, 286, Ex. Ch.; *Re Bird, Bird v. Cross* (1894), 8 R. 326 (lunacy); *Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 749, C. A.; *Re Edwards, Lloyd v. Boyes*, [1910] 1 Ch. 541; and see the cases cited in note (*k*), p. 590, *ante*.

(*c*) *Franco v. Alvares* (1746), 3 Atk. 342, 345; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 94.

(*d*) *Egerton v. Brownlow (Earl)*, *supra*, at p. 76; Co. Litt. 206 a, note (1).

(*e*) *Egerton v. Brownlow (Earl)*, *supra*, at pp. 22, 23, n.

(*f*) As to the effect of conditions contrary to public policy, see note (*h*), p. 584, *ante*, notes (*p*)—(*h*), pp. 585, 586, *ante*; as to conditions repugnant, see p. 584, *ante*; as to uncertain conditions, see p. 584, *ante*. In *Brown v. Peck* (1758), 1 Eden, 140; *Wren v. Bradley* (1848), 2 De G. & Sm. 49, the court applied to conditions precedent the rule of the civil law that a condition *contra bonos mores* should be treated as *non scriptum*; but these cases were explained otherwise, as based on a construction treating the conditions in question as subsequent, in *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116, 124, 126, 130, C. A.

(*g*) *Egerton v. Brownlow (Earl)*, *supra*; *Re Gassiot, Fladgate v. Vintners' Co.* (1901), 70 L. J. (CH.) 242.

(*h*) As to conditions *in terrorem*, see pp. 588 *et seq.*, *ante*. A rule said to be the civil law rule drew a distinction between illegal conditions involving *malum in se* and those involving *malum prohibitum*; in the latter cases the gift took effect free from the condition; see *Re Moore, Trafford v. Maconochie*, *supra*, at p. 128, where such rule, if any such exists, was held not to apply to a limitation, and compare Co. Litt. 206 a.

(*i*) See *Wedgwood v. Denton* (1871), L. R. 12 Eq. 290, 296, expressing the view that in the cases there cited the conditions had become impossible of performance.

(*k*) *Darley v. Langworthy* (1774), 3 Bro. Parl. Cas. 359 (bequest of chattels at B. conditional on residence; and a subsequent conveyance by the testator of B.); *Smith v. Cowdery* (1825), 2 Sim. & St. 358 (condition against marrying T.; marriage with T. by consent of testator); *Re Park, Bott v. Chester*, [1910] 2 Ch. 322 (marriage with testator's consent); *Gath v. Burton* (1839), 1 Beav. 479 (condition requiring payment of debt, satisfied



SECT. 2.  
Conditions.  
Other grounds  
of excuse.

**1166.** The donee may also be excused by the act of the court (*l*), or on grounds of public policy in some cases where the condition is subsequent, and where on account of the infancy or marriage (*m*) of the donee (*n*), or of his public duties, he is not free to perform the condition (*o*). But the donee is not excused by his own ignorance of the condition (*p*), at all events unless in the circumstances of the case there is a duty to give him notice thrown on a party interested (*q*), or unless he is the heir and the condition is a condition subsequent (*a*); or by his own acts rendering it impossible

by testator accepting composition); *Violett v. Brookman* (1857), 5 W. R. 342 (condition against disputing father's will: acquiescence by testator in his lifetime in revaluation of father's estate); *Walker v. Walker* (1860), 2 De G. F. & J. 255 (condition requiring conveyance by donee: purchase by testator of donee's interest). As to a condition requiring a consent to marriage, see pp. 596 *et seq.*, *post*. There are remarks in some cases suggesting that the true principle is not that of considering that the condition has been fulfilled, but that the donees are exempt from the condition altogether, so that the will must be read as if there were no condition (*Re Park, Bott v. Chester*, [1910] 2 Ch. 322, *per* PARKER, J., at p. 327), but this is doubtful; as to subsequent events, see p. 647, *post*.

(*l*) *Croskery v. Ritchie*, [1901] 1 I. R. 437 (sale by order of court).

(*m*) Thus, a married woman may be excused from a condition as to her residence, or as to her return to England, if she can only comply with the condition by separating from her husband (*Woods v. Townley* (1853), 11 Hare, 314; *Wilkinson v. Wilkinson* (1871), L. R. 12 Eq. 604; compare p. 586, *ante*). As to performance by a married woman restrained from anticipation, see *Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535, C. A. (under the law before 1882, the court could not dispense with restraint); Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 7.

(*n*) As in the case of conditions subsequent requiring an act of volition, where the persons to whom his legal custody and care are committed do not choose that he should conform; an infant cannot, therefore, be said to refuse or neglect to reside at a place (*Partridge v. Partridge*, [1894] 1 Ch. 351, following *Parry v. Roberts* (1871), 19 W. R. 1000); or to refuse or neglect to take a name and arms (*Re Edwards, Lloyd v. Boyes*, [1910] 1 Ch. 541); see note (*c*), p. 593, *post*.

(*o*) *Re Adair*, [1909] 1 I. R. 311 (absence on military service no breach of condition requiring residence); *Brannigan v. Murphy*, [1896] 1 I. R. 418 (parish priest's duties).

(*p*) Such as conditions requiring a certain act to be done within a certain time, as claiming the legacy (*Fry v. Porter* (1670), 1 Mod. Rep. 300; *Fry's (Lady Anne) Case* (1672), 1 Vent. 199; *Burgess v. Robinson* (1817), 3 Mer. 7; *Hawkes v. Baldwin* (1838), 9 Sim. 355; *Re Hodge's Legacy* (1873), L. R. 16 Eq. 92; *Powell v. Rawle* (1874), L. R. 18 Eq. 243; *Astley v. Essex (Earl)* (1874), L. R. 18 Eq. 290; *Re M'Mahon, M'Mahon v. M'Mahon*, [1901] 1 I. R. 489, C. A.).

(*q*) *Fry's (Lady Anne) Case*, *supra*, at p. 201 ("where one of the parties is more privy than the other, notice must be given"). The executor is under no obligation to disclose the condition, even in a case where he takes a benefit under it by way of gift over (*Re Lewis, Lewis v. Lewis*, [1904] 2 Ch. 656, C. A.; *Chauncy v. Graydon* (1743), 2 Atk. 616; but see *Brittlebank v. Goodwin* (1868), L. R. 5 Eq. 545, 550; *Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25, 32, 33).

(*a*) The heir, if taking by descent under the law prior to the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106) (see title DESCENT AND DISTRIBUTION, Vol. XI., p. 8, note (*l*)), was not bound by a condition subsequent divesting his estate, unless and until he had notice of it (*Doe d. Kenrick v. Beaucherk* (1809), 11 East, 657, following *Fraunces's Case* (1609), 8 Co. Rep. 89 b, 92 a, *Malloon v. Fitzgerald* (1671), 3 Mod. Rep. 29, and *Fry's (Lady Anne) Case*, *supra*, at p. 200; *Doe d. Taylor v. Crisp* (1838), 8 Ad. & El. 779, 788; *Burleton v. Humfrey* (1755), Amb. 256, 259; and see *Northcote v. Duke* (1765), Amb. 511, 513); and this rule has been applied in a case since that Act (*Murphy v. Broder* (1874), 9 I. R. C. L. 123); it does not apply,

for him to perform the condition (b); or, except as mentioned above, by his infancy or other disability (c).

SECT. 2.  
Conditions.

SUB-SECT. 3.—*Performance of Conditions.*

**1167.** In many cases, particularly with regard to conditions requiring a consent to marriage, the court may hold a condition satisfied where it has been complied with substantially (d), though not in terms (e), whether the condition is precedent or

Substantial  
performance.

however, to conditions precedent (*Murphy v. Broder* (1874), 9 I. R. C. L. 123, 127; *Horrigan v. Horrigan*, [1904] 1 I. R. 29; and see *Simpson v. Vickers* (1807), 14 Ves. 341). There does not appear to be any such rule in favour of next of kin; and the rule in favour of the heir may be now obsolete in England owing to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), as to cases within that Act where the title of the heir is subject to that of the testator's representative.

(b) *Philips v. Walter* (1720), 2 Bro. Parl. Cas. 250; *Carter v. Carter* (1857), 3 K. & J. 617, 651, disapproved, but on other grounds, in *Pilcher v. Rawlins* (1872), 7 Ch. App. 259; *Middleton v. Windross* (1873), L. R. 16 Eq. 212 (settlement by donee, with testator's approval).

(c) *Fry's (Lady Anne) Case* (1672), 1 Vent. 199, 200. Thus, an infant (except as mentioned in note (n), p. 592, *ante*) is bound by a condition, e.g., as to taking a name and arms (*Whittingham's Case* (1603), 8 Co. Rep. 42 b, 44 b; *Bevan v. Mahon-Hagan* (1892), 27 L. R. Ir. 399; and see *Doe d. Luscombe v. Yates* (1815), 5 B. & Ald. 544 (condition held substantially complied with by infant); *Ledward v. Hassells* (1856), 2 K. & J. 370 (condition as to giving a discharge)). As to performance by or on behalf of a lunatic, see *Re Sefton (Earl)*, [1898] 2 Ch. 378, C. A.; *Re Crumpe, Orpen v. Moriarty*, [1912] 1 I. R. 485.

(d) As to whether a condition has been substantially fulfilled, see, generally, *Mohun (Lord) v. Hamilton (Duke)* (1704), 2 Bro. Parl. Cas. 239 (giving no trouble to executor); *Fazakerley v. Ford* (1831), 4 Sim. 390 (shifting clause on succession to estates; succession to estates subject to incumbrance, not within it); *Scarlett v. Abinger (Lord)* (1865), 34 Beav. 338 (condition for settlement of the donee's own estates); *Re Moir, Warner v. Moir* (1884), 25 Ch. D. 605; *Re Sax, Barned v. Sax* (1893), 68 L. T. 849 ("cease to carry on the business"; sale to company, donees serving as managing directors); *Galwey v. Barden*, [1899] 1 I. R. 508 (entering on a calling); *Re Crumpe, Orpen v. Moriarty*, *supra* (not returning to England); and compare *Newburgh v. Newburgh* (1715), 2 Bro. Parl. Cas. 247; *Tulk v. Houlditch* (1813), 1 Ves. & B. 248; *Schnell v. Tyrrell* (1834), 7 Sim. 86 (remaining in England); *Re Stone's Trusts* (1866), 12 Jur. (N. S.) 447 (claim within time made by third person); *Re Arbib and Class's Contract*, [1891] 1 Ch. 601, C. A. (return to England; temporary visit sufficient); *Browne v. Browne*, [1912] 1 I. R. 272. Literal compliance may be necessary if the words of the will are clear and the condition is capable of being literally complied with (*Caldwell v. Cresswell* (1871), 6 Ch. App. 278). As to what is sufficient compliance with a name and arms clause, see titles NAME AND ARMS, CHANGE OF, Vol. XXI., pp. 349 *et seq.*; SETTLEMENTS, Vol. XXV., pp. 697 *et seq.* As to what is sufficient compliance with a condition as to residence, see title SETTLEMENTS, Vol. XXV., p. 696, note (t). A condition requiring the donee to claim the legacy may be sufficiently complied with by an order in an action for administration, even though the donee is not a party (*Tollner v. Marriott* (1830), 4 Sim. 19), but not, it seems, by a mere order on originating summons not asking for general administration (*Re Hartley, Stedman v. Dunster* (1887), 34 Ch. D. 742). A condition requiring the donee to give a good discharge may similarly be sufficiently performed by bringing an action (*Franco v. Alvares* (1746), 3 Atk. 342; *Ledward v. Hassells*, *supra*).

(e) Co. Litt. 206 a; *Popham v. Bampfseild* (1682), 1 Vern. 79, 83; *Daley v. Desbouverie* (1738), 2 Atk. 261; *Clarke v. Parker* (1812), 19 Ves. 1, 24; *Re Smith, Keeling v. Smith* (1890), 44 Ch. D. 654 (conditions

SECT. 2. subsequent(*f*), but does not in general do so in case of conditions divesting an estate that has become vested (*g*).

Conditions.

There may be cases where, in the circumstances, an attempted or inchoate performance is sufficient (*h*), but this is not the general rule, even though the completion of the performance is prevented by the death of the donee or other act of God (*i*).

Time of performance.

**1168.** Where the testator has prescribed a period within which a condition must be performed, this period must be strictly observed (*k*), subject to the jurisdiction, if any, of the court to grant relief from forfeiture (*l*). If, however, the testator has not prescribed such a period and the condition is one to be performed by the donee personally, not requiring the intervention or concurrence of any other person, the period for the performance of the condition is necessarily the life of the donee and no longer, and the condition is not complied with if the donee dies without having performed it (*m*). Where persons other than the donee are benefited, the period allowed is, as a rule, a reasonable period (*n*).

Enforcement of a condition.

**1169.** The person entitled under a gift over on non-performance of the condition may release the donee from the condition (*o*), but as a rule only without prejudice to the rights of others (*p*).

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with respect to marriage); *Tanner v. Tebbutt* (1843), 2 Y. & C. Ch. Cas. 225 (establishment of identity of donee).

(*f*) *Popham v. Bampfild* (1682), 1 Vern. 79; *Worsley v. Wood* (1796), 6 Term Rep. 710, 719, 722; *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 753 (conditional gift on marriage with consent of parents, one dead), citing with approval Roper, *Legacies*, 3rd ed., p. 690; Story, s. 291.

(*g*) *Hervey-Bathurst v. Stanley*, *Craven v. Stanley* (1876), 4 Ch. D. 251, 272, C. A.

(*h*) *Priestley v. Holgate* (1857), 3 K. & J. 286, 288; *Re Conington's Will* (1860), 6 Jur. (N. S.) 992.

(*i*) *Tulk v. Houlditch* (1813), 1 Ves. & B. 248; *Roundel v. Currer* (1786), 2 Bro. C. C. 67 (and see 1 Swan. 383, n.); *Priestley v. Holgate*, *supra*.

(*k*) *Simpson v. Vickers* (1807), 14 Ves. 341 (conditions as to giving a release within a fixed time); *Brooke v. Garrod* (1857), 2 De G. & J. 62 (option to purchase); and see *Austin v. Tawney* (1867), 2 Ch. App. 143; *Re Glubb, Bamfield v. Rogers*, [1900] 1 Ch. 354, C. A.; *Re Knox, Von Scheffler v. Shuldham*, [1912] 1 I. R. 288 (naturalisation within two years); and note (*p*), p. 592, *ante*. As to how the time is computed, see *Lester v. Garland* (1808), 15 Ves. 248; *Gorst v. Lowndes* (1841), 11 Sim. 434; *Miller v. Wheatley* (1891), 28 L. R. Ir. 144.

(*l*) See p. 595, *post*.

(*m*) *Patching v. Barnet* (1881), 51 L. J. (CH.) 74, C. A.; *Re Greenwood, Goodhart v. Woodhead*, [1902] 2 Ch. 198, *per* JOYCE, J., at pp. 204, 205 (reversed on construction, [1903] 1 Ch. 749, C. A.). Thus, in case of a gift conditionally on marriage with, or with the consent of, a particular person, the donee has his whole life to perform the condition (*Johnson v. Smith* (1749), 1 Ves. Sen. 314, and Supplement, 154; *Randal v. Payne* (1779), 1 Bro. C. C. 55; *Fitzgerald v. Ryan*, [1899] 2 I. R. 637, 652, 654; and see *Beaumont v. Squire* (1852), 17 Q. B. 905, 933, 936, criticising *Clifford v. Beaumont* (1878), 4 Russ. 325).

(*n*) *Huckstep v. Mathews* (1686), 1 Vern. 362; *Davies v. Lowndes* (1835), 1 Bing. (N. C.) 597, 618; and see *Carteret v. Carteret* (1723), 2 P. Wms. 132, 135. Compare the rules as to time of performance of a contract, for which see title CONTRACT, Vol. VII., pp. 412 *et seq.*

(*o*) *Ex parte Palmer* (1852), 5 De G. & Sm. 649.

(*p*) See *Wynne v. Fletcher* (1857), 24 Beav. 430.



SECT. 2.  
Conditions.

No one can take advantage of the non-performance of a condition who intentionally prevented the condition from being performed (*g*).

If a legacy is given on a valid condition subsequent that the donee does or abstains from doing any specified act, the court orders payment of the legacy to the donee, but requires security for the observance of the condition (*r*); if, on the other hand, the condition refers to no act or default of the donee, he may be entitled to payment without giving security (*s*). In each case, however, the court gives effect to the intentions of the testator, which may modify or exclude these rules (*t*).

SUB-SECT. 4.—*Relief against Conditions.*

**1170.** A court with equitable jurisdiction (*a*) may grant a donee relief against a condition precedent (*b*), or against forfeiture under a condition subsequent (*c*), in the case of any condition on the usual equitable grounds of such relief (*d*), as where performance has been prevented by the contrivance of the executors (*e*), or other persons interested (*f*), and by no fault of the donee (*g*), or where the condition is in the nature of a penalty (*h*); and also in the case of conditions relating to matters such as the payment of legacies or other sums (*i*) or the release of claims (*k*), where performance has not

Relief against conditions.

(*g*) Co. Litt. 206 b; *Falkland (Viscount) v. Bertie* (1697), 2 Vern. 333, 344; *Simpson v. Vickers* (1807), 14 Ves. 341, 346; and see *Mesgrett v. Mesgrett* (1707), 2 Vern. 580.

(*r*) *Aston v. Aston* (1703), 2 Vern. 452; *Colston v. Morris* (1821), Madd. & G. 89.

(*s*) *Griffiths v. Smith* (1790), 1 Ves. 97; *Fawkes v. Gray* (1811), 18 Ves. 130; and see *Madill v. Madill* (1907), 26 New Zealand Law Reports, 737, C. A.

(*t*) Thus, the testator may expressly direct security to be given (see, for example, *Roche v. M'Dermott*, [1901] 1 I. R. 394; *Re Lester, Burton v. Lester* (1906), 7 State Reports, New South Wales, 58); and the fact that trustees have the legal estate and active duties in relation to the property may prevent the donee obtaining transfer (*Polson v. Polson* (1900), 21 New South Wales Law Reports (Equity), 90).

(*a*) The jurisdiction of a court of law to hold a condition substantially performed did not exist in all cases in which there was the equitable jurisdiction to give relief against non-performance (*Clarke v. Parker* (1812), 19 Ves. 1, 21, 22).

(*b*) *Wallis v. Crimes* (1667), 1 Cas. in Ch. 89, 90; *Woodman v. Blake* (1692), 2 Vern. 222; *Hayward v. Angell* (1684), 1 Vern. 222; *Falkland (Viscount) v. Bertie*, *supra*, at p. 339.

(*c*) See, generally, title EQUITY, Vol. XIII., pp. 153 *et seq.*

(*d*) *Ibid.*

(*e*) *Brooke v. Garrod* (1857), 2 De G. & J. 62.

(*f*) As, for instance, persons interested under the gift over (*Cary v. Bertie*, *supra*, at p. 343; and see *D'Aguilar v. Drinkwater* (1813), 2 Ves. & B. 225), or under a prior gift (*Hayes v. Hayes* (1675), Cas. temp. Finch, 231).

(*g*) *Clarke v. Parker*, *supra*, per Lord ELDON, L.C., at p. 17.

(*h*) *Wallis v. Crimes*, *supra*; *Priestley v. Holgate* (1857), 3 K. & J. 286, 288.

(*i*) *Paine v. Hyde* (1841), 4 Beav. 468. Where the heir has entered on breach of condition by the devisee, the court gives relief to the devisee on payment of the legacy (*Underwood v. Swain* (1649), 1 Rep. Ch. 85 [161]; *Barnardiston v. Fane* (1699), 2 Vern. 366; *Grimston v. Bruce* (1707), 1 Salk. 156); as to construction of such conditions, see p. 792, *post*.

(*k*) *Hayward v. Angell*, *supra*; *Taylor v. Popham* (1782), 1 Bro. C. C.

SECT. 2. — been made within the time required by the testator, but is capable of being adequately performed at any time, on compensation being made for the delay (*l*); the court, however, does not give relief even in such cases where there is a gift over (*m*) to any other than that person who would take by operation of law (*n*). Except in such cases, the court cannot give relief at all (*a*).

SUB-SECT. 5.—*Conditions as to Consent to Marriage.*

Application  
to conditions  
as to consent  
to marriage.

**1171.** A condition, whether precedent or subsequent, referring to marriage with the consent of a named person is generally construed as operative only during the life of the named person (*b*). If, therefore, that person dies in the life of the testator, or before any marriage, the gift takes effect free from the condition in cases where the condition is subsequent (*c*). Where the gift vests at a specified age, the condition is construed as referring only to a marriage under that age (*d*). On the other hand, where the condition refers to marriage with a consent attached to a certain office, such as that of trustee or guardian, it may be operative at any time while a person holds or can be appointed to that office (*e*). The giving of consent in such cases is of a fiduciary nature (*f*), but the condition is then

168; *Simpson v. Vickers* (1807), 14 Ves. 341; *Hollinrake v. Lister* (1826), 1 Russ. 500, 508.

(*l*) As, for instance, by way of interest.

(*m*) A mere clause of revocation, it appears, does not amount to a gift over for this purpose (*Simpson v. Vickers, supra*).

(*n*) *Ibid.*, at p. 346; *Cage v. Russel* (1681), 2 Vent. 352.

(*a*) *E.g.*, against forfeiture under a condition as to marriage with consent (*Ashton v. Ashton* (1703), Prec. Ch. 226; *Dashwood v. Bulkeley* (Lord) (1804), 10 Ves. 230, 239; *Clarke v. Parker* (1812), 19 Ves. 1).

(*b*) *Mercer v. Hall* (1793), 4 Bro. C. C. 326; *Green v. Green* (1845), 2 Jo. & Lat. 529, 539, 540; *Curran v. Corbet*, [1897] 1 I. R. 343; *Booth v. Meyer* (1877), 38 L. T. 125, explaining *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 753.

(*c*) *Peyton v. Bury* (1731), 2 P. Wms. 626; S. C., *sub nom. Painter v. Berry* (1732), 2 Eq. Cas. Abr. 548; *Aislaby v. Rice* (1818), 3 Madd. 256; *Collett v. Collett* (1866), 35 Beav. 312.

(*d*) *Desbody v. Boyville* (1729), 2 P. Wms. 547; *Pullen v. Ready* (1744), 2 Atk. 587; *Knapp v. Noyes* (1768), Amb. 662 (age specified by reference to portions); *Laird v. Tobin* (1830), 1 Mol. 543. As to gifts vesting on attaining a specified age or on marriage with consent, compare *Dobbins v. Bland* (1730), 2 Eq. Cas. Abr. 545; *Knight v. Cameron* (1807), 14 Ves. 389; *Davidson v. Eook* (1856), 22 Beav. 206; *West v. West* (1863), 4 Giff. 198. There is no such restriction where no age is expressly or impliedly specified (*Lloyd v. Branton* (1817), 3 Mer. 108).

(*e*) *Re Brown's Will, Re Brown's Settlement* (1881), 18 Ch. D. 61, C. A. (guardian who might be appointed by the court); and see *Gardiner v. Slater* (1858), 25 Beav. 509, *per* ROMILLY, M.R., at p. 511. In cases where the consent of executors or trustees is required, the consent of those who renounce is unnecessary (*Worthington v. Evans* (1823), 1 Sim. & St. 165; *Boyce v. Corbally* (1834), L. & G. temp. Plunk. 102; *Ewens v. Addison* (1858), 4 Jur. (N. S.) 1034, doubting *Graydon v. Hicks* (1739), 2 Atk. 16).

(*f*) All the trustees or persons holding the office must as a rule concur; a consent of a majority is not sufficient unless the testator expressly allows it (*Clarke v. Parker, supra*, at pp. 17, 22, dissenting from *Harvey v. Aston* (1737), 1 Atk. 361, 375). The court may interfere if the consent is withheld or refused by a trustee from a corrupt, vicious, or

satisfied (*g*) by the testator's own unqualified (*h*) previous consent to (*i*) or subsequent approbation of (*k*) a marriage. The condition, therefore, does not, as a rule, apply to a donee who marries with the testator's consent and becomes a widow after the date of the will during the testator's life (*l*).

SECT. 2.  
Conditions.

**1172.** The consent must be a free consent (*m*), not obtained by misconduct (*n*). A general consent (*o*), or a consent evidenced by conduct (*p*), or presumed from the circumstances (*q*), or a conditional consent where the condition attached is afterwards performed (*r*), or a subsequent approbation (*s*), may be considered as a substantial compliance with the condition, even in cases where a consent in writing is required by the will (*a*).

Nature of  
consent.

A consent given unconditionally cannot be withdrawn (*b*), except on grounds which affect the propriety of giving the consent (*c*).

### SECT. 3.—Acceptance and Disclaimer by the Donee.

**1173.** If the donee accepts the gift, he takes it with all the benefits and burdens which are incident to it by law (*d*),

Effect of  
acceptance.

unreasonable cause (*Clarke v. Parker* (1812), 19 Ves. 1, 18), and may give consent if a trustee refuses either to consent or dissent (*Goldsmid v. Goldsmid* (1815), 19 Ves. 368). As to the control of a trustee's discretion in general, see title TRUSTS AND TRUSTEES, pp. 138 *et seq.*, *ante*.

(*g*) *Re Park, Bott v. Chester*, [1910] 2 Ch. 322, 325, 326 ("satisfied as well for the purpose of a gift over as for the purpose of seeing who is entitled under the conditional gift").

(*h*) See *Lowry v. Patterson* (1874), 8 I. R. Eq. 372.

(*i*) *Clarke v. Berkeley* (1716), 2 Vern. 720; *Parnell v. Lyon* (1813), 1 Ves. & B. 479; *Coventry v. Higgins* (1844), 14 Sim. 30; *Tweeddale v. Tweeddale* (1878), 7 Ch. D. 633; *Re Park, Bott v. Chester*, *supra*.

(*k*) *Wheeler v. Warner* (1823), 1 Sim. & St. 304.

(*l*) *Crommelin v. Crommelin* (1796), 3 Ves. 227.

(*m*) No reasons need, as a rule, be given for dissent (*Clarke v. Parker*, *supra*, at p. 22).

(*n*) *Dillon v. Harris* (1830), 4 Bli. (N. S.) 321, H. L.; *Re Stephenson's Trusts* (1870), 18 W. R. 1066.

(*o*) *Mercer v. Hall* (1793), 4 Bro. C. C. 326; *Pollock v. Croft* (1816), 1 Mer. 181.

(*p*) *D'Aguilar v. Drinkwater* (1813), 2 Ves. & B. 225; *Burleton v. Humfrey* (1755), Amb. 256.

(*q*) *Re Birch* (1853), 17 Beav. 358.

(*r*) *Le Jeune v. Budd* (1834), 6 Sim. 441; *Re Smith, Keeling v. Smith* (1890), 44 Ch. D. 654.

(*s*) *Burleton v. Humfrey*, *supra*; but this is not the general rule, especially if the vesting of an estate is in question; see *Clarke v. Parker*, *supra*, at p. 21; and compare *Reynish v. Martin* (1746), 3 Atk. 330, 331; *Malcolm v. O'Callaghan* (1817), 2 Madd. 349; *Duffield v. Elwes* (1823), 1 Sim. & St. 239.

(*a*) *Worthington v. Evans* (1823), 1 Sim. & St. 165; *Holton v. Lloyd* (1827), 1 Mol. 30.

(*b*) *Le Jeune v. Budd*, *supra*, at p. 455.

(*c*) *Strange (Lord) v. Smith* (1755), Amb. 263; *Merry v. Ryves* (1757), 1 Eden, 1; *Dashwood v. Bulkeley (Lord)* (1804), 10 Ves. 230, 242; *Re Brown, Ingall v. Brown*, [1904] 1 Ch. 120.

(*d*) As to interest and accretions on legacies, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273. As to the liability of the donee for payment of calls on a specific gift of unpaid shares, see *ibid.*, p. 286.



SECT. 3.  
Acceptance  
and  
Disclaimer  
by the  
Donee.

or which are validly attached to it by the testator, and in particular with the burden of all the conditions and obligations validly attached to it which are intended to be binding on him (*e*). Unless the conditions are such that only a trust or charge on the property is created (*f*), or that the donee is only entitled to the enjoyment of the gift during such period as the conditions are performed by him (*g*), the donee on accepting the gift is bound to observe and perform the conditions (*h*) as on an implied contract by him (*i*). Thus, where the condition requires him to do some act involving expense, he is, if he accepts the gift, personally liable for

(*e*) *Messenger v. Andrews* (1828), 4 Russ. 478 (where the plaintiff claimed to be in possession not by virtue of the bequest, but in satisfaction of moneys advanced, and inquiry was ordered whether he accepted); *Hickling v. Boyer* (1851), 3 Mac. & G. 635 (covenants and conditions of lease); and see note (*i*), *infra*. As to the burden of incumbrances, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 288; as to acceptance by a trustee, see title TRUSTS AND TRUSTEES, p. 82, *ante*. A legatee who in pursuance of a condition attached to the legacy conveys land of his own to another has no lien for his legacy on the land so conveyed (*Barker v. Barker* (1870), L. R. 10 Eq. 438).

(*f*) *Jillard v. Edgar* (1849), 3 De G. & Sm. 502; *Re Cowley, Souch v. Cowley* (1885), 53 L. T. 494 ("subject to" the payment of debts etc.).

(*g*) *Re Robinson, Wright v. Tugwell*, [1892] 1 Ch. 95; *A.-G. v. Christ's Hospital* (1830), 1 Russ. & M. 626, *per* LEACH, M.R., at p. 628, where a gift over on non-performance did not produce this result; compare, however, *Re Tyler, Tyler v. Tyler*, [1891] 3 Ch. 352, C. A.; *Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337, where only the validity of the gifts over was considered; see title PERPETUITIES, Vol. XXII., p. 330, note (*p*).

(*h*) *Northumberland (Earl) v. Granby (Marquis)* (1760), 1 Eden, 489, 499, also reported *sub nom. Northumberland (Earl) v. Aylesford (Earl)*, Amb. 540, affirmed, *sub nom. Northumberland (Duke) v. Egremont (Lord)* (1768), Amb. 657; *A.-G. v. Christ's Hospital* (1790), 3 Bro. C. C. 165 (on condition of maintaining six children: rents insufficient); *Messenger v. Andrews*, *supra* (in "consideration of" paying debts etc.: property insufficient); *A.-G. v. Christ's Hospital*, *supra*, at p. 628 (condition of maintaining four children); *Re Skingley* (1851), 3 Mac. & G. 221 (condition of keeping house in repair); *Gregg v. Coates, Hodgson v. Coates* (1856), 23 Beav. 33; *Woodhouse v. Walker* (1880), 5 Q. B. D. 404, 408 (where the decision is based on liability at common law, but is criticised and explained in the two following cases); *Re Williams, Andrew v. Williams*, [1885] W. N. 158, C. A.; *Blackmore v. White*, [1899] 1 Q. B. 293, 304; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726, 733; compare *Joliffe v. Twyford* (1858), 26 Beav. 227; as to the liability of a tenant for life subject to a condition for repair of the settled property, see title SETTLEMENTS, Vol. XXV., pp. 606, 607.

(*i*) *Gregg v. Coates, Hodgson v. Coates*, *supra*, at p. 38; *Blackmore v. White*, *supra*, at p. 304; compare *Batthyany v. Walford* (1887), 36 Ch. D. 269, 281, C. A., affirming S. C. (1886), 33 Ch. D. 624, 630. The liability of the donee is in the nature of a personal liability (*Rees v. Engelback* (1871), L. R. 12 Eq. 225, 237; *Re Loom, Fulford v. Reversionary Interest Society, Ltd.*, [1910] 2 Ch. 230, 233; *Re M'Mahon, M'Mahon v. M'Mahon*, [1901] 1 I. R. 489, C. A. (order for personal payment made; but as to whether such relief is generally granted in England on the procedure there adopted, compare Yearly Practice of the Supreme Court, 1914, p. 874); *Carrodus v. Carrodus*, [1913] Victorian Law Reports, 1. The acceptance may also operate to bind the donee by way of estoppel in favour of third persons, as, for instance, persons to whom by the condition he is bound to give a release (*Egg v. Devey* (1847), 10 Beav. 444; and see *Robertson v. Junkin* (1896), 26 Canada Supreme Court Reports, 192, 195, 196).

that act being done (*k*), even though the gift is insufficient to enable him to do so without loss (*l*).

**1174.** In general, and subject to the terms of the will (*m*), acceptance may be made by or inferred from informal acts of conduct (*n*), especially if they amount to acts of ownership (*o*). The donee need not accept the gift (*p*), but unless by the will the duty of doing some act to show his election is put upon him (*a*), his acceptance of the gift is presumed and the property vests in him unless and until he disclaims (*b*).

**1175.** Disclaimer (*c*) may be made in the case of a person *sui juris* (*d*) by informal acts of conduct as well as by record or

SECT. 3.  
Acceptance  
and  
Disclaimer  
by the  
Donee.  
When  
acceptance  
inferred.

Disclaimer.

(*k*) As to the limits of the jurisdiction of the court to order the condition specifically to be performed, see *Kinnersley v. Williamson* (1870), 18 W. R. 1016; and title SPECIFIC PERFORMANCE, Vol. XXVII., pp. 52, 53.

(*l*) See the cases cited in note (*h*), p. 598, *ante*.

(*m*) Thus, the will may require some writing (*Evans v. Stratford* (1864), 2 Hem. & M. 142).

(*n*) *Northumberland (Earl) v. Granby (Marquis)* (1760), 1 Eden, 489, also reported *sub nom. Northumberland (Earl) v. Aylesford (Earl)*, Amb. 540, affirmed *sub nom. Northumberland (Duke) v. Egremont (Lord)* (1768), Amb. 657; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, 524.

(*o*) *Bence v. Gilpin* (1868), L. R. 3 Exch. 76. Acts done by a donee merely to preserve the property and not amounting to acts of ownership need not amount to acceptance (*A.-G. v. Andrew* (1798), 3 Ves. 633; *Stacey v. Elph* (1833), 1 My. & K. 195).

(*p*) "A man cannot have an estate put into him in spite of his teeth" (*Thompson v. Leach* (1690), 2 Vent. 198, *per* VENTRIS, J. (who dissented from the rest of the court), at p. 206, approved S. C., 2 Salk. 618, H. L.; 4 Man. & Ry. (K. B.) 190, n.; *Townson v. Tickell* (1819), 3 B. & Ald. 31, 37).

(*a*) As in the case of options to purchase; see p. 529, *ante*; and note (*b*), p. 530, *ante*.

(*b*) *Townson v. Tickell*, *supra*, at pp. 36, 37; Shep. Touch. (ed. Preston) 285; *Re Arbib and Class's Contract*, [1891] 1 Ch. 601, C. A.; and see *Re Defoe* (1882), 2 Ontario Reports, 623; see also title GIFTS, Vol. XV., p. 418. Acceptance is thus presumed for the purpose of the property vesting in the donee even if the donee had no knowledge of the will, but in that case, it appears, not for the purpose of his incurring liabilities (*Houghton v. Bell* (1892), 23 Canada Supreme Court Reports, 498, 508 (liability as trustee)).

(*c*) As to what constitutes a disclaimer, see *Doe d. Wyatt v. Stagg* (1839), 5 Bing. (N. C.) 564; *Doe d. Chidgey v. Harris*, *supra*. As to disclaimer of the office and estate of trustee, see title TRUSTS AND TRUSTEES, p. 83, *ante*. As to the effect of disclaimer of a particular estate in accelerating subsequent limitations, see pp. 605, 606, *post*. As to sale of land, on one executor disclaiming, see stat. (1529) 21 Hen. 8, c. 4; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, as amended by the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 12; and title SALE OF LAND, Vol. XXV., p. 378, note (*e*).

(*d*) The court may order disclaimer on behalf of a lunatic (*Re Marriott* (1808), 2 Mol. 516; compare title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 448) or an infant (see title INFANTS AND CHILDREN, Vol. XVII., pp. 75, 76). A married woman may now disclaim a legacy, given to her since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), as a *feme sole*, even though restrained from anticipation (*Re Wimperis, Wicken v. Wilson*, [1914] 1 Ch. 502); as to her disclaimer of real estate, see *ibid.*; Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 7.

SECT. 3.  
Acceptance  
and  
Disclaimer  
by the  
Donee.

Acceptance  
and dis-  
claimer of  
blended gifts.

When dis-  
claimer or  
acceptance  
may be  
retracted.

deed (*e*), even if the gift confers a legal estate in real property (*f*). A disclaimer puts a donee, as regards his liabilities, burdens and rights, in the same position as if no gift had been made to him (*g*), but does not necessarily render the gift void in regard to all persons and for all purposes (*h*), as, for example, where the donee is a trustee (*i*).

**1176.** When two distinct properties are given to a donee, he is *primâ facie* entitled to take one and disclaim the other (*k*), even where the two are included under the same words of gift (*l*); his right to do so may be rebutted if the intention of the testator is shown that the two gifts should be taken together, or generally that the option to disclaim one of them should not exist (*m*). Where, however, there is a single and undivided gift of an aggregate property, such as a residuary estate, *primâ facie* the donee must either take the whole or none (*n*).

**1177.** A mere refusal by a life tenant to receive income, where there has been no change of position as regards the other persons claiming under the will and the refusal is made without consideration, may be retracted so far as regards future payments of income (*o*). Similarly, if the disclaimer is not of any estate in the

(*e*) A deed is sufficient (*Townson v. Tickell* (1819), 3 B. & Ald. 31; *Begbie v. Crook* (1835), 2 Bing. (N. C.) 70) and is advisable particularly in the case of a trustee; see title TRUSTS AND TRUSTEES, p. 83, *ante*.

(*f*) *Re Birchall, Birchall v. Ashton* (1889), 40 Ch. D. 436, 439; *Townson v. Tickell*, *supra*, per HOLROYD, J., at p. 39; *Stacey v. Elph* (1833), 1 My. & K. 195; *Bingham v. Clanmorris (Lord)* (1828), 2 Moll. 253. It was at one time the rule that estates of freehold must be disclaimed by record (*Anon.* (1579), 4 Leon. 207; *Bonefant v. Greinfield* (1587), Godb. 77, 79; and see *Re Ellison's Trust* (1856), 2 Jur. (N. S.) 62).

(*g*) *Silcock v. Roynon* (1843), 2 Y. & C. (CH.) 376 (costs of foreclosure suit; see title MORTGAGE, Vol. XXI., pp. 295, 296).

(*h*) *Mallott v. Wilson*, [1903] 2 Ch. 494, 501; *Wilson v. Wilson* (1847), 1 De G. & Sm. 152 (without prejudice to charge).

(*i*) See title TRUSTS AND TRUSTEES, p. 85, *ante*.

(*k*) *Andrew v. Trinity Hall, Cambridge* (1804), 9 Ves. 525, 534; *Warren v. Rudall, Ex parte Godfrey* (1860), 1 John. & H. 1; *Long v. Kent* (1865), 11 Jur. (N. S.) 724; *Aston v. Wood* (1874), 43 L. J. (CH.) 715; *Re Loom, Fulford v. Reversionary Interest Society*, [1910] 2 Ch. 230.

(*l*) *Syer v. Gladstone* (1885), 30 Ch. D. 614, discussed and explained in *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511, 516, 517, and followed in *Re Lysons, Beck v. Lysons* (1912), 107 L. T. 146; and see *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C.A., per COTTON, L.J., at pp. 417, 418; *Re Kensington (Baron), Longford (Earl) v. Kensington (Baron)*, [1902] 1 Ch. 203, 210, 211, n.

(*m*) *Guthrie v. Walrond* (1883), 22 Ch. D. 573, per FRY, J., at p. 577; and see *Moffett v. Bates* (1857), 3 Sm. & G. 468. It appears that it is readily inferred that the donee is not entitled to disclaim where one gift is a leasehold known by the testator to be onerous and bequeathed so as to show that the remainder of the testator's estate was intended to be free from the burden (*Talbot v. Radnor (Earl)* (1834), 3 My. & K. 252, corrected and explained in *Fairtlough v. Johnstone* (1865), 16 I. Ch. R. 442; and see *Re Sitwell, Worsley v. Sitwell* (1913), 135 L. T. Jo. 323).

(*n*) *A.-G. v. Brackenbury* (1863), 1 H. & C. 782, 791; *Green v. Britten* (1872), 42 L. J. (CH.) 187; *Hawkins v. Hawkins* (1880), 13 Ch. D. 470, 474; *Guthrie v. Walrond*, *supra*; *Re Hotchkys, Freke v. Calmady*, *supra*, at pp. 417, 419; *Frewen v. Law Life Assurance Society*, *supra*; *Parnell v. Boyd*, [1896] 2 I. R. 571, 602.

(*o*) *Re Young, Fraser v. Young*, [1913] 1 Ch. 272. A life tenant merely



property, but only of the benefit under the will, accompanied by an assertion of a right by a higher and better title, the person disclaiming is not precluded from acting under his better judgment and taking the property as donee (*p*). As a rule, however, if the donee is *sui juris* (*q*), and the will itself does not provide otherwise, a gift once unequivocally disclaimed cannot be afterwards claimed (*r*), nor can a gift once unequivocally accepted (*s*) be afterwards repudiated (*a*) to the prejudice of others.

SECT. 3.  
Acceptance  
and  
Disclaimer  
by the  
Donee.

SECT. 4.—*Modes of Failure of a Gift.*

**1178.** A gift may fail for reasons personal to the donee, as, for example, that the donee does not exist to benefit by the gift, and that the gift lapses (*b*). Further, the donee may disclaim the gift (*c*). The gift may also fail by reason of a title paramount to that of the donee, for example, that of the executors or administrators (*d*). Again, the property given to the testator may not be his own property, but the property of some other person (*e*). In general.

**1179.** Acts of the testator prior to the date of the will may cause a gift to fail, in the sense that the gift takes effect not as a gift, but in entire or partial satisfaction of a liability undertaken by the testator prior to and existing at the date of the will. In certain cases a presumption arises as to the satisfaction, wholly or partially, by gifts in a will, of portions already covenanted to be paid, or of debts already owing to creditors at the date of the will, in which cases, unless the presumption is displaced by evidence or the context of the will, the portioner or creditor is bound to elect (*f*). Acts of  
testator.

refusing to take possession of a leasehold on account of its burdensome nature is nevertheless entitled to the income of the proceeds of sale (*Lonsdale (Earl) v. Berchtoldt (Countess)* (1857), 3 K. & J. 185).

(*p*) *Doe d. Smyth v. Smyth* (1826), 6 B. & C. 112, 117. Where a general power is exercised by will in favour of a person who might take in default of appointment, the latter title is not a higher and better title than the title under the appointment, and the appointee cannot disclaim so as to avoid death duties; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 237.

(*q*) *Shep. Touch.* (ed. Preston) 70, 285.

(*r*) *Ibid.*

(*s*) *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517, 523, 524 (acceptance held equivocal on subsequent disclaimer); *Re Wimperis, Wicken v. Wilson*, [1914] 1 Ch. 502 (mere negotiations).

(*a*) *A.-G. v. Christ's Hospital* (1830), 1 Russ. & M. 626 (attempted disclaimer by charity); *A.-G. v. Munby* (1858), 3 H. & N. 826, 831 (attempted disclaimer by executors of legatee who had accepted); *Bence v. Gilpin* (1868), L. R. 3 Exch. 76; *Parnell v. Boyd*, [1896] 2 I. R. 571, 589, 596.

(*b*) See p. 607, *post*.

(*c*) See p. 599, *ante*.

(*d*) See p. 583, *ante* (according to the course of administration a gift may be subject to abatement or ademption); and see titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 4 *et seq.*; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 217 *et seq.*

(*e*) In such cases the true owner may sometimes be compelled under the doctrine of election to elect between taking a benefit under the testator's will and insisting on his own title to the property in question; see title EQUIT, Vol. XIII., pp. 116 *et seq.*

(*f*) See title EQUIT, Vol. XIII., pp. 128 *et seq.*; as to the admissibility of evidence, see p. 649, *post*; title EQUIT, Vol. XIII., p. 136.

SECT. 4. —  
Modes of  
Failure of  
a Gift.

Ademption  
(i.) by sub-  
sequent gift  
to donee.

Ademption  
(ii.) by  
testator's  
disposition in  
his lifetime.

**1180.** A gift may also be adeemed, or taken away from the donee, by an act of the testator or of other persons subsequent to the date of the will. In certain cases a presumption arises that a gift by will for a particular purpose, or to a child or person to whom the testator stood *in loco parentis*, is adeemed by a subsequent gift *inter vivos* by the testator for the same object (*g*).

**1181.** Further, a specific gift (*h*) may be adeemed by the subject-matter of the gift afterwards, during the testator's life, ceasing to be part of his estate or ceasing to be subject to his right of disposition (*i*), or ceasing to conform to the description by which it is given (*k*) on account of his own disposition or change of investment (*l*), or other subsequent events (*m*).

(*g*) See title EQUITY, Vol. XIII., pp. 135, 136. As to the admissibility of evidence rebutting or re-supporting the presumption, see p. 649, *post*; title EQUITY, Vol. XIII., p. 136; *Re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591.

(*h*) As to general, specific and demonstrative legacies, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 261; *Re Borrer's Trusts, Dunlop v. Borrer* (1909), 54 Sol. Jo. 32; and for cases of distinction in this respect, see *Hayes v. Hayes* (1836), 1 Keen, 97; *Robinson v. Addison* (1840), 2 Beav. 515.

(*i*) As to the application of the doctrine of ademption to general and special powers of appointment, see title POWERS, Vol. XXIII., pp. 42, 43; *Re Peel's Settlement, Biddulph v. Peel*, [1911] 2 Ch. 165, where appointment by deed adeemed appointment by will. If a specific gift is adeemed, a charge on it is adeemed also (*Cowper v. Mantell* (1856), 22 Beav. 223).

(*k*) See the text and cases cited in notes (*l*), (*m*), *infra*, notes (*n*), (*o*), p. 603, *post*. A specific gift of chattels in a certain locality is as a rule adeemed by their permanent removal to another locality; see the cases cited in notes (*i*), (*p*), p. 696, *post*.

(*l*) *Humphreys v. Humphreys* (1789), 2 Cox, Eq. Cas. 184 (sale); *Farrar v. Winterton (Lord)* (1842), 5 Beav. 1 (sale); *Lee v. Lee* (1858), 27 L. J. (CH.) 824 (sale); *Harrison v. Jackson* (1877), 7 Ch. D. 339; *Macdonald v. Irvine* (1877), 8 Ch. D. 101, C. A. (change of investment); *Re Lane, Luard v. Lane* (1880), 14 Ch. D. 856 (debentures converted into debenture stock: see the observations of JOYCE, J., in *Re Herring, Murray v. Herring*, [1908] 2 Ch. 493, at p. 499); *Moor v. Raisbeck* (1841), 12 Sim. 123; *Re Clowes*, [1893] 1 Ch. 214 (property sold by and afterwards mortgaged to testator); *Holmes v. Langley*, [1913] 1 L. R. 232. A contract for sale by a testator which is unenforceable or rescinded by the purchaser does not cause ademption (*Re Pearce, Roberts v. Stephens* (1894), 8 R. 805; see *Re Thomas, Thomas v. Howell* (1886), 34 Ch. D. 166), nor does a mere request by the testator to his agents to sell (*Harrison v. Asher* (1848), 2 De G. & Sm. 436).

(*m*) As by loss or destruction (*Durrant v. Friend* (1852), 5 De G. & Sm. 343 (specific legatee of chattels lost had no right to insurance money); *Trustees, Executors and Agency Co., Ltd. v. Scott* (1898) 24 Victorian Law Reports, 522 (fire)), or by notice to treat on compulsory purchase, even though the purchase is completed after death (*Ex parte Hawkins* (1843), 13 Sim. 569; *Re Manchester and Southport Rail. Co.* (1854), 19 Beav. 365; *Re Bagot's Settlement* (1862), 31 L. J. (CH.) 772 (where the purchase-money was liable to be re-invested in land); *Watts v. Watts* (1873), L. R. 17 Eq. 217; *Manton v. Tabois* (1885), 30 Ch. D. 92). No ademption is, as a rule, caused by the transfer of the specifically bequeathed property by trustees into the testator's own name unless described by reference to the trustees' ownership (*Dingwell v. Askew* (1788), 1 Cox, Eq. Cas. 427; *Lee v. Lee* (1858), 27 L. J. (CH.) 824; and see *Clough v. Clough* (1834), 3 My. & K. 296; *Jones v. Southall* (No. 2) (1862), 32 Beav. 31), or by the unauthorised acts of third parties without the testator's knowledge (*Shaftsbury (Earl) v. Shaftsbury (Countess)* (1719), 2 Vern. 747; *Basan v. Brandon* (1836), 8 Sim. 171 (investment there authorised by testator); *Jenkins v. Jones* (1866),

SECT. 4.  
**Modes of  
 Failure of  
 a Gift.**

Thus, where a change has occurred in the nature of the specific property given, even though effected by Act of Parliament, then ademption follows (*n*), unless the change is a change in name or form only, and the property exists as substantially the same thing although in a different shape (*o*). Whether the property exists substantially the same at the death of the testator is a question of fact (*p*).

The first question, however, in these cases is that of construction—what the testator is describing or dealing with, or, in other words, what it is that is bequeathed (*q*). The court may, on the words of the particular will, construe according to the usual rules in cases of descriptions (*r*), find that the testator contemplated a change of investment (*s*), and that the thing bequeathed is the property which for the time being should represent the property which the testator formerly had (*t*); and the gift in that case is not dependent on the specific investments representing the gift at the date of the will but includes re-investments into which they can be traced (*u*).

Construction referring to investments representing property mentioned.

L. R. 2 Eq. 323); nor can, on the other hand, the value of the specifically bequeathed property be increased by such unauthorised acts, as, for instance, where an agent without authority discharges a liability affecting the property (*Re Larking, Larking v. Larking* (1887), 37 Ch. D. 310).

(*n*) *Frewen v. Frewen* (1875), 10 Ch. App. 610 (advowson affected by Irish Church Act, 1869); *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665, C. A. (water company affected by Metropolis Water Act, 1902 (2 Edw. 7, c. 41)); *Re Lane, Luard v. Lane* (1880), 14 Ch. D. 856.

(*o*) *Oakes v. Oakes* (1852), 9 Hare, 666, 672, approved in *Re Slater, Slater v. Slater, supra*, at p. 672; *Partridge v. Partridge* (1736), Cas. temp. Talb. 226; *Bronsdon v. Winter* (1738), Amb. 57, 59; *Re Pilkington's Trusts* (1865), 6 New Rep. 246; *Humphreys v. Humphreys* (1789), 2 Cox, Eq. Cas. 184, 185 ("the only rule . . . was to see whether the subject of the specific bequest remained in specie at the time of the testator's death").

(*p*) In the following cases the subject-matter in its altered form passed under the gift: *Backwell v. Child* (1755), Amb. 260 (share of profits of partnership; articles renewed and altered); *Collison v. Curling* (1842), 9 Cl. & Fin. 88, H. L. (consols sold and invested on stock mortgage); *Re Vickers, Vickers v. Mellor* (1899), 81 L. T. 719 (bequest of trust fund, afterwards transferred to testatrix's banking account); *Toole v. Hamilton*, [1901] 1 I. R. 383; *Re Clifford, Mallam v. McFie*, [1912] 1 Ch. 29 (shares subdivided); *Re Greenberry, Hops v. Daniell* (1911), 55 Sol. Jo. 633 (shares subdivided); *Re Faris, Goddard v. Overend*, [1911] 1 I. R. 165 (conversion into stock); *Re Leeming, Turner v. Leeming*, [1912] 1 Ch. 828 (reconstruction of company under substantially the same constitution with diminished capital).

(*q*) *Re Bridle* (1879), 4 C. P. D. 336, per LINDLEY, J., at p. 341; *Re Slater, Slater v. Slater*, [1906] 2 Ch. 480, per JOYCE, J., at p. 484; *Re Jameson, King v. Winn*, [1908] 2 Ch. 111, per EVE, J., at p. 115.

(*r*) See p. 691, *post*.

(*s*) *Sidebotham v. Watson* (1853), 11 Hare 170, 174; and see *Thomond (Earl) v. Suffolk (Earl)* (1718), 1 P. Wms. 461.

(*t*) *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100, 102, C. A., affirmed, *sub. nom. Beddington v. Baumann*, [1903] A. C. 13, 15; *Bronsdon v. Winter, supra*; *Re Jameson, King v. Winn, supra*.

(*u*) *Le Grice v. Finch* (1817), 3 Mer. 50; *Clarke v. Browne* (1854), 2 Sm. & G. 224 (which cases were, however, doubted, on the questions of construction involved, in *Harrison v. Jackson* (1877), 7 Ch. D. 339, per JESSEL, M. R., at pp. 342, 343); *Lee v. Lee* (1858), 27 L. J. (CH.) 824; *Moore v. Moore* (1860), 29 Beav. 496; *Morgan v. Thomas* (1876), 6 Ch. D. 176,



## SECT. 4.

Modes of  
Failure of  
a Gift.Effect of  
exercise of  
an option.Payment of  
debt.Sale by court  
of lunacy.Acts of  
testator  
generally.

**1182.** The exercise of an option, created by the testator after the date of his will, to purchase property specifically given by his will, adeems the gift (*w*), unless the context of the will or the circumstances of the case show that the testator had the option present to his mind at the date of the will (*a*), or otherwise that the donee was intended to take the whole interest of the testator (*b*). But the exercise of an option which is created before the date of the will does not adeem the gift, since the property in the state in which it is given is subject to the option (*c*).

**1183.** A bequest of a debt is adeemed by the whole debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, and whether the sum be expressed in the bequest or the debt bequeathed generally (*d*); and the bequest is adeemed *pro tanto* if the testator receives payment of part of the debt (*e*).

**1184.** A sale by order of court in a subsequent lunacy of the testator does not now cause ademption (*f*).

**1185.** By statute (*g*), in the case of modern wills, and subject to

followed in *Re Kenyon's Estate*, *Mann v. Knapp* (1887), 56 L. T. 626; *Re Johnstone's Settlement* (1880), 14 Ch. D. 162; *Willett v. Finlay* (1891), 29 L. R. Ir. 156, 497, explained, as decided on the ground stated at p. 603, *ante*, in *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100.

(*w*) *Laves v. Bennett* (1785), 1 Cox, Eq. Cas. 167; *Weeding v. Weeding* (1859), 1 John. & H. 424; see *Re Isaacs, Isaacs v. Reginall*, [1894] 3 Ch. 506. But the determination after the testator's death of a lease containing a provision for determination on payment of compensation does not deprive the specific legatee of the right to the compensation (*Coyne v. Coyne* (1876), 10 I. R. Eq. 496).

(*a*) *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724, 729.

(*b*) *Re Isaacs, Isaacs v. Reginall*, *supra*, at p. 510, explaining *Emuss v. Smith* (1848), 2 De G. & Sm. 722 (option to be exercisable only after death, with trustees of will).

(*c*) *Drant v. Vause* (1842), 1 Y. & C. Ch. Cas. 580; *Emuss v. Smith*, *supra* (codicil after date of contract); *Re Pyle, Pyle v. Pyle*, *supra*. The donee is in such a case, therefore, entitled to the purchase-money payable on exercise of the option.

(*d*) *Drinkwater v. Falconer* (1755), 2 Ves. Sen. 623; *Stanley v. Potter* (1789), 2 Cox, Eq. Cas. 180; *Badrick v. Stevens* (1792), 3 Bro. C. C. 431; *Rider v. Wager* (1725), 2 P. Wms. 329; *Barker v. Rayner* (1826), 2 Russ. 122; *Gardner v. Hatton* (1833), 6 Sim. 93; *Sidney v. Sidney* (1873), L. R. 17 Eq. 65; *Re Bridle* (1879), 4 C. P. D. 336.

(*e*) *Ashburner v. Maguire* (1786), 2 Bro. C. C. 108 (bankruptcy dividends); *Fryer v. Morris* (1804), 9 Ves. 360.

(*f*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 449; *Re Wood, Anderson v. London City Mission*, [1894] 2 Ch. 577; *Re Palmer, Thomas v. Marsh*, [1911] W. N. 171; see *Macfarlane's Trustees v. Macfarlane*, [1910] S. C. 325 (sale by curator of lunatic's stock).

(*g*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 23; see p. 564, *ante*. Before that Act, any conveyance under which the testator's interest was altered, with certain exceptions, caused a gift of the property so affected to fail (*Jacob v. Jacob* (1900), 82 L. T. 270, H. L. (contract by testator to purchase specific devise; conveyance to uses to bar dower), following *Rawlins v. Burgis* (1814), 2 Ves. & B. 382; *Goodtitle d. Holford v. Otway* (1797), 7 Term Rep. 399 (settlement with remainder to settlor in fee); *Yardley v. Holland* (1875), L. R. 20 Eq. 428 (lease of mortgage estates; purchase of equity of redemption)). A partition, however, not affecting the uses to which the testator's interest was subject (*Knollys v. Alcock* (1802), 7 Ves. 558; see *Grant v. Bridger* (1876), L. R. 3 Eq. 347) did not affect such a

this doctrine of ademption (*h*), no conveyance or other subsequent act of the testator relating to property comprised in the will, except an act revoking the will, prevents the will from operating with respect to the estate or interest in property of which the testator has the power of disposing by will at the time of his death (*i*).

SECT. 4.  
Modes of  
Failure of  
a Gift.

**1186.** A gift may also fail by reason of the non-performance of a condition precedent (*k*), or by reason of the illegality of the gift (*l*).

Illegality.

SECT. 5.—*Effect of Failure of a Gift.*

**1187.** A general residuary gift includes all interests, not themselves interests in the general residue, which are otherwise undisposed of or which fail in any manner, unless the testator provides otherwise (*m*). There may be a particular residuary gift, or gift of the residue of a particular description of property, a specific part of which is the subject of a prior gift, and it may appear that on the failure of such latter gift the subject-matter is to fall into the particular residue (*n*).

Effect on  
subject of  
gift.

**1188.** The effect of failure of a prior life interest, or other particular interest, through the donee of that interest being dead or prevented by law from taking the gift (*o*), for example, owing to the attestation of the will by him or his spouse (*p*), or through revocation

Acceleration  
of subsequent  
interests.

revocation; further, a mortgage did not prevent the will operating on the testator's equity of redemption, and if the mortgage were paid off and the reconveyance made to the same uses as were existing before the mortgage (*Plowden v. Hyde* (1852), 2 De G. M. & G. 684, C. A.), the whole interest of the testator passed (*Sidebotham v. Watson* (1853), 11 Hare, 170; *Phillips v. Turner* (1853), 17 Beav. 194). Thus, after a sale of specifically devised property the money produced by the sale, if not otherwise disposed of by the will, passes as part of the general personal estate (*Moor v. Raisbeck* (1841), 12 Sim. 123, 139); and if the sale is not completed until after the testator's death, the donee takes the intermediate rents until completion to which the testator is entitled (*Watts v. Watts* (1873), L. R. 19 Eq. 217, 221; compare *Townley v. Bedwell* (1808), 14 Ves. 591).

(*h*) *Moor v. Raisbeck*, *supra*: see note (*b*), p. 565, *ante*.

(*i*) This clause "applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines and recoveries, or where they mortgage the devised estates in fee, and afterwards take a reconveyance of them to themselves and a trustee to uses to bar dower, but does not apply when the thing meant to be given is gone" (*Moor v. Raisbeck*, *supra*; *Blake v. Blake* (1880), 15 Ch. D. 481, 487).

(*k*) See p. 585, *ante*.

(*l*) See pp. 527, 538, *ante*. As to illegality of conditions, see p. 584, *ante*.

(*m*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 280 *et seq.* As to the rights as between tenant for life and remainderman of a residuary gift with regard to income the trusts of which are not effectually declared, see title TRUSTS AND TRUSTEES, p. 34, *ante*; and as to cases where the failure of the gift is due to the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), see title PERPETUITIES, Vol. XXII., p. 382, note (*a*).

(*n*) See, for example, *Malcolm v. Taylor* (1831), 2 Russ. & M. 416; *De Trafford v. Tempest* (1856), 21 Beav. 564.

(*o*) Y. B. 9 Hen. 6, fol. 24 b; Perkins, Profitable Book, s. 567.

(*p*) *Jull v. Jacobs* (1876), 3 Ch. D. 703; *Re Clark, Clark v. Randall* (1885), 31 Ch. D. 72, explained in *Aplin v. Stone*, [1904] 1 Ch. 543, 547, 548; and see *Burke v. Burke* (1899), 18 New Zealand Law Reports, 216;

SECT. 5.  
Effect of  
Failure of  
a Gift.

by codicil (*q*), disclaimer (*r*), forfeiture (*s*), or lapse (*t*), is to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest: the court construes gifts of such interests as intended to take effect on the failure or determination of the prior interest in any manner (*u*). This rule applies both to real and to personal estate (*a*).

Such a failure of a prior gift, however, does not accelerate a subsequent executory limitation not taking effect merely on the determination of the prior interest (*b*); and subsequent gifts cannot be accelerated where the persons who are to take under them are only contingently ascertainable at a future date (*c*).

Contingent  
gifts over.

**1189.** Where the contingency giving rise to a gift over occurs, and is such a contingency as is allowed by law as a condition precedent to vesting of the gift over (*d*), then the prior gift is divested, although the gift over fails to take effect according to its tenor in favour of the donee over, owing to lapse or some rule of law (*e*); and the residuary donee or the person entitled on

*Re Maybee* (1904), 8 Ontario Law Reports, 601; as to the effect of such attestation, see pp. 555, 556, *ante*.

(*q*) *Lainson v. Lainson* (1854), 5 De G. M. & G. 754; *Eavestaff v. Austin* (1854), 19 Beav. 591; *Re Love, Green v. Tribe* (1878), 47 L. J. (CH.) 783; *Stephenson v. Stephenson* (1885), 52 L. T. 576; *Re Whitehorne, Whitehorne v. Best*, [1906] 2 Ch. 121; see p. 565, *ante*.

(*r*) Y. B. 37 Hen. 6, fo. 35, pl. 23; *Re Scott, Scott v. Scott*, [1911] 2 Ch. 374, 377; *Re Young, Fraser v. Young*, [1913] 1 Ch. 272, 275; *Toronto General Trusts Co. v. Irwin* (1896), 27 Ontario Reports, 491; see p. 599, *ante*.

(*s*) *D'Eyncourt v. Gregory* (1864), 34 Beav. 36; *Craven v. Brady* (1869), 4 Ch. App. 296; see p. 599, *ante*.

(*t*) *Fuller v. Fuller* (1595), Cro. Eliz. 422.

(*u*) *Jull v. Jacobs* (1876), 3 Ch. D. 703, 712.

(*a*) See the cases cited in note (*p*), p. 605, *ante*, notes (*q*)—(*s*), *supra*. In *Eavestaff v. Austin*, *supra*, ROMILLY, M.R., at p. 592, thought that the same rules did not generally apply to real and personal estate.

(*b*) *Sidney v. Wilmer* (1858), 25 Beav. 260; *M'Carthy v. M'Carthy* (1878), 1 L. R. Ir. 189; *Re Scott, Scott v. Scott*, [1911] 2 Ch. 375 (contingent remainder taking effect as executory limitation under the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33)); *Kearney v. Kearney*, [1911] 1 I. R. 137, C. A.; and see *Crozier v. Crozier* (1843), 3 Dr. & War. 353, 367. In all these cases, therefore, the question of construction arises whether the words introducing the subsequent limitations merely denote the order of succession of the limitations or whether they introduce a new contingency; see *Lainson v. Lainson*, *supra* ("after the death").

(*c*) *Re Townsend's Estate, Townsend v. Townsend* (1886), 34 Ch. D. 357, 360; *Re Vernon, Garland v. Shaw* (1906), 93 L. T. 48, 54; and see *Re Love, Green v. Tribe*, *supra*, where, pending a member of the class of donees under the subsequent gift coming into existence, the intermediate income was held to fall into residue. In *Re Johnson, Danily v. Johnson* (1893), 68 L. T. 20, the time of ascertainment of the donees was in the context also accelerated.

(*d*) Thus, the contingency must observe the proper limits, otherwise the prior gift is not divested; see title PERPETUITIES, Vol. XXII., p. 350.

(*e*) *Doe d. Blomfield v. Eyre* (1849), 5 C. B. 713 (gift over by way of appointment to non-object of the power); *Robinson v. Wood* (1858), 4 Jur. (N. S.) 625 (void gift over to a charity under the old law); *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 388, 399, 407 (lapse); and see *Hurst v. Hurst* (1882), 21 Ch. D. 278, 293, C. A. (forfeiture clause independent of gift over); *Re Archer* (1907), 14 Ontario Law Reports, 374 (mortmain).



intestacy takes, as the case may be. The entire contingency suspending vesting of the gift over must occur in such cases (*f*). It is otherwise, however, where the intention of the testator is inferred that divesting shall not take place unless the gift over is effective, or where the gift over is void for uncertainty (*g*).

SECT. 5.  
Effect of  
Failure of  
a Gift.

## Part XI.—Lapse.

### SECT. 1.—*Nature of Lapse.*

**1190.** The term “lapse” is strictly applied to the failure of a testamentary gift owing to the death of the devisee or legatee in the testator’s lifetime (*h*), whether before or after the date of the will (*i*). As a rule (*k*), a devisee or legatee must survive the testator (*l*) in order that he or his estate may have the benefit of the gift (*m*), and a confirmation by codicil of a gift in a will to a legatee, who has died since the date of the will, does not prevent a lapse (*n*).

Meaning of  
lapse.

**1191.** The doctrine of lapse applies to powers created by will, and a power of appointment (*o*) or of charging settled estates (*p*) fails if the testator survives the donee of the power; but the death of the donee of a power prior to the testator does not cause the interests of persons taking in default of appointment to lapse (*q*).

Application  
to powers.

(*f*) Where the gift over is to a class not in existence, the coming into existence of the class may be part of the contingency on which the gift over is to take effect, and accordingly, where the other events giving rise to the gift over happen, but the class fails to come into existence, the original gift is not divested, the combined contingency not having happened (*Jackson v. Noble* (1838), 2 Keen, 590, explained in *Robinson v. Wood* (1858), 4 Jur. (N. S.) 625). Similarly a gift over, on a contingent event which happens, to the survivor of a number of persons is contingent also on the survivor existing to take the gift, and if he does not exist, the prior gift is not divested (*Jones v. Davies* (1880), 28 W. R. 455; *Re Deacon’s Trusts*, *Deacon v. Deacon*, *Hagger v. Heath* (1906), 95 L. T. 701). (*g*) *Re Archer* (1907), 14 Ontario Law Reports, 374, *per* RIDDELL, J., at p. 377, citing *O’Mahoney v. Burdett* (1874), L. R. 7 H. L. 388, *per* Lord SELBORNE, at p. 407.

(*h*) *Elliott v. Davenport* (1705), 1 P. Wms. 83.

(*i*) *Maybank v. Brooks* (1780), 1 Bro. C. C. 84, where it was held that parol evidence was inadmissible to prove that the testator knew at the date of his will that the legatee was dead; *Clarke v. Clemmans*, *Selway v. Clemmans* (1866), 36 L. J. (CH.) 171.

(*k*) As to the exceptions, see pp. 608 *et seq.*, *post*.

(*l*) As to the burden of proof of survivorship, see p. 538, *ante*.

(*m*) 5 Bac. Abr., tits. Legacies and Devises (L.) 4, Legacies (E.); 7th ed., pp. 113, 147; *Elliott v. Davenport*, *supra*. The rule applies to a devise by A. to the uses of the will of a deceased person, and the devise fails as regards those devisees under the latter will who predecease A. (*Culsha v. Cheese* (1849), 7 Hare, 236, 245; and see *Re Currie’s Settlement*, *Re Rooper*, *Rooper v. Williams*, [1910] 1 Ch. 329).

(*n*) *Hutcheson v. Hammond* (1790), 3 Bro. C. C. 128; *Maybank v. Brooks*, *supra*; and see *Re Fraser*, *Lowther v. Fraser*, [1904] 1 Ch. 726, C. A.

(*o*) *Jones v. Southall* (No. 2) (1862), 32 Beav. 31.

(*p*) *Griggs v. Gibson*, *Maynard v. Gibson* (No. 2) (1866), 35 L. J. (CH.) 458; see *Sharpe v. M’Call*, [1903] 1 I. R. 179; as to lapse of powers, see, further, p. 626, *post*; title POWERS, Vol. XXIII., p. 44.

(*q*) *Nichols v. Haviland* (1855), 1 K. & J. 504; *Edwards v. Saloway*

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Lapse.

A power to appoint by will to an individual cannot be exercised in favour of his executors if the individual dies before the donee of the power (*r*), and therefore any appointment to the individual lapses if he predecease the donee (*s*); but where a power of appointment among a class or among named individuals is given by will, and all the objects survive the testator, but one or more die in the lifetime of the donee of the power, the power may be exercised in favour of the survivors (*t*).

SECT. 2.—*Exceptions from Lapse.*

SUB-SECT. 1.—*Moral Obligation.*

Gifts in  
pursuance  
of moral  
obligation.

**1192.** The doctrine of lapse does not apply, although the legatee predeceases the testator, where the legacy is given with the intention of discharging a moral obligation (*u*), whether legally binding or not, which is recognised by the testator and is existing at his death (*v*); but the fact that the gift is made in pursuance of a covenant by the testator does not protect it from lapse (*a*).

Gift of debt.

A bequest of a debt to the debtor or to him, his executors and administrators, coupled with a direction to hand over securities, lapses like an ordinary legacy (*b*).

SUB-SECT. 2.—*Substituted Gifts.*

Alternative  
gifts.

**1193.** Where it is clear that in the event of the legatee or devisee

(1848), 2 Ph. 625; *Hardwick v. Thurston* (1828), 4 Russ. 380; *Kellett v. Kellett* (1871), 5 I. R. Eq. 298.

(*r*) *Marlborough (Duke) v. Godolphin (Lord)* (1750), 2 Ves. Sen. 61; *Re Susanni's Trusts* (1877), 47 L. J. (CH.) 65. An appointment under a general power may be saved from lapse by a substitutional appointment to the executors or administrators of the object of the power; see title POWERS, Vol. XXIII., p. 40.

(*s*) *Freeland v. Pearson* (1867), L. R. 3 Eq. 658, following *Reid v. Reid* (1857), 25 Beav. 469, and *Kennedy v. Kingston* (1821), 2 Jac. & W. 431; distinguish *Ex parte Williams* (1819), 1 Jac. & W. 89; and see *Re Brookman's Trust* (1869), 5 Ch. App. 182, where there was a covenant in a marriage settlement to appoint by will, and the object of the power died in the lifetime of the covenantor; *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18. As to objects who survive taking by implication, where no appointment is made and there is no gift over, see title POWERS, Vol. XXIII., pp. 70, 71.

(*t*) See title POWERS, Vol. XXIII., p. 24.

(*u*) As, for instance, a statute-barred debt (*Williamson v. Naylor* (1838), 3 Y. & C. (EX.) 208; *Philips v. Philips* (1844), 3 Hare, 281, 290), or a debt barred by a discharge in bankruptcy (*Re Sowerby's Trust* (1856), 2 K. & J. 630; *Turner v. Martin* (1857), 7 De G. M. & G. 429); but see *Coppin v. Coppin* (1725), 2 P. Wms. 291, 296, where legacies to creditors of the amounts of debts which had been released were treated as voluntary gifts.

(*v*) *Stevens v. King*, [1904] 2 Ch. 30.

(*a*) *Re Brookman's Trust* (1869), 5 Ch. App. 182.

(*b*) *Elliott v. Davenport* (1705), 1 P. Wms. 83; *Toplis v. Baker* (1789), 2 Cox, Eq. Cas. 118; *Maitland v. Adair* (1796), 3 Ves. 231; *Izon v. Butler* (1815), 2 Price, 34; *A.-G. v. Holbrook* (1829), 3 Y. & J. 114; see *Re Wedmore, Wedmore v. Wedmore*, [1907] 2 Ch. 277, where it was held that the forgiveness of certain debts amounted to specific legacies; distinguish *Sibthorp v. Moxom* (1747), 3 Atk. 580; *South v. Williams* (1842), 12 Sim. 566, where the will was held to express an intention that the legacy should not lapse.

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predeceasing the testator an alternative bequest is intended to be substituted (*c*), such alternative gift takes effect notwithstanding the death of the original legatee in the testator's lifetime; but if the intention is merely to signify that the legatee is to take a vested and transmissible interest, the legacy lapses in the ordinary way (*d*). Thus, the mere addition to the name of the devisee (*e*) or legatee (*f*) of words of limitation such as "heirs," "executors," or the like, or a declaration that a devise or legacy shall not lapse, if unaccompanied by a gift by way of substitution (*g*), or a declaration that a gift shall vest as from the date of the will, even though words of limitation are added to the name of the legatee or devisee (*h*), does not prevent a lapse. On the other hand, a declaration that, if any of certain named legatees should die in the lifetime of the testator leaving issue living at his death the benefits given to the legatees so dying should not lapse, but should take effect as if such legatees had died immediately after the testator, prevents a lapse, and the benefits of such legatees pass to their respective legal personal representatives (*i*).

**1194.** A legacy can be given directly to the executors or administrators of a deceased person, in which case the legacy becomes part of the deceased person's estate and does not lapse by the death of all the persons who were such executors or administrators at the date of the will before the testator's death (*k*).

Legacy to  
executors of  
deceased  
legatee.

Questions whether particular words or expressions show an intention to substitute an alternative gift, especially where the executors or administrators of the legatee are mentioned, have frequently called for judicial decision, the decisions in several instances not being easily reconcilable (*l*).

(*c*) For forms of substituted gifts, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 576.

(*d*) *Re Porter's Trust* (1857), 4 K. & J. 188, 193; *Corbyn v. French* (1799), 4 Ves. 418.

(*e*) *Hutton v. Simpson* (1716), 2 Vern. 722; *Goodright v. Wright* (1718), 1 P. Wms. 397, and earlier cases there cited. As to words of limitation being unnecessary in a will to pass an estate of inheritance in realty, see p. 775, *post*.

(*f*) *Stone v. Evans* (1740), 2 Atk. 86; *Elliott v. Davenport* (1705), 1 P. Wms. 83; *Maybank v. Brooks* (1780), 1 Bro. C. C. 127, 143; *Re Currie's Settlement*, *Re Rooper*, *Rooper v. Williams*, [1910] 1 Ch. 329, 333, 334.

(*g*) *Sibley v. Cook* (1747), 3 Atk. 572; *Pickering v. Stamford* (Lord) (1797), 3 Ves. 492, 493; see *Johnson v. Johnson* (1841), 4 Beav. 318; *Underwood v. Wing* (1855), 4 De G. M. & G. 633.

(*h*) *Browne v. Hope* (1872), L. R. 14 Eq. 343.

(*i*) *Re Greenwood*, *Greenwood v. Sutcliffe*, [1912] 1 Ch. 392, following *Re Clunies-Ross*, *Stubbings v. Clunies-Ross*, [1912] W. N. 33, and distinguishing *Re Gresley's Settlement*, *Willoughby v. Drummond*, [1911] 1 Ch. 358, and *Re Scott*, [1901] 1 K. B. 228, C. A. For form of devise with provision against lapse, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 576.

(*k*) *Trethewy v. Helyar* (1876), 4 Ch. D. 53; and see *Re Newton's Trusts* (1867), L. R. 4 Eq. 171, where a gift of personal estate to the heirs and assigns of a deceased person was treated as a gift to her statutory next of kin.

(*l*) Thus, in the following cases the bequests were held to be substitutional, and accordingly no lapse occurred by reason of the death of the original legatee in the testator's lifetime: *Long v. Watkinson* (1852), 17 Beav. 471 (to A. "and in case of his death to his executors or



## SECT. 2.

SUB-SECT. 3.—*Statutory Exceptions from Lapse.***Exceptions from Lapse.**

## Estate tail.

**1195.** Where no intention to the contrary is contained in the will, a devise of an estate tail or a *quasi*-estate tail does not lapse if the devisee dies in the lifetime of the testator leaving issue capable of inheriting under the entail (*m*). The devise in such case takes effect as if the death of the devisee had occurred immediately after the death of the testator (*n*).

## Gift to testator's issue.

**1196.** Similarly, in the absence of a contrary intention in the will, a devise or bequest of real or personal property to a child or other issue (*o*) of the testator for any estate or interest not determinable at or before the death of such child or issue does not lapse if the devisee or legatee predeceases the testator, leaving issue who are living at the death of the latter (*p*), but takes effect as if the devisee or legatee had died immediately after the testator, and becomes disposable under the will (*q*) of the devisee or legatee, or as part of his estate if he dies intestate (*r*); and if the testator intends a gift to go over in the event of his child predeceasing him he must expressly so provide (*s*).

This rule is applicable in the case of a gift to a child dead at the

administrators"); *Bridge v. Abbot* (1791), 3 Bro. C. C. 224; *Re Seymour's Trusts* (1859), John. 472; *Darrel v. Molesworth* (1700), 2 Vern. 378; *Hewitson v. Todhunter* (1852), 22 L. J. (CH.) 76 (declaration that if legatee died in testator's lifetime, legacy should not lapse, but should go to his personal representatives); *Sibley v. Cook* (1747), 3 Atk. 572 (declaration against lapse following a bequest to A. and his executors or administrators); *Re Wilder's Trusts* (1859), 27 Beav. 418 (express words of substitution); *Hinchliffe v. Westwood* (1848), 2 De G. & Sm. 216 (to testator's sons by name, and in case of the decease of them all in the lifetime of the tenant for life, to their personal representatives); *Maxwell v. Maxwell* (1868), 2 I. R. Eq. 478 (to younger sons or their executors); *Re Green's Estate* (1860), 1 Drew. & Sm. 68; *Aspinall v. Duckworth* (1866), 35 Beav. 307 (class gift: share not to lapse, but to go to executors); *Re Clay, Clay v. Clay* (1885), 54 L. J. (CH.) 648, C. A.; *Re Clunies-Ross, Stubbings v. Clunies-Ross*, [1912] W. N. 33; *Re Greenwood, Greenwood v. Sutcliffe*, [1912] 1 Ch. 392. In the following cases the gift was held to fail on the ground that the expression used did not show an intention to substitute an alternative gift on failure of the primary one: *Smith v. Oliver* (1848), 11 Beav. 494 (gift to legatee, and in case of his death, "not having received his legacy," to his children); *Tidwell v. Ariel* (1818), 3 Madd. 403 (legacy to A. or to her heir); but compare *Re Porter's Trust* (1857), 4 K. & J. 188; *Bone v. Cook* (1824), M'Cle. 168 (where a distinction was drawn between a gift to children and a gift to executors or administrators in the event of the death of the legatee); *Leach v. Leach* (1866), 35 Beav. 185; *Re Masterson, Trevanion v. Dumas*, [1902] W. N. 192; as to gifts to executors, see, further, p. 776, *post*; as to gifts by way of substitution, pp. 608, 609, *ante*.

(*m*) As to estates tail generally, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 241 *et seq.*

(*n*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 32.

(*o*) This statutory provision does not apply to collateral relations of the testator (*Re Gresley's Settlement, Willoughby v. Drummond*, [1911] 1 Ch. 358).

(*p*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.

(*q*) *Johnson v. Johnson* (1843), 3 Hare, 157; *Re Mason's Will* (1865), 34 Beav. 494.

(*r*) *Skinner v. Ogle* (1845), 9 Jur. 432; *Re Peerless, Peerless v. Smith*, [1901] W. N. 151.

(*s*) *Re More's Trust* (1851), 10 Hare, 178.

date of the will (*t*), or where the issue surviving the testator was not living at the death of the devisee or legatee (*u*), or where the will was made before but republished after the Wills Act, 1837 (*a*), and the devisee or legatee dies after the statute came into operation (*b*), or to the case of a posthumous child born to the child who had died before the testator (*c*).

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from Lapse.

The gift must, however, be to the legatee as a *persona designata* (*d*), and the rule is not applicable where the gift is to a class not ascertainable until the death of the testator (*e*), even where there happens to be only one member of the class (*f*). Class gifts.

**1197.** A gift to a child, though dependent on the fact of there being issue of the devisee or legatee living at the testator's death, is not a gift to such issue, but takes effect exactly as if the actual death of the devisee or legatee had happened immediately after the death of the testator, and with all the consequences (*g*), and devolves subject to any burden (*h*) or condition (*i*) which under the will would have been imposed on the devisee or legatee if he had survived the testator. Thus, if a daughter of the testator dies intestate in his lifetime, her surviving husband may take an estate by the curtesy (*k*) in real estate devised to her by the will (*l*). Where a married woman, a legatee under her father's will, dies in his lifetime and in that of her husband, leaving issue, and the Effect of  
child's  
decease.

(*t*) *Mower v. Orr* (1849), 7 Hare, 473; *Wisden v. Wisden* (1854), 2 Sm. & G. 396.

(*u*) *In the Goods of Parker* (1860), 1 Sw. & Tr. 523, where a testatrix gave all her property to her daughter, and the daughter died in her lifetime leaving a child who also predeceased the testatrix, leaving a child who survived the testatrix.

(*a*) 7 Will. 4 & 1 Vict. c. 26.

(*b*) *Winter v. Winter* (1846), 5 Hare, 306.

(*c*) *Re Griffiths' Settlement*, *Griffiths v. Waghorne*, [1911] 1 Ch. 246.

(*d*) *Re Stansfield*, *Stansfield v. Stansfield* (1880), 15 Ch. D. 84. As to a gift to "my surviving children," see *Fullford v. Fullford* (1853), 16 Beav. 565.

(*e*) *Olney v. Bates* (1855), 3 Drew. 319; *Browne v. Hammond* (1858), John. 210; *Re Jackson*, *Shiers v. Ashworth* (1883), 25 Ch. D. 162, 164. As to gifts to a class, see pp. 614 *et seq.*, *post*.

(*f*) *Re Harvey's (Sir E.) Estate*, *Harvey v. Gillow*, [1893] 1 Ch. 567; see p. 716, *post*.

(*g*) *Johnson v. Johnson* (1843), 3 Hare, 157; *Eager v. Furnivall* (1881), 17 Ch. D. 115, 118.

(*h*) *Pickersgill v. Rodger* (1876), 5 Ch. D. 163, 172.

(*i*) Thus, a direction that the share of a daughter shall go over if she dies unmarried takes effect if she dies unmarried before the testator (*Kellett v. Kellett* (1871), 5 L. R. Eq. 298); and a direction that a share given to a daughter should be subject to the trusts of her marriage settlement takes effect notwithstanding that the daughter predeceases her father (*Re Hone's Trusts* (1883), 22 Ch. D. 663). But a legacy saved from lapse by the fictitious survivorship created by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33, is not caught by a covenant of the deceased legatee to settle property acquired during coverture (*Pearce v. Graham* (1863), 9 Jur. (N.S.) 568; and see *Re Blundell*, *Blundell v. Blundell*, [1906] 2 Ch. 222, 229).

(*k*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 183 *et seq.*

(*l*) *Eager v. Furnivall*, *supra*; *Re Derbyshire*, *Webb v. Derbyshire* (1905), 75 L. J. (CH.) 95.

SECT. 2. husband also predeceases the father, the woman is deemed to have died a widow (*m*).  
**Exceptions from Lapse.** This fictitious survivorship causes a lapse where a child to whom

Devise by child to parent.

property has been specifically devised by a parent devises his residuary real estate to such parent and predeceases him, leaving issue, and the property passes to the child's heir-at-law (*n*).

Appointment.

**1198.** A gift under a general power of appointment to a child predeceasing the testator and leaving issue is preserved from lapse (*o*), but not a gift under a special power (*p*), or a power of charging given under a will to a tenant for life who dies before the testator (*q*).

SUB-SECT. 4.—*Settled Shares.*

Settled shares.

**1199.** A bequest of an absolute interest in a fixed share of residue to a named person followed by a direction settling such share does not lapse by reason of the legatee's death in the lifetime of the testator (*r*). It is otherwise where the original gift is to a class (*s*) or where the share of residue cannot be regarded as fixed (*t*).

Future gifts.

**1200.** A legacy to a legatee to become vested at the expiration of six years from a testator's decease apparently fails if the legatee does not survive the period (*a*). If, however, a testator directs payment of the income of a fund for three years after his death to one person followed by a bequest of the capital to another, the bequest of the capital does not lapse by the latter's death prior to the expiration of the three years (*b*); nor does the death of a prospective tenant for life in the lifetime of the testator cause a gift in

(*m*) *In the Goods of Councill* (1871), L. R. 2 P. & D. 314; *Re Allen's Trusts*, [1909] W. N. 181.

(*n*) *Re Hensler, deceased*, *Jones v. Hensler* (1881), 19 Ch. D. 612. By virtue of the fictitious survivorship probate duty was (*Perry's Executors v. R.* (1868), L. R. 4 Exch. 27; and see *A.-G. v. Loyd*, [1895] 1 Q. B. 496), and estate duty is (*Re Scott*, [1900] 1 Q. B. 372; *Lord Advocate v. Bogie*, [1894] A. C. 83), payable on the child's death; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 308, 309.

(*o*) *Eccles v. Cheyne* (1856), 2 K. & J. 676.

(*p*) *Griffiths v. Gale* (1844), 12 Sim. 354; *Freeland v. Pearson* (1867), L. R. 3 Eq. 658; *Holyland v. Lewin* (1884), 26 Ch. D. 266, C. A.; see, further, title POWERS, Vol. XXIII., pp. 40 *et seq.*

(*q*) *Griggs v. Gibson*, *Maynard v. Gibson* (No. 2) (1866), 35 L. J. (CH.) 458.

(*r*) *Re Speakman*, *Unsworth v. Speakman* (1876), 4 Ch. D. 620; *Re Pinhorn*, *Moreton v. Hughes*, [1894] 2 Ch. 276; *Re Powell*, *Campbell v. Campbell*, [1900] 2 Ch. 525; see *Re Whitmore*, *Walters v. Harrison*, [1902] 2 Ch. 66, C. A.; *Re Walter*, *Turner v. Walter* (1912), 56 Sol. Jo. 632, C. A.

(*s*) *Stewart v. Jones* (1859), 3 De G. & J. 532. As to class gifts, see pp. 614 *et seq.*, *post*.

(*t*) *Re Roberts*, *Tarleton v. Bruton* (1885), 30 Ch. D. 234, C. A. (accruer clause).

(*a*) *Smell v. Dee* (1707), 2 Salk. 415; *Bruce v. Charlton* (1842), 13 Sim. 65; *Re Eve*, *Belton v. Thompson* (1905), 93 L. T. 235; and compare *Re Laing*, *Laing v. Morrison*, [1912] 2 Ch. 386. As to cases where payment but not vesting is postponed, see pp. 812 *et seq.*, *post*.

(*b*) *Re Boam*, *Shorthouse v. Annibal* (1911), 56 Sol. Jo. 142.



remainder (c) or a contingent limitation over (d) to lapse, though the gift over may lapse from other causes (e); and a bequest in remainder following an absolute gift, which would otherwise be void for repugnancy, may be rendered valid by the lapse of the prior gift (f).

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from Lapse.

SUB-SECT. 5.—*Gifts in Joint Tenancy or Tenancy in Common.*

**1201.** There may be a joint legacy as well as a joint grant (g). Where property is devised or bequeathed to joint tenants, and one dies in the testator's lifetime, the doctrine of survivorship prevents a lapse occurring, and the survivor or survivors take the whole (h). Similarly, if the interest of one of the joint tenants is revoked, the others take the whole and there is no lapse (i). Joint tenants.

**1202.** In the case of a devise (k) or bequest (l) to persons as tenants in common, not being a gift to a class (m), the doctrine of survivorship does not apply, unless a contrary intention is expressed in the will (n), and the share of one dying before the testator lapses. The revocation of a share also occasions a lapse (o). It seems, however, that if one of the named persons has been previously referred to in the will as dead the fund is divisible among the others and there is no lapse (p). Tenancy in common.

(c) *Habergham v. Ridehalgh* (1870), L. R. 9 Eq. 395, 401.

(d) *Rackham v. De La Mare* (1864), 2 De G. J. & Sm. 74, C.A., where there was a gift to A. for life and after her death to her children, with a gift over in case no child attained a vested interest, and A. died in the lifetime of the testator; see also *Re Green's Estate* (1860), 1 Drew. & Sm. 68; and p. 804, *post*.

(e) *Williams v. Jones* (1826), 1 Russ. 517.

(f) *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348, C. A.; see title *PERPETUITIES*, Vol. XXII., p. 350, note (a).

(g) *Willing v. Baine* (1731), 3 P. Wms. 113, 115; as to the creation of joint tenancies, see, further, pp. 780, 781, *post*. For form of devise to joint tenants or tenants in common, see *Encyclopædia of Forms and Precedents*, Vol. XV., p. 571.

(h) *Davis v. Kemp* (1664), 1 Eq. Cas. Abr. 216, pl. 7; *Willing v. Baine*, *supra*; *Buffar v. Bradford* (1741), 2 Atk. 220; *Morley v. Bird* (1798), 3 Ves. 628; as to class gifts, see pp. 614 *et seq.*, *post*.

(i) *Humphrey v. Tayleur* (1752), Amb. 136, 137, 138; *Sykes v. Sykes* (1867), L. R. 4 Eq. 200.

(k) *Ackroyd v. Smithson* (1780), 1 Bro. C. C. App. 503; *Digby v. Legard* (1774), cited 3 P. Wms. 21.

(l) *Bagwell v. Dry* (1721), 1 P. Wms. 700; *Page v. Page* (1728), 2 P. Wms. 489; *Peat v. Chapman* (1750), 1 Ves. Sen. 542; *Sykes v. Sykes*, *supra*; and see *Havergal v. Harrison* (1843), 7 Beav. 49.

(m) As to class gifts, see pp. 614 *et seq.*, *post*. A gift to the children of A., adding their names, is not a class gift, and is subject to lapse (*Bain v. Lescher* (1840), 11 Sim. 397).

(n) *Re Radcliffe, Young v. Beale* (1903), 51 W. R. 409, where there was a gift of residue to four named persons as tenants in common followed by a gift over, if only one survived the testatrix to that one, and three survived, and no lapse was held to have occurred.

(o) *Owen v. Owen* (1739), 1 Atk. 494; *Cheslyn v. Cresswell* (1763), 3 Bro. Parl. Cas. 246; *Ramsay v. Shelmerdine* (1865), L. R. 1 Eq. 129; *Sykes v. Sykes* (1868), 3 Ch. App. 301; but see *Vaudrey v. Howard* (1853), 2 W. R. 32; *M-Kay v. M-Kay*, [1900] 1 I. R. 213; *Re Whiting, Ormond v. De Lavency*, [1913] 2 Ch. 1, where the wills in question showed a contrary intention.

(p) *Clarke v. Clemmans, Selway v. Clemmans* (1866), 36 L. J. (CH.) 171; see *Re Sharp, Maddison v. Gill*, [1908] 1 Ch. 372.

## SECT. 2.

SUB-SECT. 6.—*Class Gifts.***Exceptions from Lapse.**

## Class gifts.

**1203.** In the case of a gift to a fluctuating (*q*) class (*r*), as tenants in common, to be ascertained at any particular time, no lapse occurs if a member of the class dies antecedently to such time, the class being automatically contracted (*s*). Similarly, where a member of the class is precluded from participation expressly by exception or revocation (*t*), or by his attesting the will (*a*), there is no lapse, and the property is divided among those members capable of taking. This rule is not, however, applicable where an appointment is made under a power to objects and non-objects; in such a case the part invalidly appointed goes as in default of appointment (*b*).

## Proviso against lapse.

A proviso in a class gift that the share of any member predeceasing the testator and leaving issue shall not lapse but shall go to his executors does not cause the share of a member dying without issue to lapse so as to exclude the other members of the class from taking such share (*c*).

## Meaning of class gift.

**1204.** *Primâ facie* a class gift is a gift to a class of persons included and comprehended under some general description and bearing a certain relation to the testator or another person (*d*). Thus, where a testator divides his residue into as many equal shares as he shall have children surviving him, or predeceasing him leaving issue, and gives a share to or in trust for each such child, the gift is to a class (*e*). There may also be a class compounded of persons answering one or other of alternative descriptions, as, for example, "the children of A. and the children of B." (*f*), or "the children of A. who attain twenty-one and the issue of such as die under that age" (*g*).

(*q*) The rule applies whether the class fluctuates by increase or diminution (see note (*i*), p. 616, *post*), or by diminution alone; see *Dimond v. Bostock* (1875), 10 Ch. App. 358; *Leigh v. Leigh* (1854), 17 Beav. 605; *Lee v. Pain* (1845), 4 Hare, 201, 250.

(*r*) As to what constitutes a class gift, see the text, *infra*.

(*s*) *Doe d. Stewart v. Sheffield* (1811), 13 East, 526; *Havergal v. Harrison* (1843), 7 Beav. 49; *Shuttleworth v. Greaves* (1838), 4 My. & Cr. 35; *Re Hornby* (1859), 7 W. R. 729; *M'Kay v. M'Kay*, [1900] 1 I. R. 213; *Re Spiller, Spiller v. Madge* (1881), 18 Ch. D. 614; *Re Dunster, Brown v. Heywood*, [1909] 1 Ch. 103.

(*t*) *Re Dunster, Brown v. Heywood*, *supra*; *Clark v. Phillips* (1853), 17 Jur. 886; *Shaw v. M'Mahon* (1843), 4 Dr. & War. 431; *M'Kay v. M'Kay*, *supra*; *Re Jackson, Shiers v. Ashworth* (1883), 25 Ch. D. 162 (to all testator's children born or to be born except his son A.).

(*a*) *Fell v. Biddolph* (1875), L. R. 10 C. P. 701; *Young v. Davies* (1863), 2 Drew. & Sm. 167; *Re Coleman and Jarrom* (1876), 4 Ch. D. 165; see p. 537, *ante*.

(*b*) *Re Farncombe's Trusts* (1878), 9 Ch. D. 652; see, further, p. 625, *post*; title POWERS, Vol. XXIII., pp. 50, 51.

(*c*) *Aspinall v. Duckworth* (1866), 35 Beav. 307.

(*d*) *Kingsbury v. Walter*, [1901] A. C. 187; *Re Featherstone's Trusts* (1882), 22 Ch. D. 111; *Pearks v. Moseley* (1880), 5 App. Cas. 714, 723; *Re Chaplin's Trusts* (1863), 33 L. J. (CH.) 183; *Viner v. Francis* (1789), 2 Bro. C. C. 658.

(*e*) *Re Dunster, Brown v. Heywood*, *supra*, not following *Ramsay v. Shelmerdine* (1865), L. R. 1 Eq. 129; see *Shaw v. M'Mahon*, *supra*.

(*f*) *Kingsbury v. Walter*, *supra*, at p. 193; *Best v. Stonehewer* (1865), 2 De G. J. & Sm. 537, C. A.

(*g*) *Pearks v. Moseley*, *supra*, at p. 722; see, further, p. 537, *ante*.

A gift to the issue of A. and B. *per stirpes* and not *per capita* is divisible into as many shares as there are families of issue living at the death of the testator (*h*).

SECT. 2.  
Exceptions  
from Lapse.

**1205.** Gifts to persons described only by relationship are sometimes construed as class gifts (*i*), and sometimes as gifts to individuals (*k*). A gift may be none the less a gift to a class because some of the members are referred to by name (*l*), or because a person who would otherwise fall within the class is excluded by name (*m*). On the other hand, a gift to an individual and the children of another individual is not regarded as a class gift (*n*), unless there is something in the context to show that the testator intended to form a class (*o*); and gifts to several persons designated by name (*p*) or number (*q*) or by reference (*r*) are not class gifts,

Gifts to  
class and  
individuals.

(*h*) *Re Dering, Neale v. Beale*, [1911] W. N. 187; see *Re Wilson, Parker v. Winder* (1883), 24 Ch. D. 664.

(*i*) *Re Hannam, Haddelsey v. Hannam*, [1897] 2 Ch. 46 (to my brothers and sisters in equal shares), following *Thornhill v. Thornhill* (1819), 4 Madd. 377, *Ive v. King* (1852), 16 Beav. 46, *per Lord ROMILLY*, at p. 53, and *King v. Cleaveland* (No. 1) (1858), 26 Beav. 26, 31, 32; see also *Doe d. Stewart v. Sheffield* (1811), 13 East, 526 (gift to the children of A.); *Shuttleworth v. Greaves* (1838), 4 My. & Cr. 35.

(*k*) *Havergal v. Harrison* (1843), 7 Beav. 49 (to the brother and sister of A. and my brothers and sisters equally); see also *Smith v. Smith* (1837), 8 Sim. 353; *Collins v. Johnson* (1835), 4 L. J. (CH.) 226; *Jones v. Frewin* (1864), 12 W. R. 369 ("to my nephews and nieces"); *Leach v. Leach* (1843), 2 Y. & C. Ch. Cas. 495; *Habergham v. Ridehalgh* (1870), L. R. 9 Eq. 395.

(*l*) *Kingsbury v. Walter*, [1901] A. C. 187; *Shaw v. M' Mahon* (1843), 4 Dr. & War. 431 (to all my children, including A. and B.); *Re Stanhope's Trusts* (1859), 27 Beav. 201 (to four named daughters, and "all my after-born daughters"); *Re Jackson, Shiers v. Ashworth* (1883), 25 Ch. D. 162; *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197; compare the cases cited in note (*o*), p. 781, *post*, where the gift is to an individual and a class.

(*m*) *Re Jackson, Shiers v. Ashworth, supra*; *Dimond v. Bostock* (1875), 10 Ch. App. 358.

(*n*) *Re Wood's (Ann) Will* (1862), 31 Beav. 323; *Re Chaplin's Trusts* (1863), 33 L. J. (CH.) 183 (gift to A. and all the children of B.: held not a class gift); *Re Allen, Wilson v. Atter* (1881), 44 L. T. 240; *Re Venn, Lindon v. Ingram*, [1904] 2 Ch. 52 (gift to the brothers and sisters of A. living at her decease and B., C. and D. in equal shares).

(*o*) *Kingsbury v. Walter*, [1901] A. C. 187, 193; *Aspinall v. Duckworth* (1866), 35 Beav. 307; see *Drakeford v. Drakeford* (1863), 33 Beav. 43, 48; *Kekewich v. Barker* (1903), 88 L. T. 130, H. L.

(*p*) *Bain v. Lescher* (1840), 11 Sim. 397 (gift to the children of A., to wit, B., C. and D.); *Spencer v. Wilson* (1873), L. R. 16 Eq. 501; *Re Hull's Estate* (1855), 21 Beav. 314; *Burrell v. Baskerfield* (1849), 11 Beav. 525; *Sykes v. Sykes* (1867), L. R. 4 Eq. 200; *Creswell v. Cheslyn* (1762), 2 Eden, 123 (to my sons A. and B. and my daughter C.); *Re Bentley, Podmore v. Smith* (1914), 110 L. T. 623.

(*q*) *Jacob v. Calling*, [1881] W. N. 105; *Re Smith's Trusts* (1878), 9 Ch. D. 117; *Orford v. Orford*, [1903] 1 I. R. 121; see *Re Stansfield, Stansfield v. Stansfield* (1880), 15 Ch. D. 84.

(*r*) As, for instance, "to all the before-mentioned legatees in proportion to their legacies" (*Re Gibson's Trusts* (1861), 2 John. & H. 656; *Nicholson v. Patrickson* (1861), 3 Giff. 209). The same principle applies to a beneficial gift "to my executors herein named" (*Barber v. Barber* (1833), 3 My. & Cr. 688; *Hoare v. Osborne* (1864), 10 Jur. (N. S.) 694), but not where the gift is to executors in their official capacity (*Knight v. Gould* (1833), 2 My. & K. 295; *Parsons v. Saffery* (1821), 9 Price, 578; *Re Maxwell, Eivers v. Curry*, [1906] 1 I. R. 386).



SECT. 2. and are liable to lapse unless a joint tenancy is created (s), or words  
 Exceptions are added implying a contingency (t).  
 from Lapse.

Issue of  
 deceased  
 child.

**1206.** A child of the testator dying in his lifetime and leaving issue living at the testator's death is not by virtue of the Wills Act, 1837 (u), included in a class gift (a), and the other members of the class who survive the testator take the subject of the gift between them (b); but the testator may by apt words substitute the issue of a member of the class for their parent so as to make such issue members of the class (c).

Time when  
 class ascer-  
 tained.

**1207.** The class may be ascertained at any particular point of time (d), as, for instance, at the death of the testator (e), or of the tenant for life (f), or during the testator's lifetime at the date when he made his will (g), and the period of distribution may be postponed to a different and later time (h).

In class gifts the interests of all the members must vest in interest at the same time (i).

#### SUB-SECT. 7.—Effect of Lapse.

Effect of  
 lapsed  
 devises.

**1208.** Unless a contrary intention appears in a will containing a residuary devise, real estate, or an interest in real estate, comprised or intended to be comprised in any devise which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of the devise being contrary to law, or otherwise incapable of taking effect, is included in such residuary devise (k). If the will contains no residuary devise, and a specific

(s) See p. 613, *ante*.

(t) As, for instance, a gift to testator's five great-nieces, A., B., C., D. and E., equally to be divided between them if more than one (*Sanders v. Ashford* (1860), 28 Beav. 609; see also *Re Spiller, Spiller v. Madge* (1881), 18 Ch. D. 614; *Re Hornby* (1859), 7 W. R. 729 (to A., B., C., and D. "if living")).

(u) 7 Will. 4 & 1 Vict. c. 26.

(a) *Ibid.*, s. 33; *Olney v. Bates* (1855), 3 Drew. 219; *Browne v. Hammond* (1858), John. 210; *Re Harvey's (Sir E.) Estate, Harvey v. Gillow*, [1893] 1 Ch. 567; see p. 716, *post*.

(b) *Re Coleman and Jarrom* (1876), 4 Ch. D. 165, 168.

(c) *Aspinall v. Duckworth* (1866), 35 Beav. 307; see *Toplis v. Baker* (1789), 2 Cox, Eq. Cas. 118, 121; *Re Greenwood, Greenwood v. Sutcliffe*, [1912] 1 Ch. 392.

(d) *Re Hannam, Haddelsey v. Hannam*, [1897] 2 Ch. 46.

(e) *Sanders v. Ashford*, *supra*.

(f) *Smith v. Smith* (1837), 8 Sim. 353.

(g) *Re Hornby, supra*; *Lee v. Pain* (1845), 4 Hare, 201, 254; *Leigh v. Leigh* (1854), 17 Beav. 605; *Viner v. Francis* (1789), 2 Cox, Eq. Cas. 190.

(h) *Re Hannam, Haddelsey v. Hannam, supra*.

(i) Thus, "if there is a gift to A. for life and afterwards to B and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life" (*Kingsbury v. Waller*, [1901] A. C. 187, *per* Lord DAVEY, at p. 194).

(k) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 25; *Harris v. Davis* (1844), 1 Coll. 416; *Greated v. Greated* (1859), 26 Beav. 621, 629. Before the Act a residuary devise did not include lapsed specific devises (*Cambridge v. Rous* (1802), 8 Ves. 12, 25). Parliament intended by this enactment to assimilate the law as to residuary devises of real estate to that of residuary gifts of personal property, which had long been settled to comprise any legacy which failed by lapse or by being void *ab initio* (*Carter*

devise fails, the devised property passes to the heir (*l*). Property included in a residuary devise which lapses also passes to the heir (*m*).

SECT. 2.  
Exceptions  
from Lapse.

**1209.** Lapsed bequests of personalty fall into residue and pass under the residuary bequest (*n*), or, where there is no residuary bequest, pass to the next of kin, who also take a lapsed residue or share of residue (*o*).

Effect of  
lapsed  
bequests.

**1210.** Where property is given or appointed by will to one person charged with an annual or lump sum in favour of another, the charge is not affected by the death of the donee of the property before the testator (*p*), though it would be destroyed if the gift to the donee were revoked (*q*); but if the chargee dies in the testator's lifetime (*r*) or the charge fails for illegality (*s*), the charge as a general rule (*t*) sinks for the benefit of the devisee. Similarly, where personal property, including a particular fund (*a*), is bequeathed subject to a charge, and the chargee dies before the

Charge on  
lapsed  
property.

*v. Haswell* (1857), 3 Jur. (N. S.) 788, *per* STUART, V.-C., at p. 790). The enactment applies to a residuary gift of freeholds only (*Mason v. Ogden*, [1903] A. C. 1); but not to a gift of a particular residue (*Springett v. Jenings* (1871), 6 Ch. App. 333; *Re Brown* (1855), 1 K. & J. 522). As to what passes under a residuary devise, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 280.

(*l*) As to the distinction between an exception from a devise and a charge on the estate devised, see *Arnold v. Chapman* (1748), 1 Ves. Sen. 108; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262; Jarman on Wills, 6th ed., pp. 441 *et seq.*; and see the text, *infra*.

(*m*) *Ackroyd v. Smithson* (1780), 1 Bro. C. C. App. 503; Jarman on Wills, 6th ed., p. 451.

(*n*) *Cambridge v. Rous* (1802), 8 Ves. 12, 25; as to residuary bequests, see, further, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 280; p. 713, *post*. As to whether lapsed legacies fall into a particular or general residuary gift, see *Re Shipley, Middleton v. Newcastle-upon-Tyne Corporation* (1910), 130 L. T. Jo. 82; *M'Kay v. M'Kay*, [1900] 1 I. R. 213.

(*o*) *Bagwell v. Dry* (1721), 1 P. Wms. 700; *Page v. Page* (1728), 2 P. Wms. 489; *Sykes v. Sykes* (1868), 3 Ch. App. 301.

(*p*) *Wigg v. Wigg* (1739), 1 Atk. 382; *Hills v. Wirley* (1743), 2 Atk. 605; *Oke v. Heath* (1748), 1 Ves. Sen. 135; see *Re Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431, C. A., where land was devised to a creditor subject to a condition that he should release a debt, and the creditor predeceased the testator.

(*q*) *Cowper v. Mantell* (No. 1) (1856), 22 Beav. 223.

(*r*) *Re Cooper's Legacy Trusts, Ex parte Sparks* (1853), 4 De G. M. & G. 757, C. A.; *Kennell v. Abbott* (1799), 4 Ves. 802; *Re Clulow's Trust* (1859), 1 John. & H. 639; *Wright v. Row* (1779), 1 Bro. C. C. 61; *Sutcliffe v. Cole* (1855), 3 Drew. 135; *Tucker v. Kayess* (1858), 4 K. & J. 339; *A.-G. v. Milner* (1744), 3 Atk. 112; *Jackson v. Hurlock* (1764), 2 Eden, 263; *King v. Denison* (1813), 1 Ves. & B. 260, 265; see, further, Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 25.

(*s*) *Baker v. Hall* (1806), 12 Ves. 497; *Cooke v. Stationers' Co.*, *supra*; *Blight v. Hartnoll* (1883), 23 Ch. D. 218, 222, C. A.

(*t*) The testator may manifest an intention that the money charged shall be raised in any event (see *Tregonwell v. Sydenham* (1815), 3 Dow, 194, 211, H. L.). Most of the cases on this point are cases, not of lapse, but of failure of charges on land in favour of a charity: see *Arnold v. Chapman*, *supra*; *Gravenor v. Hallum* (1767), Amb. 643; *Bland v. Wilkins* (1782), 1 Bro. C. C. 61, n. For the case where the money charged or interest created is not disposed of by the will, see *Sidney v. Shelley* (1815), 19 Ves. 352 (term of years); *Heptinstall v. Gott* (1862), 2 John. & H. 449.

(*a*) *Scott v. Salmond* (1833), 1 My. & K. 363.

SECT. 2.  
Exceptions  
from Lapse.

Exception  
out of lapsed  
property.

Lapse of  
charitable  
legacies.

testator, his interest lapses for the benefit of the legatee (*b*). The same principle applies where the object for which the charge was created fails for illegality (*c*).

A distinction must, however, be drawn between a devise subject to a charge and a devise with an exception out of it. In the latter case, if the gift of the excepted property lapses or fails for any reason, it falls as a rule into residue (*d*).

**1211.** Legacies to charitable institutions ceasing to exist in the testator's lifetime lapse, or are applicable *cy-près*, according as to whether the gift is construed to be for the benefit of the particular institution or to import a general charitable intention (*e*).

## Part XII.—Exercise of Powers by Will.

### SECT. 1.—General Powers.

Exercise of  
general  
powers.

**1212.** A general devise or bequest of realty or personalty, or of realty or personalty described in a general manner (*f*), operates, unless a contrary intention appears by the will, as an execution of any general power (*g*) of appointment (*h*) capable of being exercised by will (*i*), even though such power is contingent (*k*).

The contrary intention sufficient to counteract this provision (*l*)

(*b*) *Tucker v. Kayess* (1858), 4 K. & J. 339, 342.

(*c*) *Re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715; and see title CHARITIES, Vol. IV., p. 150, note (*q*). As to where there is a partial intestacy, see, further, note (*t*), p. 617, *ante*.

(*d*) *Re Jupp, Gladman v. Jupp* (1903), 87 L. T. 739; *Sutcliffe v. Cole* (1855), 3 Drew. 135; see also *Hepinstall v. Gott* (1862), 2 John. & H. 449; *Simmons v. Pitt* (1873), 8 Ch. App. 978; *Wainman v. Field* (1854), Kay, 507; *Blight v. Hartnoll* (1883), 23 Ch. D. 218, 222, C. A.

(*e*) See title CHARITIES, Vol. IV., pp. 156, 157, 190. In *Re Magrath, Histed v. Queen's University of Belfast*, [1913] 2 Ch. 331, where a legacy was given to a named charity, which had been dissolved but replaced by a similar charity, the case was treated as one of mere misdescription.

(*f*) As, for instance, "all stock, shares and securities which I possess" (*Re Jacob, Mortimer v. Mortimer*, [1907] 1 Ch. 445); "securities for money" (*Turner v. Turner* (1852), 21 L. J. (CH.) 843); see also *Re Greave's Settlement Trusts* (1883), 23 Ch. D. 313, 318; and title POWERS, Vol. XXIII., pp. 29, 30.

(*g*) *Re Williams (Esther), Foulkes v. Williams* (1889), 42 Ch. D. 93, C. A. As to the distinction between general and special powers, see title POWERS, Vol. XXIII., p. 4; as to the exercise of powers by will, see, generally, *ibid.*, pp. 14 *et seq.*, 18 *et seq.*; as to the powers which are regarded as being general powers, see *ibid.*, p. 29, note (*t*).

(*h*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27; as to the earlier law, see title POWERS, Vol. XXIII., p. 29, note (*p*).

(*i*) *Re Powell's Trusts* (1869), 39 L. J. (CH.) 188; *Lefevre v. Freeland* (1857), 24 Beav. 403; compare *Re Barnett, Dawes v. Ixer*, [1908] 1 Ch. 402 (appointment by document intended to be, but not, a will). A testamentary power cannot by any device be exercised by deed (*Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147, C. A.).

(*k*) *Thomas v. Jones* (1862), 2 John. & H. 475, where the power was given to the survivor of the testator and another.

(*l*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27. As to proof of intention apart from this provision, see title POWERS, Vol. XXIII., pp. 32 *et seq.*



SECT. 1.  
General Powers.

must be clearly expressed in or implied by the will (*m*). It is not indicated by an express confirmation of the settlement creating the power, where the testator's power does not extend to the whole subject-matter of the settlement (*n*), or by an ineffectual attempt to appoint (*o*), or by reason of the power being contained in a settlement made by the testator or any other person and prior to the date of the testator's will (*p*). Under this provision property over which a testator has a general power of appointment is treated as if it were his own property, and it is unnecessary for the testator to refer to the instrument creating, or to the subject-matter of, a general power (*q*), or to use technical language in executing the power (*r*).

**1213.** A general devise or bequest does not, however, operate as an exercise of a power vested in a testator to revoke existing uses and appoint to other uses, except, it seems, where the gift would otherwise be inoperative (*s*); and the rule does not apply, in the absence of a contrary intention expressed in the will, where the donee of a general testamentary power is domiciled abroad (*t*). Exceptions from rule.

**1214.** The generality of a power is destroyed if it is exercisable subject to exceptions, though a power limited in its inception may by reason of subsequent events become a general power (*a*). A power Nature of general powers.

(*m*) See title POWERS, Vol. XXIII., pp. 32, note (*r*), 43, note (*f*); *Walker v. Banks* (1855), 1 Jur. (N. S.) 606; *Pettinger v. Ambler, Bunni v. Pettinger* (1866), L. R. 1 Eq. 510; *Thompson v. Simpson* (1881), 50 L. J. (CH.) 461.

(*n*) *Lake v. Currie* (1852), 2 De G. M. & G. 536; *Atherton v. Langford* (1857), 25 Beav. 75. The question is doubtful where the testator's power extends to the whole subject-matter of the settlement (*Moss v. Harter* (1854), 2 Sm. & G. 458).

(*o*) *Re Spooner's Trust* (1851), 2 Sim. (N. S.) 129; *Bernard v. Minshull* (1859), John. 276; *Bush v. Cowan* (1863), 32 Beav. 228; *Hickson v. Wolfe* (1858), 9 L. Ch. R. 144; *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816 (failure of contingent appointment); *Freem v. Clement* (1881), 18 Ch. D. 499, 512.

(*p*) *Re Clark's Estate, Maddick v. Marks* (1879), 14 Ch. D. 422, C. A. see *Moss v. Harter* (1854), 2 Sm. & G. 458, where it was held that a bequest of "property not otherwise effectually disposed of" did not execute a power, where the property subject to the power was contained in a settlement which declared trusts in default of appointment; Sugden on Powers, 8th ed., p. 305.

(*q*) *Re Wilkinson* (1869), 4 Ch. App. 587, 590; see, further, title POWERS, Vol. XXIII., p. 29; as to cases in which intention to exercise the power must be shown, see *ibid.*, pp. 32 *et seq.*

(*r*) Any language which would be construed as a residuary gift is sufficient (*Re Spooner's Trust, supra*; *Re Wilkinson* (1869), 4 Ch. App. 587); see, further, title POWERS, Vol. XXIII., pp. 28, note (*o*), 30, 31.

(*s*) *Re Brace, Welch v. Colt*, [1891] 2 Ch. 671; see *Pomfret v. Perring* (1854), 5 De G. M. & G. 775, C. A.; *Palmer v. Newell* (1855), 20 Beav. 32; *Charles v. Burke* (1888), 43 Ch. D. 223, n.; *Re Goulding's Settlement, Dobell v. Dutton* (1899), 48 W. R. 183; *Re Jones, Greene v. Gordon* (1886), 34 Ch. D. 65; and compare *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646; *Re Gibbs' Settlement, White v. Randolph* (1887), 37 Ch. D. 143; and see title POWERS, Vol. XXIII., p. 4, note (*n*).

(*t*) *Re Scholefield, Scholefield v. St. John, Re Young, Smith v. St. John*, [1905] 2 Ch. 408; S. C., on appeal, 75 L. J. (CH.) 720, C. A.; *Re D'Este's Settlement, Poulter v. D'Este*, [1903] 1 Ch. 898; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

(*a*) *Re Byron's Settlement, Williams v. Mitchell*, [1891] 3 Ch. 474 (power for A. to appoint generally except to B. or any relative of B.).

SECT. 1.  
General  
Powers.

is not general where it must be exercised subject to prescribed conditions, as, for instance, by will expressly referring to the power (*b*), or for the benefit of special persons (*c*); nor is a power to create a charge upon realty and to appoint the sum raised a general power within the meaning of the statutory provision (*d*).

Will before  
power  
created.

**1215.** A will containing a general devise or bequest, made before the creation of a general power to appoint by will, and allowed by the testator to remain his will without alteration until his death, is a good execution of the power that has been created (*e*). A power created by will lapses unless the appointor survives the testator (*f*), even though the appointor refers to the power and purports to exercise it (*g*).

Effect of  
appointment.

**1216.** An appointee under a power derives title from the instrument creating the power and not from the appointment (*h*). Nevertheless property, whether real or personal, with the exception of foreign property (*i*), appointed by will under a general power passes to the appointor's legal personal representatives (*k*) and becomes

(*b*) *Re Waterhouse*, *Waterhouse v. Ryley* (1908), 77 L. J. (CH.) 30; *Phillips v. Cayley* (1889), 43 Ch. D. 222, C. A., overruling *Re Marsh*, *Mason v. Thorne* (1888), 38 Ch. D. 630; see also *Re Lane*, *Belli v. Lane*, [1908] 2 Ch. 581; *Re Davies*, *Davies v. Davies*, [1892] 3 Ch. 63; *Re Phillips*, *Robinson v. Burke* (1889), 41 Ch. D. 417.

(*c*) *Cloves v. Awdry* (1850), 12 Beav. 604 (children); *Re Caplin's Will* (1865), 2 Drew. & Sm. 527 (relations).

(*d*) *Re Wallinger's Estate*, [1898] 1 I. R. 139, C. A.; *Re Salvin*, *Marshall v. Wolseley*, [1906] 2 Ch. 459, 464; distinguish *Re Jones*, *Greene v. Gordon* (1886), 34 Ch. D. 65, where there was a trust for conversion and the power was in effect to appoint part of the converted fund, followed in *Re Wilkinson*, *Thomas v. Wilkinson*, [1910] 2 Ch. 216. In *Clifford v. Clifford* (1852), 9 Hare, 675, it was held that the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27, operated on a power to appoint a sum charged on land, though the testator possessed, and by the same will had exercised, a power of appointing the land itself. See, further, title POWERS, Vol. XXIII., p. 31.

(*e*) *Boyes v. Cook* (1880), 14 Ch. D. 53, C. A., disapproving *Re Ruding's Settlement* (1872), L. R. 14 Eq. 266; see *Carte v. Carte* (1745), 3 Atk. 174; *Cofield v. Pollard* (1857), 3 Jur. (N. S.) 1203; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Stillman v. Weedon* (1848), 16 Sim. 26; *Thomas v. Jones* (1862), 2 John. & H. 475 (contingent power existing at date of will); *Hodsdon v. Dancer* (1868), 16 W. R. 1101; *Lake v. Currie* (1852), 2 De G. M. & G. 536; *Re Hernando*, *Hernando v. Sawtell* (1884), 27 Ch. D. 284; *Re Marsh*, *Mason v. Thorne*, *supra*; *Airey v. Bower* (1887), 12 App. Cas. 263; *Re Old's Trusts*, *Pengelley v. Herbert* (1886), 54 L. T. 677; *Re Hayes*, *Turnbull v. Hayes*, [1900] 2 Ch. 332, affirmed, [1901] 2 Ch. 529, C. A.

(*f*) *Jones v. Southall* (No. 2) (1862), 32 Beav. 31.

(*g*) *Sharpe v. McCall*, [1903] 1 I. R. 179; see title POWERS, Vol. XXIII., p. 46.

(*h*) *Beyfus v. Lawley*, [1903] A. C. 411. *per* Lord LINDLEY, at p. 413; *Re Devon's (Earl) Settled Estates*, *White v. Devon (Earl)*, *Re Steer*, *Steer v. Dobell*, [1896] 2 Ch. 562, 567. As to the bearing of this rule on the duration of a settlement, see *Re Gordon and Adams' Contract*, *Re Pritchard's Settled Estate*, [1914] 1 Ch. 110, C. A.; and as to its effect as regards perpetuities, see title PERPETUITIES, Vol. XXII., p. 356. As a question of construction, property "passing" under a will may include property appointed by the will under a special power (*Re Bath (Marquess)*, *Thynne v. Shaw-Stewart*, [1914] W. N. 188).

(*i*) *Re Bald*, *Bald v. Bald* (1897), 66 L. J. (CH.) 524.

(*k*) Personally appointed by will under a general power vests in the executors or the administrators with the will annexed, and they are entitled to administer it (*Re Philbrick's Settlement* (1865), 11 Jur. (N. S.) 558; *Hayes v. Oatley* (1872), L. R. 14 Eq. 1; *Re Hoskin's Trusts* 1877), 5

assets applicable to the payment of the appointor's debts after all his own property has been exhausted (*l*).

If the appointor is an undischarged bankrupt at the date of his death the appointed fund does not become divisible among the creditors as part of the bankrupt's property, but is payable to his executors for the benefit of subsequent creditors (*m*).

SECT. 1.  
General  
Powers.  
Undischarged  
bankrupt.  
Ineffectual  
appointment.

**1217.** Where an appointment under a general testamentary power is ineffectual, the property concerned, whether real or personal (*n*), devolves as part of the testator's estate, or, in default of appointment, according to the intention of the donee of the power (*o*). It is not always easy to ascertain what his intention is.

Thus, a testator shows an intention to make the property his own for all purposes by giving it to his executors, or trustees (*p*), or by dealing with the settled property and his other property as one mass, without making the appointment either to executors or

Ch. D. 229 ; 6 Ch. D. 281, C. A. ; *Re Peacock's Settlement*, *Kelcey v. Harrison* [1902] 1 Ch. 552 (testamentary power executed by married woman who died before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), came into operation). The appointed fund passes to the executors "as such," and vests in them as legal and not as equitable assets within the meaning of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (1) (*Re Hadley*, *Johnson v. Hadley*, [1909] 1 Ch. 20, 22, C. A.) ; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 219, 220. Where real property is appointed by the will of a person dying since 1897 under a general power, the land vests in his personal representatives (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1). It is doubtful whether the effect of this is to make the land liable as legal assets for payment of debts ; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246.

(*l*) *Beyfus v. Lawley*, [1903] A. C. 411 ; see *Fleming v. Buchanan* (1853), 3 De G. M. & G. 976, C. A. ; *Hawthorn v. Shedden* (1856), 3 Sm. & G. 293, 305 ; *Petre v. Petre* (1851), 14 Beav. 197 ; *Williams v. Lomas* (1852), 16 Beav. 1 ; *Holmes v. Coghill* (1806), 12 Ves. 206 ; *Re Hartley*, *Williams v. Jones* (1899), 69 L. J. (CH.) 79 ; and title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 222, 223. The execution of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 4 ; see title HUSBAND AND WIFE, Vol. XVI., pp. 388, 389.

(*m*) *Re Guedalla*, *Lee v. Guedalla's Trustee*, [1905] 2 Ch. 331 ; *Jenney v. Andrews* (1822), Madd. & G. 264 ; Sugden on Powers, 8th ed., p. 652 ; see *Townshend (Lord) v. Windham* (1750), 2 Ves. Sen. 1.

(*n*) *Re Van Hagan*, *Sperling v. Rochfort* (1880), 16 Ch. D. 18, C. A. ; see *Willoughby Osborne v. Holyoake* (1882), 22 Ch. D. 238 ; *Coxen v. Rowland*, [1894] 1 Ch. 406.

(*o*) *Re De Lusi's Trusts* (1879), 3 L. R. Ir. 232, where it was said that the question "is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed" ; *Re Pinède's Settlement* (1879), 12 Ch. D. 667 ; *Re Boyd*, *Kelly v. Boyd*, [1897] 2 Ch. 232.

(*p*) *Brickenden v. Williams* (1869), L. R. 4 Eq. 310 ; *Chamberlain v. Hutchinson* (1856), 22 Beav. 444 ; *Wilkinson v. Schneider* (1870), L. R. 9 Eq. 423 ; *Lefevre v. Freeland* (1857), 24 Beav. 403 ; *Re Van Hagan*, *Sperling v. Rochfort*, *supra* ; see *Re Scott*, *Scott v. Hanbury*, [1891] 1 Ch. 298 (general power exercised by marriage settlement) ; *Re Keown's Estate* (1867), 1 L. R. Eq. 372 ; *Blight v. Hartnoll* (1883), 23 Ch. D. 218, C. A. ; *Scriven v. Sandom* (1862), 2 John. & H. 743.



SECT. 1.  
General  
Powers.

trustees, or to any individual object (*q*). No such intention, however, is shown where the donee of a general power makes a will dealing only with the settled property (*r*), or expressly distinguishes between his own and the settled property (*s*); and an express direction to pay debts, coupled with the appointment of an executor, takes the fund from persons entitled in default of appointment only so far as it is required to pay debts (*a*).

SECT. 2.—*Special Powers.*

Special  
powers.

**1218.** The exercise of a special power of appointment by will is purely a question of intention (*b*), the burden of proof being upon those who assert affirmatively the exercise of the power (*c*). A mere general devise or bequest does not operate as an execution of a special power (*d*). Thus, a general devise by a testator possessed of no real estate, but having a special power to appoint real estate, to persons some of whom are objects (*e*), or even to the sole object of the power (*f*), is not a valid exercise of a special power.

Essentials of  
exercise.

**1219.** To exercise a special power there must be either (1) a reference to the power (*g*), or (2) a reference to the property subject to the power (*h*), or (3) an intention otherwise expressed in the will to exercise the power (*i*).

Reference to  
power.

**1220.** Any reference to a special power, however slight, is

(*q*) *Re Pinède's Settlement* (1879), 12 Ch. D. 667; *Re Ickeringill's Estate*, *Hinsley v. Ickeringill* (1881), 17 Ch. D. 151; *Willoughby Osborne v. Holyoake* (1882), 22 Ch. D. 238; *Coxen v. Rowland*, [1894] 1 Ch. 406; *Re Horton*, *Horton v. Perks*, *Horton v. Clark* (1884), 51 L. T. 420; *Re Marten*, *Shaw v. Marten*, [1902] 1 Ch. 314, C. A.

(*r*) *Re Thurston*, *Thurston v. Evans* (1886), 32 Ch. D. 508; *Bristow v. Skirrow* (1870), L. R. 10 Eq. 1.

(*s*) *Re De Lusi's Trusts* (1879), 3 L. R. Ir. 232; *Re Boyd*, *Kelly v. Boyd*, [1897] 2 Ch. 232, following *Re Davies' Trusts* (1871), L. R. 13 Eq. 163; see *Re Marten*, *Shaw v. Marten*, *supra*; *Re Creed*, *Thomas v. Hudson*, [1905] W. N. 94.

(*a*) *Laing v. Cowan* (1857), 24 Beav. 112.

(*b*) *Bennett v. Aburrow* (1803), 8 Ves. 609, 615; *Denn d. Nowell v. Roake* (1826), 5 B. & C. 720; *Re Mills*, *Mills v. Mills* (1886), 34 Ch. D. 186; see, further, title POWERS, Vol. XXIII., pp. 32 *et seq.*

(*c*) *Re Mills*, *Mills v. Mills*, *supra*.

(*d*) The Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27 (see p. 618, *ante*), does not apply to special powers (*Re Hayes*, *Turnbull v. Hayes*, [1901] 2 Ch. 529, C. A.; *Cloves v. Awdry* (1850), 12 Beav. 604; *Russell v. Russell* (1861), 12 L. Ch. R. 377; *Humphery v. Humphery* (1877), 36 L. T. 91; *Pidgely v. Pidgely* (1844), 1 Coll. 255; *Elliott v. Elliott* (1846), 15 Sim. 321; *Re Caplin's Will* (1865), 2 Drew. & Sm. 527; *Cronin v. Roche* (1858), 8 L. Ch. R. 103; *Hawthorn v. Shedden* (1856), 3 Sm. & G. 293; *Cadell v. Wilcocks*, [1898] P. 21).

(*e*) *Re Mills*, *Mills v. Mills*, *supra*.

(*f*) *Harvey v. Harvey* (1875), 32 L. T. 141; *Re Williams (Esther)*, *Foulkes v. Williams* (1889), 42 Ch. D. 93, C. A.

(*g*) See title POWERS, Vol. XXIII., p. 33.

(*h*) *Ibid.*, p. 34.

(*i*) *Ibid.*, p. 35; *Re Weston's Settlement*, *Neeves v. Weston*, [1906] 2 Ch. 620, per BUCKLEY, J., at p. 624; *Wrigley v. Lowndes*, [1908] P. 348; *Re Sanderson*, *Sanderson v. Sanderson* (1912), 106 L. T. 26; see *Re Huddleston*, *Bruno v. Eyston*, [1894] 3 Ch. 595; *Wildbore v. Gregory* (1871), L. R. 12 Eq. 482; *Harvey v. Harvey* (1875), 23 W. R. 478; *Byrne v. Cullinan*, [1904] 1 L. R. 42, C. A.; and see title POWERS, Vol. XXIII., pp. 32 *et seq.*

sufficient (*k*). Thus, an indirect reference to the power (*l*), or even a reference to the instrument creating the power, may be enough (*m*). The reference must be specific (*n*); but if the intention to exercise a special power is clear, an inaccurate or incomplete reference to it may suffice (*o*). A reference to a “beneficial” power may be treated as a sufficient reference to a special power (*p*). On the other hand, an erroneous recital by a donee of a power that another is entitled to the property subject to the power does not amount to an execution of the power (*q*); nor does a statement, following an appointment to one object of the power, that the donee makes no further appointment as she wishes the fund to pass directly to two other named objects of the power amount to her appointment by implication to the latter (*r*).

**1221.** Where a testator describes and disposes of specific property, over which he has a special power, in favour of objects (*s*), or of persons some of whom are objects (*t*), without mentioning the power, the inference is that he intended to exercise it, even though he misdescribes the property (*a*), but the intention of the testator to dispose of the specific property subject to the power must be clear (*b*). A gift in general terms of property similar to that subject to the power, such as a specific stock (*c*), or of legacies

Reference to  
property.

(*k*) *Re Williams (Esther)*, *Foulkes v. Williams* (1889), 42 Ch. D. 93, C. A., per LINDLEY, L.J., at p. 97.

(*l*) *Re Comber's Settlement Trusts* (1865), 11 Jur. (N. S.) 968 (reference in another part of the will); *Harvey v. Stracey* (1852), 1 Drew. 73; *Disney v. Crosse*, *Eyre v. Parker* (1866), L. R. 2 Eq. 592; *Lees v. Lees* (1871), 5 I. R. Eq. 549.

(*m*) *Hunloke v. Gell* (1830), 1 Russ. & M. 515; *Peirce v. M'Neale*, [1894] 1 I. R. 118.

(*n*) *Re Walsh's Trusts* (1878), 1 L. R. Ir. 320. Real estate held on trust for sale may pass under an appointment of personal estate although the will contains also an appointment of real estate generally (*Re Irving*, *Irving v. Balden* (1910), 129 L. T. Jo. 572).

(*o*) *Carver v. Richards* (1860), 27 Beav. 488, 496, C. A.; *Re Wilmot* (1861), 29 Beav. 644 (reference to power as contained in settlement of 1819 instead of 1839); *Harvey v. Stracey* (1852), 1 Drew. 73; *Bruce v. Bruce* (1871), L. R. 11 Eq. 371 (reference to wrong power: defective execution aided).

(*p*) *Von Brockdorf v. Malcolm* (1885), 30 Ch. D. 172; compare *Ames v. Cadogan* (1879), 12 Ch. D. 868.

(*q*) *L'Estrange v. L'Estrange* (1890), 25 L. R. Ir. 399; *Pennefather v. Pennefather* (1873), 7 I. R. Eq. 300; *Haverty v. Curtis*, [1895] 1 I. R. 23; compare *Re Enever's Trusts*, *Power v. Power*, [1912] 1 I. R. 511.

(*r*) *Re Jack*, *Jack v. Jack*, [1899] 1 Ch. 374. To deprive a person of an unappointed fund it must be shown that there has been an actual appointment (*Langslow v. Langslow* (1856), 21 Beav. 552; *Carver v. Richards* (1859), 27 Beav. 488); compare *Foster v. Cautley* (1855), 6 De G. M. & G. 55, where there was held to be an appointment by implication.

(*s*) *Forbes v. Ball* (1817), 3 Mer. 437; *Davies v. Davies* (1858), 4 Jur. (N. S.) 1291; *Elliott v. Elliott* (1846), 15 Sim. 321; *Re Davids' Trusts* (1859), John. 495.

(*t*) *Re Gratwick's Trusts* (1865), L. R. 1 Eq. 177; *Bruce v. Bruce* (1871), L. R. 11 Eq. 371.

(*a*) *Mackinley v. Sison* (1837), 8 Sim. 561; *Bruce v. Bruce*, *supra*.

(*b*) *Bennett v. Aburrow* (1803), 8 Ves. 609; *Re Mattingley's Trusts* (1862), 2 John. & H. 426; *Re Huddleston*, *Bruno v. Eyston*, [1894] 3 Ch. 595.

(*c*) *Webb v. Honnor* (1820), 1 Jac. & W. 352; *Re Wait*, *Workman v. Petgrave* (1885), 30 Ch. D. 617.

SECT. 2.  
Special  
Powers.

equal to the fund subject to the power (*d*), does not sufficiently evidence an intention to exercise the power. The effect of excepting out of a general gift part of property subject to a special power is to make the residue of the property pass (*e*).

If the gift is *primâ facie* specific (*f*), evidence as to the testator's property is admissible in order to show whether he intended to exercise his power (*g*). If the testator possesses property of his own answering the description the usual inference is that he did not intend to exercise the power (*h*); and a reference to property of the kind which is subject to the power coupled with an attempt to dispose of it in an unauthorised manner may rebut a presumption of intention to exercise the power (*i*).

Intention to  
exercise  
power.

**1222.** The intention of a testator to exercise a special power, if not expressed, can only be inferred from the words of his will and the circumstances at the time of executing it which were known to him, and which the court, putting itself in his place, is bound to regard (*k*). Two matters must be gathered from the construction of the will, namely, that the testator had the power in mind at the time of making his will and that he wished to exercise it (*l*). An intention to exercise a power is not, as a rule, implied if there is a gift over in default of appointment (*m*).

Will prior  
to special  
power.

It requires very clear indications in the language of a will to infer an intention to exercise a special power which was non-existent at the date of the will (*n*).

(*d*) *Jones v. Tucker* (1817), 2 Mer. 533; *Forbes v. Ball* (1817), 3 Mer. 437; *Davies v. Thorns* (1849), 3 De G. & Sm. 347.

(*e*) *Reid v. Reid* (1858), 25 Beav. 469, where a testatrix having property of her own, and a special power to appoint other property, gave the whole of the residue of her property (except certain freeholds which were included in the property subject to the power) to A., and it was held that in consequence of the exception the residue of the property subject to the power passed; *Walker v. Mackie* (1827), 4 Russ. 75.

(*f*) As to what constitutes a specific gift, see *Robertson v. Broadbent* (1883), 8 App. Cas. 812; *Bennett v. Aburrow* (1803), 8 Ves. 609; *Re Mattingley's Trusts* (1862), 2 John. & H. 426.

(*g*) *Re Huddleston, Bruno v. Eyston*, [1894] 3 Ch. 595; see *Innes v. Sayer* (1851), 3 Mac. & G. 606; *Andrews v. Emmot* (1788), 2 Bro. C. C. 297; *Nannock v. Horton* (1802), 7 Ves. 391; *Jones v. Tucker* (1817), 2 Mer. 533; *Humphery v. Humphery* (1877), 36 L. T. 91; *Peirce v. M'Neale*, [1894] 1 I. R. 118; *Re Herdman's Trusts* (1893), 31 L. R. Ir. 87; title POWERS, Vol. XXIII., pp. 36, 37.

(*h*) *Noel v. Noel* (1859), 4 Drew. 624; compare *Reid v. Reid*, *supra*; *Re Wait, Workman v. Petgrave* (1885), 30 Ch. D. 617.

(*i*) *Wildbore v. Gregory* (1871), L. R. 12 Eq. 482; *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518.

(*k*) *Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186; *Re Williams (Esther)*, *Foulkes v. Williams* (1889), 42 Ch. D. 93, C. A.; *contra*, *Re Morgan* (1857), 7 I. Ch. R. 18.

(*l*) *Wrigley v. Lowndes*, [1908] P. 348.

(*m*) *Henderson v. Constable* (1842), 5 Beav. 297.

(*n*) *Re Hayes, Turnbull v. Hayes*, [1901] 2 Ch. 529, C. A., not following *Stillman v. Weedon* (1848), 16 Sim. 26; see also *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646; *Doyle v. Coyle*, [1895] 1 I. R. 205; and pp. 618, 620, *ante* (general powers). As to the legal possibility of executing a non-existent special power by anticipation, see also *Walker v. Armstrong* (1856), 21 Beav. 284, 305; *Cowper v. Mantell* (No. 1) (1856), 22 Beav. 223, 229; *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D.



A will containing an express but partial exercise of a special power and a residuary gift *primâ facie* applicable only to the testator's property does not operate as an appointment of the balance of the property subject to the power (*o*), unless such an intention can be implied (*p*).

Language such as "I wish to leave at my death everything I have power to will to" an object of the power, as a rule, and especially where the testator has no other power (*q*), indicates an intention to exercise a special power (*r*), even though the bequest includes the testator's own property (*s*), or the testator purports to create interests in excess of the power, such as an absolute interest in lieu of a life interest (*t*).

A residuary gift to persons who are objects of a special power may operate as an appointment to them of a fund wrongly appointed to a person who is not an object (*a*).

The fact that a testator possesses a general as well as a special power does not *ipso facto* prevent a general reference to powers from being sufficient to exercise a special power, but may be taken into consideration in arriving at the testator's intention (*b*); where the word "appoint" is used, an intention may be gathered that the testator means to exercise a special power (*c*), especially if he has no general power (*d*). Extrinsic evidence is admissible where the word

SECT. 2.

Special Powers.

Partial exercise.

Universal gifts.

Residuary gifts to objects.

Co-existing general and special powers.

75, where a will republished after the creation of a power operated to exercise it; *Hope v. Hope* (1854), 5 Giff. 13; title POWERS, Vol. XXIII., pp. 43, 44.

(*o*) *Hughes v. Turner* (1834), 3 My. & K. 666; *Butler v. Gray* (1869), 5 Ch. App. 26.

(*p*) *Elliott v. Elliott* (1846), 15 Sim. 321; *Davies v. Fisher* (1842), 5 Beav. 201; *Harvey v. Stracey* (1852), 1 Drew. 73.

(*q*) See *Re Richardson's Trusts* (1886), 17 L. R. Ir. 436; *Re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; title POWERS, Vol. XXIII., pp. 33, 34.

(*r*) *Wrigley v. Lowndes*, [1908] P. 348; see also *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 75; *Re Swinburne, Swinburne v. Pitt* (1884), 27 Ch. D. 696, where part of the property subject to the power purported to be given to persons not objects of the power; *Gainsford v. Dunn* (1874), L. R. 17 Eq. 405; *Re Boyd, Neild v. Boyd* (1890), 63 L. T. 92 (attempt to create illegal interests); *Thornton v. Thornton* (1875), L. R. 20 Eq. 599; *Bailey v. Lloyd* (1829), 5 Russ. 330; *Ferrier v. Jay* (1870), L. R. 10 Eq. 550; compare *Re Hunt's Trusts* (1885), 31 Ch. D. 308; and distinguish *Hope v. Hope*, *supra*, where the will was not sufficiently precise and definite.

(*s*) *Byrne v. Cullinan*, [1904] 1 I. R. 42, C. A.

(*t*) *Re Teape's Trusts* (1873), L. R. 16 Eq. 442.

(*a*) *Re Hunt's Trusts*, *supra*.

(*b*) *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518 (special power held not exercised); *Thornton v. Thornton* (1875), L. R. 20 Eq. 599 (special and general powers held exercised by general words); *Ferrier v. Jay*, *supra* (special power held exercised); *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510; see also *Re Milner, Bray v. Milner*, *supra*; *Re Sharland, Re Rew, Rew v. Whipple*, [1899] 2 Ch. 536.

(*c*) *Re Mayhew, Spencer v. Cutbush*, *supra*; *Re Milner, Bray v. Milner*, *supra*; *Kent v. Kent*, [1902] P. 108; *Pidgely v. Pidgely* (1844), 1 Coll. 255; compare *Re Cotton, Wood v. Cotton* (1888), 40 Ch. D. 41; *Cooke v. Cunliffe* (1851), 17 Q. B. 245; *Sykes v. Carroll*, [1903] 1 I. R. 17; *Re Wes'on's Settlement, Neeves v. Wes'on*, [1906] 2 Ch. 620; *Re Sanderson, Sanderson v. Sanderson* (1912), 106 L. T. 26 (cases of special powers not being exercised by general words).

(*d*) *Re Richardson's Trusts*, *supra*.

## SECT. 2.

## Special Powers.

Direction to pay debts.

Power of revocation.

Lapse.

“appoint” is used to show that the testator possessed no other power of appointment at his death (*e*).

A direction to pay debts and general and testamentary expenses out of a fund which *ex hypothesi* includes the fund subject to the special power is not in itself sufficient to negative a presumption of an intention to exercise the power otherwise established (*f*).

**1223.** Where a person has a special power of appointment and also a power of revocation and new appointment, an appointment expressed in general words does not extend to property which the appointor cannot appoint without the exercise of the power of revocation, if there is other property to which the appointment can apply (*g*). Similarly, a will exercising a special power, which is afterwards exercised by deed reserving a power of revocation, does not affect the property appointed by deed (*h*).

**1224.** An appointment by will in exercise of a special power in favour of an object of the power is not preserved from lapse in the event of the object predeceasing the appointor and leaving issue living at the latter's death (*i*).

## Part XIII.—Construction of Wills in General.

### SECT. 1.—*Functions of a Court of Construction.*

General principle.

**1225.** The cardinal rule of English law as to the effect of a will is that the intention of the testator, as declared by him and apparent (*k*) in the words of his will, has effect given to it, so far and as nearly as may be consistently with law (*l*). The application

(*e*) *Re Mayhew, Spencer v. Outbush*, [1901] 1 Ch. 677; compare *Re Huddleston, Bruno v. Eyston*, [1894] 3 Ch. 595.

(*f*) *Cowx v. Foster* (1860), 1 John. & H. 30; *Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Re Swinburne, Swinburne v. Pitt* (1884), 27 Ch. D. 696; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *contra, Clogstoun v. Walcott* (1843), 13 Sim. 523.

(*g*) *Pomfret v. Perring* (1854), 5 De G. M. & G. 775, C. A.; see *Charles v. Burke* (1888), 43 Ch. D. 223, n.; and the other cases cited at p. 619, *ante* (general powers).

(*h*) *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646. As to circumstances where a power of revocation may be impliedly exercised, see *Quin v. Armstrong* (1876), 11 I. R. Eq. 161.

(*i*) *Holyland v. Lewin* (1884), 26 Ch. D. 266, C. A., disapproving *Freme v. Clement* (1881), 18 Ch. D. 499; see *Griffiths v. Gale* (1844), 12 Sim. 327, 354; *Freeland v. Pearson* (1867), L. R. 3 Eq. 658. As to the effect of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33, on general powers, see p. 612, *ante*; and, further, as regards lapse in connexion with powers, pp. 607, 608, *ante*.

(*k*) *Papillion v. Voice* (1728), Kel. W. 27, 32.

(*l*) *Manning's Case* (1609), 8 Co. Rep. 94 b, 95 b; *Blamford v. Blamford* (1615), 3 Bulst. 98, 103, 107; *Smith v. Clever* (1688), 2 Vern. 59, 60; *King v. Melling* (1672), 1 Vent. 225, *per* HALE, C.J., at p. 228 (“the law to expound the testament”); *Doe d. Long v. Laming* (1760), 2 Burr. 1100, *per* WILMOT, J., at p. 1112 (“the polestar for the direction of devises”); *Roe d. Dodson v. Grew* (1767), Wilm. 272, 274; *Hodgson v. Ambrose* (1780), 1 Doug. (K. B.) 337, *per* BULLER, J., at p. 341 (“the first and great rule . . . to which all others must bend”); *Tothill v. Pitt* (1816), 1 Madd. 488, 509; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 181 (“the

of the rule resolves itself into the two questions of construction (*m*): first, what is the intention of the testator disclosed by the will; and secondly, how can effect be given to that intention (*n*).

SECT. I.  
Functions  
of a Court  
of Con-  
struction.

Ascertaining  
intention.

**1226.** The first duty (*o*) of a court of construction is, therefore, to ascertain the language of the will, to read the words used and ascertain the intention of the testator from them (*p*); it is not merely to ascertain what the testator's actual mental intentions were (*q*). Where the will must be in writing, the only question is, what is the meaning of the words used in that writing (*r*). The expressed intention in all cases is considered to be the actual intention (*s*), and the court cannot give effect to any intention which is not expressed or implied in the language of the will (*t*).

**1227.** The court of construction, in ascertaining the intention, is concerned with three distinct questions, namely: (1) what words has the testator used to express his intentions (*a*); (2) what is the meaning of such words in relation to the persons and things described, that is to say, who and what are the specific persons and things to be identified as the donees and the subjects of disposition or as the persons and things otherwise mentioned in the will (*b*); and (3) what is the meaning of the words in relation to the disposition of such property among such donees (*c*). Although, as a matter of construction, these questions may become inter-related, the attitude of the court is in the first instance distinct in each case with regard to the evidence admissible.

Questions  
involved.

governing principle"); *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 226 ("the great principle"); *Baker v. Baker* (1858), 6 H. L. Cas. 616, 622; *Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222, 228, C. A.; *Re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369, C. A. *per* LINDLEY, L.J., at p. 373; *Hickling v. Fair*, [1899] A. C. 15, 27 ("the cardinal rule or principle").

(*m*) *Tothill v. Pitt* (1816), 1 Madd. 488, *per* SEWELL, M.R., at p. 509.

(*n*) *Doe d. Hickman v. Haslewood* (1837), 6 Ad. & El. 167, 174.

(*o*) *Hill v. Grange* (1554), 1 Plowd. 164, 170 ("the office of the judges"); *Ongley v. Chambers* (1824), 8 Moore (c. p.), 665, 685; *Macpherson v. Macpherson* (1852), 16 Jur. 847, 848; *Martin v. Lee* (1860), 14 Moo. P. C. C. 142, *per* TURNER, L.J., at p. 153 ("the paramount duty of the courts"); *Enohin v. Wylie* (1862), 10 H. L. Cas. 1, 26; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84, 91; and see p. 631, *post*.

(*p*) *Re Freeman, Hope v. Freeman*, [1910] 1 Ch. 681, C. A., *per* BUCKLEY, L.J., at p. 691.

(*q*) *Doe d. Gwillim v. Gwillim* (1833), 5 B. & Ad. 122, *per* PARKE, J., at p. 129.

(*r*) *Grey v. Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 106; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, *per* Lord WENSLEYDALE, at p. 876; *Waring v. Currey* (1873), 22 W. R. 150.

(*s*) "What a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound by his expressed intention" (*Simpson v. Foxon*, [1907] P. 54, *per* BAR-GRAVE DEANE, J., at p. 57).

(*t*) *Scalé v. Rawlins*, [1892] A. C. 342, *per* Lord HALSBURY and Lord WATSON, at pp. 343, 344; *Livesey v. Livesey* (1849), 2 H. L. Cas. 419; *Wilson v. O'Leary* (1872), 7 Ch. App. 448, 453; *Re Cleveland's (Duke) Settled Estates*, [1893] 3 Ch. 244, 251, C. A.

(*a*) As to evidence of the words of the will, see p. 633, *post*.

(*b*) *Webber v. Stanley* (1864), 16 C. B. (N. S.) 698, 751 (the construction of the will is for the court, and "the application of the words of the will to the person or thing described is part of the operative construction"). As to the evidence, see p. 637 *et seq.*, *post*.

(*c*) As to evidence for this purpose, see p. 646, *post*.



## SECT. 1.

Functions  
of a Court  
of Con-  
struction.Giving  
effect to  
ascertained  
intention.Rules of law  
and con-  
struction.Necessary  
authentic-  
ation.

**1228.** When the intention of the testator has been discovered, the inquiry then to be made is whether there is any rule preventing the intention from taking effect (*d*), and, generally, how the intention can be effectuated; and the court is under a duty to give effect to it accordingly (*e*).

Any rule the application of which is independent of the intention of the testator, and may operate against or to defeat that intention, is generally known as a rule of law (*f*).

Any rule adopted by the court for ascertaining (*g*) or effectuating (*h*) the intention of the testator as declared in the will, and dependent for its application to any will upon whether it is consonant with or contrary to the whole will (*i*), is generally called a rule or canon of construction (*k*).

**1229.** With regard to all wills under which the title of the donees is by law subject to that of the testator's personal representative (*l*), a court of construction does not enforce an unadmitted (*m*) title

(*d*) *Garth v. Baldwin* (1755), 2 Ves. Sen. 646, *per* Lord HARDWICKE, L.C., at p. 655; *Tatham v. Drummond* (1864), 4 De G. J. & Sm. 484, 486 (mortmain). "The question whether the intention be consistent with the rules of law or not can never arise till it is settled what the intention was" (*Hodgson v. Ambrose* (1780), 1 Doug. (K. B.) 337, *per* BULLER, J., at p. 342). As to the doubtful and ambiguous cases of construction, where the court acts on the maxim *ut res magis valeat quam pereat*, see p. 668, *post*; and see title PERPETUITIES, Vol. XXII., pp. 306 *et seq.*

(*e*) *Doe d. Tremewen v. Permewen* (1840), 11 Ad. & El. 431, 436; *Smith v. Osborne* (1857), 6 H. L. Cas. 375, 393 ("however expressed"; see p. 652, *post*); *Rose v. Rose*, [1897] 1 I. R. 9, 57, C. A. (the "fundamental theory" of the function of the court).

(*f*) For example, the rules of law as to mortmain and limitation of estates and interests generally. The rule in *Shelley's Case* (1581). 1 Co. Rep. 93 b (see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 226), is termed a rule of law, not a rule of construction; but as to how far it is a rule to give effect to the intention, see *Bowen v. Lewis* (1884), 9 App. Cas. 890, *per* Lord CAIRNS, L.C., at p. 907; compare note (*h*), *infra*.

(*g*) For example, see the general principles stated, pp. 651 *et seq.*, *post*.

(*h*) Thus, the *cy-près* doctrine (as to which see title PERPETUITIES, Vol. XXII., pp. 367 *et seq.*) is termed a rule of construction, but is inoperative in determining in the first instance the intention of the testator (*Monypenny v. Dering* (1850), 7 Hare, 568, *per* WIGRAM, V.-C., at p. 589). Some cases under the doctrine of implication are based, not on ascertaining the intention, which *ex hypothesi* is not expressed at all, but on effectuating intentions which are expressed and ascertained; see *Parker v. Tootal* (1865), 11 H. L. Cas. 143, *per* Lord WESTBURY, L.C., at p. 161.

(*i*) Certain "rules of administration" are applied by the court in administering the estate of a testator, and are also dependent for their application on his intention, namely, the rules as to the primary liability of personal estate for debts, and as to interest on legacies (see *Walford v. Walford*, [1912] A. C. 658, 663). As to such rules generally, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 285 *et seq.*; RENT-CHARGES AND ANNUITIES, Vol. XXIV., p. 500.

(*k*) As to the general principles of construction, see p. 651, *post*; as to canons of construction applied in special cases, see pp. 665 *et seq.*, *post*.

(*l*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 210 *et seq.* As regards the effect of probate on real estate, see *ibid.*, p. 212. As to the power of a court of construction to look at the original will, see *ibid.*, p. 211; and p. 633, *post*.

(*m*) Compare *Jervoise v. Northumberland (Duke)* (1820), 1 Jac. & W. 559, 570; *Robinson v. Cooper* (1831), 4 Sim. 131; *Lock v. Foote* (1833), 4 Sim. 132.

under a will until it has been authenticated by the grant of probate or letters of administration with the will annexed in the court entitled to grant probate of it(*n*); and the court, in general, receives such grant, while unrevoked, as conclusive evidence of the testamentary capacity of the testator, the testamentary nature of the instrument, and the validity of the will as regards form and execution(*o*). This conclusive effect applies to probate even where the original will was forged(*p*), or obtained by fraud or imposition(*q*), and can only be put aside in a court of construction by showing that the probate itself was forged(*r*), or obtained by fraud(*s*), or that the alleged testator was living(*t*), or that the court by which it was granted had no sufficient jurisdiction(*u*). Probate is not conclusive, however, as to the right of the testator to dispose of the property concerned(*a*) or other collateral matters(*b*).

The court assumes that all documents admitted to probate are testamentary documents to be construed in order to ascertain the intention(*c*), and that they properly constitute the whole of the testamentary dispositions of the testator(*d*).

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struction.

Effect of  
Probate.

(*n*) *Yates v. Thomson* (1835), 3 Cl. & Fin. 544, 575, 576, H. L.; *Tucker v. Inman* (1842), 4 Man. & G. 1049; *Price v. Dewhurst* (1838), 4 My. & Cr. 76; Real Property Commissioners' Fourth Report, p. 38. Formerly a court of equity had jurisdiction to entertain a bill to establish a will against an heir-at-law (*Colclough v. Boyse* (1857), 6 H. L. Cas. 1), but would not direct an issue *devisavit vel non* against the heir (*Lorton (Viscount) v. Kingston (Earl), Kingston (Earl) v. Lorton (Viscount)* (1838), 5 Cl. & Fin. 269, H. L.); and if an heir impeached a will of real estate, the court had a discretion to direct an issue *devisavit vel non* in a court of law, or merely to remove obstacles to the heir asserting his title in ejectment; see, for example, *Cooke v. Cholmondeley* (1849), 2 Mac. & G. 18; *Boyse v. Rossborough* (1857), 6 H. L. Cas. 2, where the earlier cases are discussed; and, generally, Real Property Commissioners' Fourth Report, pp. 36, 37. The practice is now in general governed by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61—64. As to the effect of the Judicature Acts, 1873—1894, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 152.

(*o*) Real Property Commissioners' Fourth Report, p. 38; *Thornton v. Curling* (1824), 8 Sim. 310, 313; *Allen v. Dundas* (1789), 3 Term Rep. 125; *Griffiths v. Hamilton* (1806), 12 Ves. 298, 307; compare *Hewson v. Shelley*, [1914] 2 Ch. 13, C. A.; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 210. As to the contents of the will, see, further, p. 633, *post*.

(*p*) *R. v. Vincent* (1721), 1 Stra. 481 (on trial on indictment for forgery of will, production of unrevoked probate is a good defence); *Plume v. Beal* (1717), 1 P. Wms. 388.

(*q*) *Kerrich v. Bransby* (1728), 7 Bro. Parl. Cas. 437; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 211.

(*r*) *Noell v. Wells* (1668), 1 Lev. 236; *Allen v. Dundas*, *supra*.

(*s*) *Barnesly v. Powell* (1749), 1 Ves. Sen. 284, 287.

(*t*) *Allen v. Dundas*, *supra*, at pp. 129, 130; Real Property Commissioners' Fourth Report, p. 38. Such a fact is ground for revocation of probate, as to which see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 213, 214.

(*u*) *Allen v. Dundas*, *supra*; *Young v. Elworthy* (1833), 1 My. & K. 215.

(*a*) *Smart v. Tranter* (1890), 43 Ch. D. 587, 593, C. A. (will of wife disposing of her choses in action).

(*b*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 210.

(*c*) *Bradford v. Young* (1885), 29 Ch. D. 617, 625, C. A. (unsigned will); *Re Price, Tomlin v. Young*, [1900] 1 Ch. 442 (holograph); *Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560 (holograph); *Re Barrance, Barrance v. Ellis*, [1910] 2 Ch. 419, 421 (list of names, with a sum of money written to each name).

(*d*) As to evidence of the words of the will, see, further, p. 633, *post*.



## SECT. 1.

Functions  
of a Court  
of Con-  
struction.

Jurisdiction  
to correct  
mistake.

Attempts  
to oust juris-  
diction of  
court.

**1230.** A mistake in a will, such as an error in a name or description or in the insertion or omission of any words, whether by the testator or his draftsman, can be corrected by the court of construction (*e*), but only on the references obtained from the whole will, and not on any parol evidence (*f*), other than such evidence of the material circumstances as is admissible in construing the will (*g*).

The court has no jurisdiction to correct the probate (*h*), and must be satisfied on the construction of the will alone that there is a mistake or omission in the will; whenever the matter is merely doubtful, the court adheres to the words of the will (*i*).

**1231.** The jurisdiction of the court in the construction of a will is not ousted by the fact that the will is in a foreign language, or has to be construed by foreign rules of construction (*k*); or by any direction or recommendation by the testator that questions of construction are to be decided in a different manner, for example, by the trustees or executors, or by arbitration (*a*); and a direction that a beneficiary resorting to litigation for the purpose shall forfeit his interest is inoperative to the extent of preventing him from seeking the aid of the court (*b*).

(*e*) *Clarke v. Norris* (1797), 3 Ves. 362; *Dent v. Pepys* (1822), Madd. & G. 350; *Re Boehm* (1891), 7 T. L. R. 368, cited in *Re Baynham*, *Hart v. Mackenzie* (1891), 7 T. L. R. 587. As to the rules of construction as regards altering the words of a will, see p. 674, *post*.

(*f*) *Shergold v. Boone* (1807), 13 Ves. 370, 376; *Newburgh (Earl) v. Newburgh (Countess Dowager)* (1820), 5 Madd. 364; Sugden, *Law of Property*, pp. 196, 367; *Miller v. Travers* (1832), 8 Bing. 244; *Langston v. Langston* (1834), 2 Cl. & Fin. 194, 238, H. L.; *Re Chenoweth*, *Ward v. Dwelley* (1901), 17 T. L. R. 515; see pp. 635, 636, *post*. Such evidence is admissible only in a court of probate; see p. 511, *ante*. As to the rules of construction in such a case, see p. 684, *post*.

(*g*) *Bradshaw v. Bradshaw* (1836), 2 Y. & C. (EX.) 72.

(*h*) *Taylor v. Creagh* (1858), 8 I. Ch. R. 281, 287. Any correction of a will must be done by the court of probate (*Re Bywater*, *Bywater v. Clarke* (1881), 18 Ch. D. 17, 22, C. A.); except where the correction can be made as a matter of construction of the will taken as a whole; see p. 630, *ante*. Evidence may be given in a court of probate in order to except words out of a grant on the ground of want of knowledge and approval on the part of the testator; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 178, 179; as to omitting from the probate words introduced in the will by mistake, see *ibid.*, pp. 168, 179; *Vaughan v. Clerk* (1902), 87 L. T. 144; *Marklew v. Turner* (1900), 17 T. L. R. 10; *In the Goods of Wrenn*, [1908] 2 I. R. 370; as to revoking a probate containing a mistake, see *Brisco v. Baillie Hamilton*, [1902] P. 234.

(*i*) *Mellish v. Mellish* (1798), 4 Ves. 45, 50; *Philipps v. Chamberlaine* (1798), 4 Ves. 51, 57; *Thompson v. Whitelock* (1859), 4 De G. & J. 490, 500, 501, C. A. As to the character which the context of a will must bear in order to show mistake, see *Morgan v. Thomas* (1882), 9 Q. B. D. 643, 645, 646, C. A.

(*k*) *Di Sora (Duchess) v. Philipps* (1863), 10 H. L. Cas. 624, 636, 639, 640; *Re Bonnefoi*, *Surrey v. Perrin*, [1912] P. 233, C. A.; compare title CONFLICT OF LAWS, Vol. VI., pp. 230 *et seq*.

(*a*) *Massy v. Rogers* (1883), 11 L. R. Ir. 409; see also *Price v. Dewhurst* (1837), 8 Sim. 279, where the court set aside the executor's decision as fraudulent; *Re Walton's Estate* (1856), 8 De G. M. & G. 173, C. A. Acts done in good faith, under a determination by the tribunal set up by the testator, are valid, it appears, not only to protect the executors or trustees, but for all purposes (*In the Will of Thompson*, *Brahe v. Mason*, [1910] Victorian Law Reports, 251, 255).

(*b*) *Rhodes v. Muswell Hill Land Co.* (1861), as reported 30 L. J. (CH.)



On the other hand, a condition that a beneficiary shall not dispute the validity of the will (*c*), or of any other instrument (*d*), or shall not interfere with the management of the testator's estate (*e*), and on breach of the condition shall wholly or partially forfeit his gift, may be valid and operative for the purpose of causing a forfeiture on litigation by the donee (*f*). Such a condition, however, is not construed *primâ facie* to extend to cases where there is a reasonable cause for litigation (*g*), or to defending proceedings taken by persons other than the donee (*h*); if it is couched in language which prevents the donee resorting to any proceedings whatever concerning his gift, even to secure its enjoyment (*i*), or if in the case of gifts of personal estate (*k*) it is merely imposed *in terrorem* (*l*) on the legatee, it is repugnant to the gift and void.

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Functions  
of a Court  
of Con-  
struction.

Condition  
against  
litigation  
about will.

**1232.** In an ordinary case, where the rights under a will are in dispute and a meaning can be attached to the words, the court is under a duty not to decline the jurisdiction to declare the meaning of the will (*m*), subject to the qualifications that it is a matter of discretion to answer a question arising on a contingency which

Duty to  
construe.

509, 511; *Massy v. Rogers* (1883), 11 L. R. Ir. 409. The persons claiming under the testator may agree upon arbitration; see *Ridout v. Pain* (1747), 3 Atk. 486; *Hughes v. Whitby* (1872), 7 I. R. Eq. 98. As to the stay of proceedings after such a submission to arbitration, compare title ARBITRATION, Vol. I., p. 451.

(*c*) *Boughton v. Boughton* (1750), 2 Ves. Sen. 12; *Cooke v. Turner* (1846), 15 M. & W. 727.

(*d*) *Violett v. Brookman* (1857), 26 L. J. (CH.) 308.

(*e*) *Adams v. Adams*, [1892] 1 Ch. 369, C. A.

(*f*) *Ibid.* (frivolous actions); and see *Re Allan, Havelock v. Havelock-Allan* (1896), 12 T. L. R. 299 (proceedings in Parliament). A donee having a vested interest does not dispute a will by merely claiming payment of a legacy directed to accumulate, in respect of which he is entitled to give a discharge and put an end to the accumulation (*Phillips v. Phillips*, [1877] W. N. 260).

(*g*) *Powell v. Morgan* (1688), 2 Vern. 90; *Adams v. Adams*, *supra*, per LOPES and KAY, L.J.J., at pp. 375, 377; *Re Williams, Williams v. Williams*, [1912] 1 Ch. 399, 401; see also *Nutt v. Burrell* (1724), Cas. temp. King, 1 (frivolous action, but no forfeiture); *Wallace v. Wallace* (1898), 24 Victorian Law Reports, 859; *Harrison v. Harrison* (1904), 7 Ontario Law Reports, 297.

(*h*) *Cooke v. Cholmondeley* (1849), 2 Mac. & G. 18, 28; *Massy v. Rogers*, *supra*, at p. 421; *Warbrick v. Varley* (No. 2) (1861), 30 Beav. 347; *Wilkinson v. Dyson* (1862), 10 W. R. 681; and see *Tomlin v. Hatfeild* (1841), 12 Sim. 167.

(*i*) *Rhodes v. Muswell Hill Land Co.* (1861), 29 Beav. 560, 563; *Re Williams, Williams v. Williams*, *supra*.

(*k*) The rule does not apply to devises of real estate, or legacies charged on real estate; see p. 590, *ante*.

(*l*) As, for instance, where there is no gift over on forfeiture (*Morris v. Burroughs* (1738), 1 Atk. 399, 404; *Lloyd v. Spillet* (1741), 2 Atk. 148). A gift over, or direction that the gift is to fall into residue on breach of the condition, prevents such a construction (*Cleaver v. Spurling* (1729), 2 P. Wms. 526, 528; *Warbrick v. Varley* (No. 2), *supra*, at p. 350; *Stevenson v. Abingdon* (1) (1863), 11 W. R. 935). As to conditions *in terrorem*, see pp. 588 *et seq.*, *ante*.

(*m*) *Crofts v. Beamish*, [1905] 2 I. R. 349, 362, 363, C. A.; and see *Dormer v. Phillips* (1855), 4 De G. M. & G. 855, 859; *Ashby v. White* (1703), 2 Ld. Raym. 938, *per* HOLT, C.J., at p. 956.

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of a Court  
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struction.

has not yet happened (*n*) and that it is a matter of duty not to answer a contingent question unless the court has before it a representative of every interest that may in any event be affected (*o*).

Further, in cases of doubtful construction, the court may decline to force a title under the will on a purchaser, even where as between parties claiming under the testator the court would interpret the will and declare and enforce the rights arising under it (*p*); a title may, however, be forced on a purchaser where the doubt is resolved by the application of a broad, general principle of construction not depending on any context (*q*).

Proceedings.

**1233.** Proceedings in the High Court of Justice (*r*) to determine the construction of a will may be commenced by originating summons (*s*); the costs of such proceedings are subject to the rules relating to actions to administer the testator's estate (*t*).

SECT. 2.—*Evidence Admissible in a Court of Construction.*

SUB-SECT. 1.—*General Rule.*

General rule.

**1234.** In a court of construction (*u*) the only legitimate evidence of the testator's intentions is the will itself properly authenticated (*w*); in order that the will may be properly expounded, however, the court adopts the general rule that any evidence of the circumstances is admissible which in its nature and effect simply explains what the testator has written (*x*); but no evidence can be admissible, except possibly in one class of cases (*a*), which in its nature or effect is applicable to the purpose of showing merely what he intended to have written (*b*). In other words, parol evidence is not to be resorted to except for the purpose of proving a fact which makes intelligible

(*n*) As to declaratory orders in such cases, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 183, 184.

(*o*) As to the power to make representation orders in such cases, see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 103.

(*p*) *Rogers v. Waterhouse* (1858), 4 Drew. 329, 330. Decisions apparently contradictory, even on the construction of the same will, have been reconciled on this ground; see *Doe d. Clift v. Birkhead* (1849), 4 Exch. 110, 126, explaining the contrary decision in *Edwards v. Alliston* (1831), 4 Russ. 78. As to title to and sale of land generally, see title SALE OF LAND, Vol. XXV., pp. 285 *et seq.*; as to specific performance in cases of doubtful title, see title SPECIFIC PERFORMANCE, Vol. XXVII., pp. 53 *et seq.*

(*q*) *Radford v. Willis* (1871), 7 Ch. App. 7, 11.

(*r*) See title COURTS, Vol. IX., pp. 52 *et seq.*

(*s*) R. S. C., Ord. 54, r. 1; Ord. 55, r. 3; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 186.

(*t*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 347 *et seq.*

(*u*) As to evidence in a court of probate, see title EVIDENCE, Vol. XIII., pp. 471, 472; and p. 511, *ante*. There is a distinction, in the matter of evidence, between an inquiry into the meaning of a will and an inquiry into the existence of such a document, or an inquiry to what extent it represents the testamentary intentions of the deceased (*Reffell v. Reffell* (1866), L. R. 1 P. & D. 139, 141, explaining *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109, 114).

(*w*) As to evidence of the words of the will, see, further, pp. 633 *et seq.*, *post*.

(*x*) *Hampshire v. Peirce* (1751), 2 Ves. Sen. 216, 217, as qualified by *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, 371.

(*a*) See pp. 643, 650, *post*.

(*b*) Wigram, *Extrinsic Evidence*, pl. 9 (3rd ed. pp. 8, 9), cited with approval in *Re Mayo, Chester v. Keirl*, [1901] 1 Ch. 404, *per* FARWELL, J., at pp. 405, 406.

something in the will which, without the aid of extrinsic evidence, would not be intelligible (*c*).

This rule applies to the construction of wills governed by the law of any other country as well as to English wills, and is therefore independent of the statutory requirements as to form and execution (*d*).

SECT. 2.  
Evidence  
Admissible  
in a Court  
of Con-  
struction.

SUB-SECT. 2.—*Evidence of the Words Used and Dispositions Made by the Testator.*

**1235.** With regard to discovering what words the testator used, and what dispositions he made, the court of construction accepts the probate, in all cases where the title of the donees is by law subject to that of the testator's personal representative (*e*), as conclusively showing the state in which the will was at its execution (*f*), and containing the whole will to be construed (*g*). By statute, the probate is evidence of the will in certain other cases (*h*). With these exceptions the words of the will must be directly proved or be admitted, and the probate is not admissible in evidence for this purpose (*i*). Probate.

The court may in all cases look at the original will in order to settle questions arising on the punctuation, or on the introduction of a capital letter or other mark which may indicate where a sentence or clause was intended to begin, and which may affect its sense, or on the effect of blanks in the will, and generally in order to see whether any light is thrown on the construction of the will by its form (*k*). Original will  
considered.

(*c*) *Clementson v. Gandy* (1836), 1 Keen, 309, 316; *Re Glassington*, *Glassington v. Follett*, [1906] 2 Ch. 305, *per* JOYCE, J., at p. 314, explaining *Higgins v. Dawson*, [1902] A. C. 1.

(*d*) *Yates v. Thomson* (1835), 3 Cl. & Fin. 544, H. L.; *Re Scholefield*, *Scholefield v. St. John*, *Re Young*, *Smith v. St. John*, [1905] 2 Ch. 408.

(*e*) See p. 583, *ante*; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2).

(*f*) *Bernal v. Bernal* (1838), 3 My. & Cr. 559, 563, n.; *Gann v. Gregory* (1854), 3 De G. M. & G. 777, 781 (cross-lines over part of will, and pencil alterations); *Oppenheim v. Henry* (1853), 9 Hare, 802, note (b); *Lynn v. Beaver* (1823), Turn. & R. 63, *per* Lord ELDON, L.C., at p. 67; *Barnaby v. Tassell* (1871), L. R. 11 Eq. 363, 368; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 61, 62, 64; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 212, 213. If none of the parties object, however, and an inaccuracy is alleged in a probate, the court looks at the original will (*Re Cliff's Trusts*, [1892] 2 Ch. 229; see also *Philipps v. Chamberlaine* (1798), 4 Ves. 51, 57 (mistake alleged); *Compton v. Bloxham* (1845), 2 Coll. 201, 204 (original will construed)). In *Wordsworth v. Wood* (1847), 1 H. L. Cas. 129, 157, n., the original will was produced and was found to be different from the probate, but the words of the probate were adhered to, the proceedings being in demurrer.

(*g*) In *Hubbard v. Alexander* (1876), 3 Ch. D. 738, evidence was admitted to show that two codicils were not two distinct instruments, though not for the purpose of construing them in order to determine whether they were cumulative in effect. It appears that this evidence was wrongly admitted; see note (*n*), p. 650, *post*. Such evidence is admissible in a court of probate (*Jenner v. Ffinch* (1879), 5 P. D. 106).

(*h*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 212. An heir-at-law may be bound by estoppel by being a party to proceedings in a court of probate as one of the next of kin (*Beardsley v. Beardsley*, [1899] 1 Q. B. 746).

(*i*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 212; *Doe d. Ash v. Calvert* (1810), 2 Camp. 387, 389.

(*k*) *Oppenheim v. Henry*, *supra*, *per* WOOD, V.-C., at p. 803, n.; *Child v. Elsworth* (1852), 2 De G. M. & G. 679, 683, C. A.; *Manning v. Purcell*



## SECT. 2.

Evidence  
Admissible  
in a Court  
of Con-  
struction.Other  
documents.Evidence to  
translate the  
language.

**1236.** A document, though not admitted to probate, may be referred to in a will in such a manner that the court of construction is entitled to look at it, as being virtually incorporated in that which is admitted to probate. In order that this may be possible the document must be clearly identified by the description given of it by the will, and it must be shown to have been in existence at the time when the will was executed (*l*).

**1237.** Where the characters in which a will is written are difficult to decipher (*m*), or the language of the will is a language not understood by the court (*n*), or is the language of a trade or business or locality with which the testator was acquainted (*o*), the evidence of persons who are skilled in deciphering writing or who understand the language in which the will is written, is admissible to declare what the words and characters are, and to inform the court of their proper meaning (*p*). On the other hand, evidence cannot be given to explain words or symbols which are not the language of any trade, business or locality, and are known only to the testator himself (*q*), unless the will itself refers to the subject of such evidence as the

(1855), 7 De G. M. & G. 55, 66, C. A., where the court considered the effect of erasures in the original will; and see *Re Baynham, Hart v. Mackenzie* (1891), 7 T. L. R. 587. In *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390, C. A., Lord ESHER, M.R., at p. 393, said that he knew of "no rule that for the purpose of construing a will you may not look at the original will itself," and BAGGALLAY, L.J., at p. 394, while agreeing that for many purposes the first thing to be looked at is the probate copy, considered that it was very material to look at the original will to explain a blank, which was consistent either with an accidental omission to fill up the blank, or with an intention not to fill it up; see also *Philipps v. Chamberlaine* (1798), 4 Ves. 51, 57; *Thellusson v. Woodford* (1799), 4 Ves. 227, 325 (parenthesis); *Belaney v. Belaney* (1867), 2 Ch. App. 138, where the original will was ignored; *Milsome v. Long* (1857), 3 Jur. (N. S.) 1073, where the court looked at the will, which confirmed the view taken from the probate; *Lunn v. Osborne* (1834), 7 Sim. 56, 61; *Compton v. Bloxham* (1845), 2 Coll. 201; *Gauntlett v. Carter* (1853), 17 Beav. 586; *Thompson v. Whitelock* (1859), 4 De G. & J. 490, C. A.; *Jull v. Jacobs* (1876), 3 Ch. D. 703; *Munro v. Henderson*, [1907] 1 I. R. 440, 443, affirmed, [1908] 1 I. R. 260, C. A.

(*l*) *Dillon v. Harris* (1830), 4 Bli. (N. S.) 321, 359, H. L.; *Quihampton v. Going* (1876), 24 W. R. 917 (entries in ledger); *Singleton v. Tomlinson* (1878), 3 App. Cas. 404, 413, 414 (schedule of property); as to incorporation of documents for the purpose of being included in the grant of probate, compare title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 159. Other documents may also be admitted in evidence for the purpose of explaining a latent ambiguity (*Dillon v. Harris, supra*; and see p. 651, *post*).

(*m*) *Masters v. Masters* (1718), 1 P. Wms. 421, 425 (illegible writing).

(*n*) In the case of a foreign will containing foreign technical terms, the court avails itself of the assistance of foreign lawyers (*Re Cliff's Trusts*, [1892] 2 Ch. 229, 232; *Reynolds v. Kortright* (1854), 18 Beav. 417, 425).

(*o*) *Kell v. Charmer* (1856), 23 Beav. 195 (use of business symbols denoting prices); *Goblet v. Beechey* (1831), 2 Russ. & M. 624, reversing S. C. (1829), 3 Sim. 24 (handwriting expert and trade expert in conflict); *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, 525, H. L. (local language etc.); *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176, C. A. ("securities" in will of a broker).

(*p*) Wigram, *Extrinsic Evidence*, 3rd ed., pp. 48, 49, Proposition IV.

(*q*) *Goblet v. Beechey* (1828), 2 Russ. & M. 624; Wigram, *Extrinsic Evidence*, Appendix I.; *Clayton v. Nugent (Lord)* (1844), 13 M. & W. 200, 206 (donees described by letters, explained by separate unattested card index, which was held inadmissible).

means of identifying them (*r*). Further, in order to discover the ordinary meaning of any word, the mind of the court may be informed not only by reference to dictionaries of good reputation (*s*), or other contemporary literary sources (*t*), but also, it seems, in the case of words describing property, by evidence of the meaning ordinarily given to such words among those who deal in such property (*u*). Evidence cannot, however, be adduced, as a general rule, to show the meaning of common words as understood by the testator or other persons (*w*), where that meaning is not the ordinary meaning of the words in the testator's society (*a*).

In the case of a foreign will there must be a translation of the instrument, and evidence may be admitted to prove (1) the translation of the words; (2) the technical meaning of words which are of a technical description or which have a peculiar meaning different from that which, literally translated into English, they would bear; and (3) any established principle of construction of the particular instrument by the corresponding foreign tribunal (*b*).

**1238.** Evidence can never be given in a court of construction (*c*) in order to complete an incomplete will (*d*), or to add to (*e*), vary (*f*),

SECT. 2.

Evidence Admissible in a Court of Construction.

Evidence of ordinary meaning of words.

Foreign will

Evidence to vary terms of will.

(*r*) See *East v. Twyford* (1853), 4 H. L. Cas. 517.

(*s*) *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176, 188.

(*t*) *Re Rayner, Rayner v. Rayner*, *supra*, at p. 187 (the *Times* newspaper); compare *A.-G. v. Cast-Plate Glass Co.* (1792), 1 Anst. 39, 44 ("dictionaries or books on the particular subject"); *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L., *per* TINDAL, C.J., at pp. 568, 569; *Camden (Marquis) v. Inland Revenue Commissioners*, [1914] 1 K. B. 641, C. A. ("any literary help they can find, including the consultation of the works of standard authors and authoritative dictionaries").

(*u*) *Brannigan v. Murphy*, [1896] 1 I. R. 418, 426; *Re Rayner, Rayner v. Rayner*, *supra*, *per* VAUGHAN WILLIAMS, L.J., at p. 188; *Re Herring, Murray v. Herring*, [1908] 2 Ch. 493 (practice of company as to debentures and debenture stock).

(*w*) *King v. Badeley* (1834), 3 My. & K. 417 ("contingent interests": testator meant expectancies); *Shore v. Wilson, Hewley's (Lady) Charities*, *supra*, at p. 558; *Barrow v. Methold* (1855), 1 Jur. (N. S.) 994 ("premium of insurance": testator meant policy).

(*a*) *O'Donnell v. O'Donnell* (1878), 1 L. R. Ir. 284, where it was considered that a statutory measure of land had superseded a customary measure among persons like the testator; compare *Church Property Trustees v. Public Trustee* (1907), 27 New Zealand Law Reports, 354 (statutory definition of a county); *Camden (Marquis) v. Inland Revenue Commissioners*, *supra* (evidence of valuers as to meaning they attached to "nominal rent" rejected).

(*b*) *Mostyn v. Fabrigas* (1774), Cowp. 161, *per* Lord MANSFIELD, C.J., at p. 174; *Di Sora (Duchess) v. Phillippis* (1863), 10 H. L. Cas. 624, 633, 639, 640, correcting *Williams v. Williams* (1841), 3 Beav. 547; and see title EVIDENCE, Vol. XIII., p. 430.

(*c*) As to the jurisdiction to correct mistakes, see p. 630, *ante*.

(*d*) Thus, no evidence can be given for the purpose of filling up a total blank in a will (*Winne v. Littleton* (1681), 2 Cas. in Ch. 51; *Baylis and Church v. A.-G.* (1742), 2 Atk. 239; *Hunt v. Hort* (1791), 3 Bro. C. C. 311; see *Taylor v. Richardson* (1853), 2 Drew. 16. Where, however, it is clear that the gifts in which blanks occurred were charitable, then if the amount of the gift can be ascertained, the gift does not fail altogether, but the property is administered according to the *cy-près* doctrine (*Pieschel v. Paris* (1825), 2 Sim. & St. 384); see title CHARITIES, Vol. IV., pp. 190 *et seq.* As to filling up blanks by construction alone, see p. 675, *post*.

(*e*) As by inserting a devise or bequest omitted by mistake of the

(*f*) For note (*f*) see p. 636, *post*.



## SECT. 2.

Evidence  
Admissible  
in a Court  
of Con-  
struction.

Other  
testamentary  
dispositions  
not duly  
expressed.

By way of  
future power  
in donee.

By way of  
future power  
in testator.

As to  
execution  
of power.

or contradict (*g*) the terms of a will, or generally to prove any testamentary intentions of the testator not found in the will (*h*), or even to reconcile two contradictory clauses, and declare which of the two was the testator's real intention (*i*).

No evidence is admissible which is offered to prove matters, not as constituting an obligation accepted by the donee (*k*), but as to the testamentary wishes of the testator not manifested in the way required by statute (*l*).

**1239.** Where power is given by the will to the donee to dispose of property in accordance with wishes verbally expressed by the testator, and there is no trust by implication in default of disposition under the power, evidence is not admissible to show his wishes (*m*).

**1240.** A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil, or by parol; and evidence of any such instrument or parol disposition is therefore inadmissible to show his testamentary wishes (*n*).

On the question whether a gift is or is not in execution of a

draftsman (*Newburgh (Earl) v. Newburgh (Countess Dowager)* (1820), 5 Madd. 364; *Selwin v. Brown* (1735), 3 Bro. Parl. Cas. 607; *Langston v. Langston* (1834), 8 Bli. (N. S.) 167, 214, H. L., where the court arrived at the conclusion that an error in copying had been made upon the instrument as it stood); and see *Whitton v. Russell* (1739), 1 Atk. 448, *per* Lord HARDWICKE, L.C. As to the jurisdiction to correct mistakes, see, further, p. 630, *ante*.

(*f*) As by changing the name or description of a legatee (*Delmare v. Robello* (1792), 1 Ves. 412; *Daubeny v. Coghlan* (1842), 12 Sim. 507; *Drake v. Drake* (1860), 8 H. L. Cas. 172; *Re Ely, Tottenham v. Ely* (1891), 65 L. T. 452 (as to which case, however, see note (*m*), p. 644, *post*)); or by including a legatee among the persons referred to in a condition (*Cheyney's (Lord) Case* (1591), 5 Co. Rep. 68 a); or by varying the terms of a legacy (*Lowfield v. Stoneham* (1746), 2 Stra. 1261); or by adding conditions to a legacy (*Vernon's Case* (1572), 4 Co. Rep. 1 a, 4 a; *Lawrence v. Dodwell* (1699), 1 Ld. Raym. 438).

(*g*) *Hampshire v. Peirce* (1751), 2 Ves. Sen. 216, *per* STRANGE, M.R., at p. 217, where the evidence tendered and rejected with respect to one gift was received as evidence of identification with regard to another; *Clementson v. Gandy* (1836), 1 Keen, 309; *Brown v. Langley* (1732), 2 Barn. (K. B.) 118. Thus, no evidence can be given to prove a trust when the terms of the will expressly give a beneficial interest, or *vice versâ* (*Langham (Lady) v. Sanford* (1816), 2 Mer. 6, *per* Lord ELDON, L.C., at p. 17; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673, 677; *Re Huxtable, Huxtable v. Crawford*, [1902] 2 Ch. 793, C. A.), except in cases of fraud (*Re Spencer's Will* (1887), 57 L. T. 519, C. A.); see p. 648, *post*; and title TRUSTS AND TRUSTEES, p. 21, *ante*.

(*h*) *Bertie v. Falkland* (1698), 1 Salk. 231, 232; *Bennet v. Davis* (1725), 2 P. Wms. 316, 318.

(*i*) *Ulrich v. Litchfield* (1742), 2 Atk. 372; *Re Bywater, Bywater v. Clarke* (1881), 18 Ch. D. 17, C. A.

(*k*) As to such cases, see p. 648, *post*.

(*l*) *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673, 678; *Briggs v. Penny* (1849), 3 De G. & Sm. 525, on appeal (1851), 3 Mac. & G. 546.

(*m*) *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866.

(*n*) *Habergham v. Vincent* (1793), 2 Ves. 204; *Johnson v. Ball* (1851), 5 De G. & Sm. 85, 91; *Re Fane, Fane v. Fane* (1886), 2 T. L. R. 510; *Re Hyslop, Hyslop v. Chamberlain*, [1894] 3 Ch. 522; and see *Reynolds v. Kortright* (1854), 18 Beav. 417, where a residuary gift to the universal donee after distribution in accordance with the testator's future directions was effective; *Re Walsh, Keenan v. Brown* (1911), 30 New Zealand Law Reports, 1166.



power validly conferred upon him, the rules as to admission of evidence as to the property of the testator are given elsewhere (o).

SUB-SECT. 3.—*Evidence for the Purpose of Identification.*

**1241.** The words of a testator's will necessarily refer to facts and circumstances respecting his property and his family and other persons and things; the meaning and application of his words cannot be ascertained without evidence of such facts and circumstances (p). Evidence is therefore necessarily admissible to show facts and circumstances corresponding, as far as possible, with those referred to in the will, for example, to show that persons and property actually exist as described (q).

The court, however, must first attempt to construe the words of the will (r); and the question whether further evidence is to be considered and what is the materiality of that evidence depends on the question whether there is any subject which the words fit (s).

**1242.** The evidence necessarily admitted may disclose some subject-matter such that the words of the will, when construed according to the usual rules (t), in the opinion of the court plainly and unambiguously describe such subject-matter, and that there is a plain, unambiguous and effectual (u) gift with reference to such subject-matter. In such a case the court does not consider any further evidence (a), unless it is to find some other subject-matter to which the same words might equally, or with a negligible variation, be applicable (b).

SECT. 2.  
Evidence  
Admissible  
in a Court  
of Con-  
struction.

Evidence  
necessarily  
admissible.

Adapting  
facts to  
words :

(1) Words un-  
ambiguously  
satisfied.

(o) See pp. 618 *et seq.*, *ante*; and title POWERS, Vol. XXIII., pp. 35, 36.

(p) *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, *per* Lord ABINGER, C.B., at pp. 367, 368; Tudor, L. C. Real Prop., 4th ed., p. 489.

(q) "You must admit evidence to show who constitute the class of takers, and what constitutes the property which is dealt with" (*Sherratt v. Mountford* (1873), 8 Ch. App. 928, *per* JAMES, L.J., at p. 929; *Sanford v. Raikes* (1816), 1 Mer. 646, 653). "If the word Blackacre be used, there must be evidence to show that the field in question is Blackacre" (*Doe d. Preedy v. Holtom* (1835), 4 Ad. & El. 76, 82).

(r) *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, 322, 323, C. A.

(s) Where the evidence may be material, it is generally admitted in the first instance, reserving the question of its materiality (*Sayer v. Sayer, Innes v. Sayer* (1849), 7 Hare, 377, 381).

(t) As to the general rules, see p. 651, *post*; as to descriptions of property and the effect of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24, see pp. 691 *et seq.*, *post*; as to descriptions of donees, see p. 713, *post*.

(u) As where there are existing persons and property to satisfy the words (*Horwood v. Griffith* (1853), 4 De G. M. & G. 700, 708, C. A.; *Millard v. Bailey* (1866), L. R. 1 Eq. 378; *Re Seal, Seal v. Taylor*, *supra*, at p. 323; *Re Trimmer, Crundwell v. Trimmer* (1904), 91 L. T. 26). The fact that there is no person of the description, however, does not render evidence admissible where there are indications that the testator made the gift in spite of his ignorance whether any such person existed (*Delmare v. Robello* (1792), 1 Ves. 412 (to the children of my sister R., who was a nun at the date of the will); *Daubeny v. Coghlan* (1842), 12 Sim. 507, 518). As to gifts apparently to persons non-existent, see p. 639, *post*.

(a) See the cases cited in notes (c)—(l), p. 638, *post*; and compare *Higstrim v. Ray* (1895), 16 New South Wales Law Reports (Equity), 1; *Re Millar, Barnard v. Mahoney* (1898), 17 New Zealand Law Reports, 160. *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio* (Dig. lib. 32, 25).

(b) Evidence of surrounding circumstances is not excluded in cases coming under this exception; see note (p), p. 639, *post*.

## SECT. 2.

Evidence  
Admissible  
in a Court  
of Con-  
struction.Evidence then  
not admitted.(2) Words  
not un-  
ambiguously  
satisfied.

Thus, the court does not then admit any evidence adduced to show that the testator must have meant some person or property different from that which his words plainly and unambiguously describe (*c*), such as evidence of the testator's fuller knowledge of or intimacy with other persons (*d*), or his want of knowledge of the person so described (*e*), or his habit of describing any other person in the same terms (*f*); or the state or value generally of the testator's property (*g*), where the will itself does not make that state or value of importance (*h*); or his knowledge or management (*i*), or the history (*k*), of the property or any part of it; or the testator's habits of describing other property in the same terms (*l*).

**1243.** Further evidence, however, to the extent mentioned

(*c*) *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L., per TINDAL, C.J., at p. 565; *Re Overhill's Trust* (1853), 1 Sm. & G. 362, 366.

(*d*) *Holmes v. Cusance* (1806), 12 Ves. 279 (to the children of R., whom it was not likely the testator would benefit); *Wilson v. Squire* (1842), 1 Y. & C. Ch. Cas. 654 (charity); *Re Williams, Gregory v. Muirhead* (1913), 134 L. T. Jo. 619.

(*e*) *Re Corsellis, Freeborn v. Napper*, [1906] 2 Ch. 316.

(*f*) *Green v. Howard* (1779), 1 Bro. C. C. 31 ("relations"); *Ellis v. Houston* (1878), 10 Ch. D. 236, 245 ("children"); *Re Parker, Bentham v. Wilson* (1881), 17 Ch. D. 262, C. A.; *Re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83, C. A. (habit of calling great-niece by the name "niece").

(*g*) *Brown v. Langley* (1732), 2 Barn. (K. B.) 118; *Inchiquin (Lord) v. French* (1745), Amb. 33, 40; *Kellett v. Kellett* (1811), 1 Ball & B. 533, 542; *Hensman v. Fryer* (1867), 3 Ch. App. 420, 424; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756, C. A., per RIGBY, L.J., at pp. 768, 769; S. C., sub nom. *Higgins v. Dawson*, [1902] A. C. 1, where, however, the question was rather of construction of the will than of identification.

(*h*) Such evidence may become admissible (see the text, *infra*) where the descriptions are not clear in the will, and unintelligible without taking such evidence (*Fonnereau v. Poyntz* (1785), 1 Bro. C. C. 472, explained in *Druce v. Denison* (1801), 6 Ves. 385, 401; *Colpoys v. Colpoys* (1822), Jac. 451; *A.-G. v. Grote*, (1827), cited in Wigram, Extrinsic Evidence, Appendix, No. II.; *Boys v. Williams* (1831), 2 Russ. & M. 689; *Hensman v. Fryer*, *supra*; *Watson v. Arundell* (1876), 11 I. R. Eq. 53, 75, C. A.); or where the testator expressly makes the gifts by reference to the amount of his property (*Barksdale v. Gilliat* (1818), 1 Swan. 562; *Druce v. Denison*, *supra*, explained in *Re Grainger, Dawson v. Higgins*, *supra*). As to such evidence for the purpose of proving the exercise of a power, see title POWERS, Vol. XXIII., p. 36.

(*i*) *Doe d. Preedy v. Holtom* (1835), 4 Ad. & El. 76; *Horwood v. Griffith* (1853), 4 De G. M. & G. 700, C. A., per TURNER, L.J., at p. 708. The rule applies especially to cases where the property is described by its local description (*Anon.* (1567), Dyer, 261 b; *Woodden v. Osbourn* (1599), Cro. Eliz. 674; *Doe d. Browne v. Greening* (1814), 3 M. & S. 171, 173; *Doe d. Tyrrell v. Lyford* (1816), 4 M. & S. 550, 555; *Doe d. Templeman v. Martin* (1833), 4 B. & Ad. 771; *Miller v. Travers* (1832), 8 Bing. 244; *Homer v. Homer* (1878), 8 Ch. D. 758, 774, C. A.).

(*k*) *Millard v. Bailey* (1866), L. R. 1 Eq. 378 (gift of shares which had been doubled or subdivided).

(*l*) *Doe d. Chichester v. Oxenden* (1810), 3 Taunt. 147; *Doe d. Chichester v. Oxenden* (1816), 4 Dow, 65, H. L. ("my estate of A."); evidence not admissible to show testator's habit of including outlying property in this estate); *Doe d. Brown v. Brown* (1809), 11 East, 441 (devise of "copyhold estates"; evidence not admissible to show habit of describing certain freeholds as copyhold); *Doe d. Tyrrell v. Lyford*, *supra*, at pp. 557, 558; *Evans v. Angell* (1858), 26 Beav. 202, 207; *King v. King* (1884), 13 L. R. Ir. 531.



below (*m*), is considered in all other cases (*n*), and also in every case where the further evidence is adduced to show that the words of the will might equally, or with a negligible variation (*o*), be applicable to two or more subjects (*p*).

Thus, if the words were plainly and unambiguously satisfied prior to, but not at, the date of the will, as, for example, where the person described has died (*q*), or the property described has ceased to conform to the description (*r*) before that date, further evidence is admitted to discover some other subject existing at that date to which the words may refer as understood by the testator.

Again, where the words do not plainly and unambiguously refer to any subject, as in cases where, on admission of the evidence necessarily admitted, it is seen that they refer to more than one subject (*s*), or do not describe any subject either at all or only with inaccuracy (*t*), further evidence is admitted to discover the true subject to which the words may refer (*a*).

Generally, where the words of the will are insensible, that is to say, have no reasonable application to the circumstances proved (*b*), further evidence is admitted to discover the meaning of the words with reference to which the will may have full effect (*c*).

SECT. 2.  
Evidence  
Admissible  
in a Court  
of Con-  
struction.

Ambiguity  
arising prior  
to date  
of will.

No one sub-  
ject existing.

Words  
generally  
insensible.

(*m*) As to evidence of circumstances, see p. 640, *post*; as to the cases in which evidence of intention is admissible, see p. 643, *post*.

(*n*) That is, where there is not a plain unambiguous gift; see p. 637, *ante*.

(*o*) As to when equivocation arises in this respect, see p. 644, *post*.

(*p*) *Doe d. Templeman v. Martin* (1833), 4 B. & Ad. 771, *per* DENMAN, C.J., at p. 783 ("almost any evidence would be admissible for that purpose"); *Henderson v. Henderson*, [1905] 1 I. R. 353, 360 (description "R. W. H." accurately satisfied; evidence of circumstances admitted to show that W. R. H. satisfied the description as understood by the testator; evidence then admitted to show testator's intention as to which of the two he meant; this case is criticised, however, in Underhill and Strahan, *Interpretation of Wills and Settlements*, 2nd ed., p. 18); *Grant v. Grant* (1870), L. R. 5 C. P. 380, 727, Ex. Ch. (as to which see note (*s*), p. 645, *post*); *Re Bowman, Bowman v. Bowman* (1891), 8 T. L. R. 117 ("Edmund B.": evidence admitted that person of that name a lunatic, as testator knew; Edward commonly called by him Edmund); *Marks v. Marks* (1908), 40 Canada Supreme Court Reports, 210 (gift to "my wife" in will of testator married, but living with a woman not his legal wife).

(*q*) *Stringer v. Gardiner* (1859), 4 De G. & J. 468; *Re Halston, Ewen v. Halston*, [1912] 1 Ch. 435; see, further, p. 690, *post*.

(*r*) *Re Jameson, King v. Winn*, [1908] 2 Ch. 111; but compare *Re Atlay, Atlay v. Atlay* (1912), 56 Sol. Jo. 444, where the evidence was treated as direct evidence of intention and excluded.

(*s*) *Miller v. Travers* (1832), 8 Bing. 244, 247, 248. *Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur* (Bacon, *Maxims*, reg. 25).

(*t*) As to inaccuracy of descriptions generally, see pp. 684 *et seq.*, *post*.

(*a*) *Miller v. Travers*, *supra*, at p. 248. As to the rule *falsa demonstratio non nocet*, see p. 685, *post*.

(*b*) See the cases cited in notes (*d*), (*e*), p. 640, *post*, and p. 685, *post*: these cases are not overruled by *Higgins v. Dawson*, [1902] A. C. 1; see *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305; *In the Will of Cain, Linehan v. Cain*, [1913] Victorian Law Reports, 50, 57, 58.

(*c*) *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, 368; *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L., *per* TINDAL, C.J., at p. 566: "where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances"; *Re Glassington, Glassington v. Follett*, *supra*, at p. 313; Wigram, *Extrinsic Evidence*, 3rd ed., p. 42, Proposition III.



## SECT. 2.

Evidence  
Admissible  
in a Court  
of Con-  
struction.Evidence  
then admis-  
sible.Evidence of  
testator's  
knowledge.

**1244.** In all such cases, for the purpose of determining the object of the testator's bounty (*d*), or the subject of disposition (*e*), or the quantity of interest intended to be given by the will (*f*), or the other persons and things described by the will (*g*), and the facts and circumstances there referred to, a court of construction may, and must (*h*), inquire into every material fact relating to the person or thing said to be identified by that description, as, for example, to the person claiming to be that object, or the property said to be the subject of disposition, and into the circumstances of the testator and of his family and affairs (*i*).

For the same purpose evidence is receivable, further, to enable the court to ascertain all the persons and facts which were known to the testator at the time when he made his will (*k*), and thus to

(*d*) For examples of construction with the aid of evidence as to the circumstances of the donee, or of decisions that evidence was admissible, see *Abbot v. Massie* (1796), 3 Ves. 148 (gifts to "W. G." and "Mrs. G."); *Price v. Page* (1799), 4 Ves. 679 (christian name left blank); *Doe d. Le Chevalier v. Huthwaite* (1820), 3 B. & Ald. 632 (to S. H., second son of J. H., he being the third son); *Camoy's (Lord) v. Blundell* (1848), 1 H. L. Cas. 778 (to second son of E. W. of L., shown by the circumstances to mean second son of J. W. of L.); *Bernasconi v. Atkinson* (1853), 10 Hare, 345; *Re Waller, White v. Scoles* (1899), 80 L. T. 701, C. A. ("daughters" of S. shown to mean sisters of S.). As to misdescription of charities and the evidence admissible thereon, see title CHARITIES, Vol. IV., pp. 156, 158, 159.

(*e*) As, for instance, with regard to what is comprised in a given description (*Goodtitle d. Radford v. Southern* (1813), 1 M. & S. 299, 301; *Sanford v. Raikes* (1816), 1 Mer. 646, 653; *Okeden v. Clifden* (1826), 2 Russ. 309, 318; *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305 ("real estate" where testatrix had only proceeds of sale of real estate); "all facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property are admissible" (*Doe d. Templeman v. Martin* (1833), 4 B. & Ad. 771, 785). Where the devise is of land in a particular parish, evidence of general reputation as to whether the lands in question are in that parish or not is admissible (*Anstee v. Nelms* (1856), 1 H. & N. 225).

(*f*) *Lowe v. Huntingtower (Lord)* (1824), 4 Russ. 532, n.; *Blundell v. Gladstone* (1841), 11 Sim. 467, 486; *Dashwood v. Magniac*, [1891] 3 Ch. 306, 355, 356, 366, 372, C. A. (evidence of local customs of cultivation, including cutting of beech trees, and practice with regard to treatment of proceeds as income or capital, and to rights of limited owners).

(*g*) *Thomson and Baxter v. Hempenstall* (1849), 13 Jur. 814 (description of former will excepted from revocation).

(*h*) *Anstee v. Nelms*, *supra*, per BRAMWELL, B., at pp. 232, 233.

(*i*) *Doe d. Gore v. Langton* (1831), 2 B. & Ad. 680, 689, 694; *Anstee v. Nelms*, *supra*, approving Wigram, *Extrinsic Evidence*, 3rd ed., p. 51, Proposition V., which proceeds as follows: "The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words" (but see p. 647, *post*); *Dashwood v. Magniac*, *supra*; *Bunbury v. Doran* (1874), 8 I. R. C. L. 516 (testator's religious views).

(*k*) As, for instance, his knowledge of persons having a certain christian name (*In the Goods of De Rosaz* (1877), 2 P. D. 66, where the surname was omitted) or surname (*Re Gregson's Trusts* (1864), 2 Hem. & M. 504, 509, where the christian name was omitted; and see *Gregory v. Smith* (1852), 9 Hare, 708); his understanding of what was the name of a certain person (*Bradshaw v. Bradshaw* (1836), 2 Y. & C. (Ex.) 72, 88; *Camoy's (Lord) v. Blundell* (1848), 1 H. L. Cas. 778, 785; S. C., *sub ncm. Blundell v. Gladstone*

place itself in the testator's position (*l*). The court, it has been said, puts itself into the testator's arm-chair (*m*). These facts and circumstances, evidence of which may be given, may be called the material circumstances.

This principle, however, of the court putting itself in the testator's position may be of no assistance where the subject-matter of the particular dispute was not in existence at the date of his will (*n*).

**1245.** Evidence is not admissible in a court of construction directly to prove a mistake in the will in describing property or any

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Evidence  
Admissible  
in a Court  
of Con-  
struction.

Limits of  
arm-chair  
rule.

Evidence of  
mistaken  
description.

(1841), 11 Sim. 467, 470, 486; his knowledge that a person who might take under the description of the donee was dead (*Re Whorwood, Ogle v. Sherborne* (*Lord*) (1887), 34 Ch. D. 446, 450, C. A.; see *Stringer v. Gardiner* (1859), 4 De G. & J. 468, 471; his knowledge of the state of his own or a particular family (*Doe d. Thomas v. Beynon* (1840), 12 Ad. & El. 431; *Goodinge v. Goodinge* (1749), 1 Ves. Sen. 231; *Re Gregory's Settlement and Will* (1865), 34 Beav. 600; *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255, C. A.; and see p. 689, *post*; for examples as regards legitimacy, see p. 738, *post*); his knowledge that one member of a family was amply provided for, showing his motive for making a particular disposition excepting that member (*Hodgson v. Clarke* (1860), 1 De G. F. & J. 394, 397, 398, C. A.). It appears that knowledge of the state of a cousin's or remoter relative's family is not presumed (*Crook v. Whitley* (1857), 7 De G. M. & G. 490, 496; *Re Herbert's Trusts* (1860), 1 John. & H. 121, 124). Evidence of the testator's knowledge of or friendship with an object alleged to be the donee described, or of the degrees of his intimacy with such objects, was admitted in *King's College Hospital v. Wheildon* (1854), 18 Beav. 30; *Re Feltham's (Bridget) Will Trusts* (1855), 1 K. & J. 528; *Re Gregory's Settlement and Will*, *supra* (one claimant, testator's godson); *Re Noble's Trusts* (1870), 5 I. R. Eq. 140; *In the Goods of Twohill* (1879), 3 L. R. Ir. 21; *In the Goods of Brake* (1881), 6 P. D. 217; *Phelan v. Slattery* (1887), 19 L. R. Ir. 177; *Furniss v. Phear* (1888), 36 W. R. 521; *In the Goods of Chappell*, [1894] P. 98; *Re Beale, Beale v. Royal Hospital for Incurables* (1890), 6 T. L. R. 308; compare *Re Jeffery, Nussey v. Jeffery*, [1914] 1 Ch. 375; and see p. 671, *post*; in the case of a gift to a charity, evidence of his subscribing to a particular charity is admissible; see title CHARITIES, Vol. IV., p. 158.

(*l*) *Re Overhill's Trust* (1853), 1 Sm. & G. 362, 366; *Bernasconi v. Atkinson* (1853), 10 Hare, 345, *per* WOOD, V.-C., at p. 348, adopted in *Charter v. Charter* (1874), L. R. 7 H. L. 364, *per* Lord CAIRNS, L.C., at p. 377, and *Kingsbury v. Walter*, [1901] A. C. 187, *per* Lord HALSBURY, L.C., at p. 189; *Re Eve, Edwards v. Burns*, [1909] 1 Ch. 796, 799; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273, *per* Lord KINGSDOWN, at p. 288; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 763, 764; *Re Gibbs, Martin v. Harding*, [1907] 1 Ch. 465, 469. The object of such evidence is not for the purpose of speculating upon what the testator's intention may have been, but of ascertaining whether the circumstances by which he was surrounded afford any certain indication of his intention (*Blackwell v. Pennant* (1852), 9 Hare, 551, *per* TURNER, V.-C., at p. 552).

(*m*) *Boyes v. Cook* (1880), 14 Ch. D. 53, C. A., *per* JAMES, L.J., at p. 56; *Clifford v. Koe* (1880), 5 App. Cas. 447, *per* Lord HATHERLEY, at p. 462; *Fitzgerald v. Ryan*, [1899] 2 I. R. 637, *per* O'BRIEN, C.J., at p. 658: "I shall endeavour to find an armchair in his house . . . the rude seat upon which he sat will suffice"; *Re Vaughan, Scott v. British and Foreign School Society* (1901), 17 T. L. R. 278, 279; *Re Sykes, Sykes v. Sykes*, [1909] 2 Ch. 241, C. A., *per* FARWELL, L.J., at p. 251; *Wills v. Wills*, [1909] 1 I. R. 268, 276, C. A. As to a distinction between the construction of contracts and that of wills in this respect, see *Grant v. Grant* (1870), L. R. 5 C. P. 727, Ex. Ch., *per* BLACKBURN, J., at pp. 728, 729.

(*n*) *Re Price, Price v. Newton*, [1905] 2 Ch. 55, 58.



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Evidence  
Admissible  
in a Court  
of Con-  
struction.

Habits of  
testator.

When  
evidence  
closed.

donee (*o*); but where on construction of the words of the will it is clear that there is a mistake, evidence of surrounding circumstances (*p*) becomes admissible to prove how the mistake arose, in order to identify the true subject (*q*).

Evidence is admitted, therefore, of the habits of the testator (*r*), as, for example, the practice of the testator to call a certain person by a nickname (*s*) or other name by which he was not commonly known (*t*), but by which he is described in the will. Similarly, with regard to a description of property which is not accurately satisfied as ordinarily understood, evidence is admitted of the testator's habit of dealing with certain property under that description and of its accuracy as he understood it (*u*).

When any subject is thus discovered which not only is within the words of the instrument, but exhausts the whole of those words, then the investigation must stop; the court takes that interpretation and does not go further (*a*), unless it is shown that another interpretation also exhausts the words (*b*) and that there is an equivocation, or ambiguity arising from the circumstances (*c*).

Evidence merely indicative of an improbability that the testator intended to benefit certain persons is inadmissible unless a ground for that evidence is first made by proving that there is some other class which might possibly take under the description (*d*).

(*o*) See p. 630, *ante*.

(*p*) Such evidence must not amount to direct evidence of the testator's intention; for example, evidence that by a mistake of the draftsman a name has been omitted or changed would be inadmissible for this purpose; see pp. 635, 636, *ante*.

(*q*) *Selwood v. Mildmay* (1797), 3 Ves. 306; *Lindgren v. Lindgren* (1846), 9 Beav. 358, where it is explained that the doubts as to the soundness of *Selwood v. Mildmay*, *supra*, expressed in *Miller v. Travers* (1832), 8 Bing. 244, and *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 563, were founded on a misapprehension; see *Findlater v. Lowe*, [1904] 1 I. R. 519.

(*r*) *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 349.

(*s*) *Edge v. Salisbury* (1749), Amb. 70, 71; *Goodinge v. Goodinge* (1749), 1 Ves. Sen. 231; *Dowset v. Sweet* (1753), Amb. 175 (to "John S.," the testator calling him "Jacky").

(*t*) *Beaumont v. Fell* (1723), 2 P. Wms. 141, as to which case see, however, *Mostyn v. Mostyn* (1854), 5 H. L. Cas. 155, 168; *Parsons v. Parsons* (1791), 1 Ves. 266; *Re Feltham's (Bridget) Will Trusts* (1855), 1 K. & J. 528; *Lee v. Pain* (1845), 4 Hare, 201, 251; *Andrews v. Andrews* (1885), 15 L. R. Ir. 199, C. A.; *Re Ofner, Samuel v. Ofner*, [1909] 1 Ch. 60, C. A. "If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them in like manner as if his will were written in cipher or in a foreign language" (*Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, *per* Lord ABINGER, C.B., at p. 368). It seems, however, that this type of evidence should not be relied upon where there is sufficient evidence of other circumstances to render the will intelligible; see *Camoy's (Lord) v. Blundell* (1848), 1 H. L. Cas. 778, 785; S. C., *sub nom. Blundell v. Gladstone* (1841), 11 Sim. 467, 470, 486; compare pp. 637, 638, *ante*.

(*u*) *Doe d. Beach v. Jersey (Earl)* (1825), 3 B. & C. 870; *Ricketts v. Turquand* (1848), 1 H. L. Cas. 472; *Webb v. Byng* (1855), 1 K. & J. 580; *Castle v. Fox* (1871), L. R. 11 Eq. 542; *Jennings v. Jennings* (1877), 1 L. R. Ir. 552.

(*a*) *Webb v. Byng* (1855), 1 K. & J. 580, *per* WOOD, V.-C., at p. 585.

(*b*) *Sherratt v. Mountford* (1873), 8 Ch. App. 928, 930.

(*c*) As to the meaning of "equivocation," see p. 644, *post*.

(*d*) *Sherratt v. Mountford*, *supra*, *per* MELLISH, L.J., at p. 931. As to cases where such evidence is admissible, see p. 643, *post*.



**1246.** Where after the admission of the evidence of the material circumstances the language of the testator remains ambiguous or obscure, then, except in the case of equivocation (*e*), no further evidence, whether of the testator's intention or a mistake in the description or of a mistake in copying the will or otherwise, is admissible (*f*), and the gift may be void for uncertainty (*g*).

**1247.** In cases where it is shown that from some of the circumstances admitted in evidence (*h*) there is an equivocation (*i*) in the description of some person or thing, and that evidence of the surrounding circumstances is insufficient to resolve the ambiguity (*k*),

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further  
evidence.

Exception in  
cases of  
equivocation.

(*e*) See the text, *infra*.

(*f*) Wigram, *Extrinsic Evidence*, 3rd ed., p. 83, Proposition VI. Thus, declarations by the testator as to the persons or property he meant to include under a particular description, or expressions of testamentary intentions in favour of particular persons who might be so described, are inadmissible (*Willis v. Lucas* (1718), 10 Mod. Rep. 416, 417; *Andrews v. Dobson* (1788), 1 Cox, Eq. Cas. 425; *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363; *Martin v. Drinkwater* (1840), 2 Beav. 215, 218; *Doe d. Hubbard v. Hubbard* (1850), 15 Q. B. 227; *Douglas v. Fellows* (1853), Kay, 114; *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 348; *Drake v. Drake* (1860), 8 H. L. Cas. 172, 177; *McClure v. Evans* (1861), 29 Beav. 422; *Sullivan v. Sullivan* (1870), 4 I. R. Eq. 457, 460; *Re Ingle's Trusts* (1871), L. R. 11 Eq. 578, 587; *Farrer v. St. Catharine's College, Cambridge* (1873), L. R. 16 Eq. 19, 21; *Charter v. Charter* (1874), L. R. 7 H. L. 364, 370, 376, 383; *Baker v. Ker* (1882), 11 L. R. Ir. 3, 17; *Re Ely, Tottenham v. Ely* (1891), 65 L. T. 452 (as to which case see note (*m*), p. 644, *post*); *Re Whorwood, Ogle v. Sherborne (Lord)* (1887), 34 Ch. D. 446, 450, C. A.; *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255, 258, C. A.; *Paton v. Ormerod*, [1892] P. 247; *Downe v. Sheffield* (1894), 71 L. T. 292; *Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620, 624, C. A.; *Re Chenoweth, Ward v. Dwelley* (1901), 17 T. L. R. 515; *McHugh v. McHugh*, [1908] 1 I. R. 155, 159). Thus, a legacy to a debtor is *primâ facie* not a release to him of his debt (*Re Tinline, Elder v. Tinline* (1912), 56 Sol. Jo. 310; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 268, 269), and extrinsic evidence is not admitted to show that by the legacy the testator intended to release the debt (*Re Tinline, Elder v. Tinline*, *supra*; *Selwin v. Brown* (1735), 3 Bro. Parl. Cas. 607), although such evidence may be omitted, not to show such intention, but to show some extraneous act constituting a release apart from the will (*Cross v. Sprigg* (1849), 6 Hare, 552; S. C., on appeal (1850), 2 Mac. & G. 113; *Peace v. Hains* (1853), 11 Hare, 151, 154). In a court of probate, on the other hand, in cases where the question relates to the *factum* of the will, such evidence is admissible in a doubtful or ambiguous case, at all events if the declarations were made before the will (*Doe d. Ellis v. Hardy* (1836), 1 Mood. & R. 525; *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747).

(*g*) *Dowset v. Sweet* (1753), Amb. 175; *Thomas d. Evans v. Thomas* (1796), 6 Term Rep. 671; *Doe d. Hayter v. Joinville* (1802), 3 East, 172; *Drake v. Drake*, *supra*; *Richardson v. Watson* (1833), 4 B. & Ad. 787; *Re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, C. A. In cases of charitable gifts the gift may not be void, but may be administered *cy-près* (*Re Clergy Society* (1856), 2 K. & J. 615; *Re Bateman, Wallace v. Mawdsley* (1911), 27 T. L. R. 313 (charitable gift, where the conversations with solicitor preparing will were excluded); see title CHARITIES, Vol. IV., p. 156).

(*h*) The fact that, if the description is by name, the equivocation is shown on the face of the will, does not exclude the rule (*Doe d. Gord v. Needs* (1836), 2 M. & W. 129, 141, following *Doe d. Morgan v. Morgan* (1832), 1 Cr. & M. 235).

(*i*) Bacon, *Maxims*, reg. 25; and see p. 644, *post*.

(*k*) *Healy v. Healy* (1875), 9 I. R. Eq. 418, *per SULLIVAN, M.R.*, at p. 421: "I am one of those who think that parol evidence in cases of this description ought to be a matter of the last resort"; see Elphinstone, Introduction

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then evidence has been admitted to prove the testator's declarations of his intention as to which of the persons and things so described was meant by him (*l*).

An equivocation in this sense arises when the description in the will, considered in the light of the context, is on the face of it apt to describe and determine, unambiguously and without obscurity at the time when the subject is to be ascertained (*m*), any of two or

to Conveyancing, 6th ed., p. 35; and note (*s*), p. 645, *post*. In *Careless v. Careless* (1816), 1 Mer. 384; *Doe d. Thomas v. Beynon* (1840), 12 Ad. & El. 431; *Reynolds v. Whelan* (1847), 16 L. J. (CH.) 434; *Jefferies v. Michell* (1855), 20 Beav. 15; *Phillips v. Barker* (1853), 1 Sm. & G. 583; *Re Kilvert's Trusts* (1871), 7 Ch. App. 170, it appears that the only evidence in fact admitted was evidence of the circumstances of the testator and donee, and not evidence of declarations of the testator, or other evidence of his intention. In *Reynolds v. Whelan*, *supra*, on appeal (not reported), it is said that the evidence of intention was considered conclusive; see *Re Feltham's (Bridget) Will Trusts* (1855), 1 K. & J. 528, *per* WOOD, V.-C., at p. 532. Evidence of the surrounding circumstances in such a case includes evidence of the intimacy of the testator with the various claimants, the presumption being that the testator intended that person whom he knew best; see p. 671, *post*.

(*l*) *Jones v. Newman* (1750), 1 Wm. Bl. 60; *Doe d. Morgan v. Morgan* (1832), 1 Cr. & M. 235; *Doe d. Gord v. Needs* (1836), 2 M. & W. 129; *Fleming v. Fleming* (1862), 1 H. & C. 242; *Phelan v. Slattery* (1887), 19 L. R. Ir. 177; see also *A.-G. v. Hudson* (1720), 1 P. Wms. 674; compare *Re Jeffery, Nussey v. Jeffery*, [1914] 1 Ch. 375; and the cases in note (*o*), p. 645, *post*, where inaccuracies occurred. The rule is also stated in *dicta* in the following cases, namely: *Cheyney's (Lord) Case* (1591), 5 Co. Rep. 68 a, 68 b, *per* WRAY and ANDERSON, C.JJ., citing *Peynel v. Peynel* (1373), Y. B. 47 Edw. 3, 16 b; *Lansdown's (Lord) Case* (1712), 10 Mod. Rep. 96, 100; *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, *per* Lord ABINGER, C.B., at p. 368; *Re Kilvert's Trusts*, *supra*, *per* JAMES, L.J., at p. 173; *Charter v. Charter* (1874), L. R. 7 H. L. 364, *per* Lord CHELMSFORD, at p. 370, and Lord CAIRNS, L.C., at p. 377. Some of the above decisions and *dicta* were considered in *Bennett v. Marshall* (1856), 2 K. & J. 740, where, however, the character of the parol evidence held admissible is not stated. In *Re Mayo, Chester v. Keirl*, [1901] 1 Ch. 404, FARWELL, J., at p. 406, said that the Court of Appeal might some time have to determine how far the cases allowing such evidence of intention are consistent with the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); see also Wigram, *Extrinsic Evidence*, 3rd ed., p. 101, Proposition VII.; and as to the cases where the rule has been stated in relation to the interpretation of instruments *inter vivos*, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 454.

(*m*) As to the rules of construction relating to the time for ascertaining the property given, see p. 691, *post*; and for ascertaining the donee, p. 713, *post*. It has been held that where a donee is described by name, and there has been a person in existence known to the testator answering to the exact description of the donee, while at the date of the will or of the death of the testator there is no such person, parol evidence is admissible to prove not only the testator's intimacy with a person who exists to whom a sufficient part of the description is applicable, but even his intention to make the gift to that person (*Re Halston, Ewen v. Halston*, [1912] 1 Ch. 435, not following *Re Ely, Tottenham v. Ely* (1891), 65 L. T. 452, as being disapproved by FARWELL, J., in *Re Ofner, Samuel v. Ofner*, [1909] 1 Ch. 60, 63, C. A., and following *Re Blackman* (1852), 16 Beav. 377). In *Re Ely, Tottenham v. Ely*, *supra*, the evidence relied on merely went to prove intention, and was held inadmissible as such; it is submitted that the disapproval of FARWELL, J., of the decision in this case did not extend to the *ratio decidendi* (see *Re Mayo, Chester v. Keirl*, *supra*, at p. 406); but that it was meant that the case ought to have been decided otherwise on evidence, properly admissible, of



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struction.

more different subjects, either accurately (*n*) or subject to inaccuracies which are blanks in the description or which have to be rejected as a false description not applying to anyone (*o*) or are otherwise negligible (*p*). An equivocation does not arise where part of the description applies to one subject and another part to another subject (*q*); or in cases where from the context of the whole will (*r*), or by the aid of any canon of construction applicable to the will (*s*),

the surrounding circumstances, including the knowledge of the testator as to the death of the person described; see *In the Will of Loughlin, Acheson v. O'Meara*, [1906] Victorian Law Reports, 597, 601, 603, where *Re Ely, Tottenham v. Ely* (1891), 65 L. T. 452, is explained. In *Stringer v. Gardiner* (1859), 4 De G. & J. 468, the case was decided on "such part of the evidence as is admissible," and the evidence of intention was not alluded to. In this respect *Re Blackman* (1852), 16 Beav. 377, and *Re Halston, Ewen v. Halston*, [1912] 1 Ch. 435, are difficult to reconcile with *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, and other cases where evidence of intention was excluded; see note (*f*), p. 643, *ante*.

(*n*) Where the donee is described by a christian name, and there are found two persons, one having that name only, and the other having that name with others, this has been treated as an accurate description under this rule, and an equivocation has been held to arise (*Bennett v. Marshall* (1856), 2 K. & J. 740; *Re Wolverton Mortgaged Estates* (1877), 7 Ch. D. 197, 199, where, however, the decision is also sufficiently grounded on evidence of material circumstances; and see *Re Halston, Ewen v. Halston, supra*).

(*o*) *Price v. Page* (1799), 4 Ves. 679 (blank); *Still v. Hoste* (1821), Madd. & G. 192 (name wrong); *Careless v. Careless* (1816), 1 Mer. 388 ("to Robert C. my nephew the son of Joseph C.," the testator having two nephews Robert, and no brother Joseph). These three cases were explained in *Doe d. Hiscocks v. Hiscocks, supra, per* Lord ABINGER, C.B., at p. 370, the inaccurate part of the description being either a mere blank or applicable to no person at all; see also *Garner v. Garner* (1860), 29 Beav. 114 (a settlement on "J. G. of S., and E. his wife," there being a J. G. of B. whose wife's name was E., a niece of the settlor; and a J. G. of S., whose wife was H.); *In the Estate of Hubbuck*, [1905] P. 129 ("my granddaughter," there being three).

(*p*) *Henderson v. Henderson*, [1905] 1 I. R. 353 (inaccuracy of name, as understood by the testator).

(*q*) *Doe d. Hiscocks v. Hiscocks supra*; *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 348, 349; *Charter v. Charter* (1874), L. R. 7 H. L. 364; *In the Goods of Chappell*, [1894] P. 98. In *In the Goods of Brake* (1881), 6 P. D. 217, the evidence of intention was not relied upon.

(*r*) *Doe d. Westlake v. Westlake* (1820), 4 B. & Ald. 57 (to "M. W. my brother and S. W. my brother's son," there being two persons S. W., sons of brothers of the testator).

(*s*) In *Webber v. Corbett* (1873), L. R. 16 Eq. 515, one of the persons was described clearly in another part of the will, and the presumption as to repeated words (see p. 681, *post*) was applied; compare *Healy v. Healy* (1875), 9 I. R. Eq. 418. In *Doe d. Morgan v. Morgan* (1832), 1 Cr. & M. 235, a similar case, this presumption was not alluded to, and evidence of intention was admitted; and in *Phelan v. Slattery* (1887), 19 L. R. Ir. 177, it was excluded by the context, and evidence of intention was admitted. In *Re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83, C. A., one of the persons claiming was illegitimate; the presumption as to legitimacy (see p. 735, *post*) was applied, and evidence of intention was excluded. In *In the Goods of Ashton*, [1892] P. 83, this presumption was excluded by the terms of the will; the description was accordingly held applicable to both the legitimate and illegitimate claimants, and evidence of intention was held admissible. In *Grant v. Grant* (1870), L. R. 5 C. P. 380, 727, Ex. Ch., where the devise was to "my nephew J. G.," and the testator had both a nephew and a nephew by affinity of that name, evidence was held admissible to show the relation in which they respectively stood to the



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or from the circumstances of the case properly admissible in evidence (*t*), it can be gathered which of the different subjects was intended: nor does it arise in cases where the description is on the face of it indefinite, and not apt to determine any subject, as, for example, in a devise to "one of the sons of a named person," who has more than one son; in the last-mentioned cases no evidence is admissible to resolve the patent ambiguity (*a*).

The declarations of the testator with regard to his intention need not be contemporaneous with the will, but may be of prior or of later date; and may have more or less weight according to the time and circumstances under which they were made (*b*).

SUB-SECT. 4.—*Evidence to Aid Construction apart from Identification.*

Difficulties of  
construction.

**1248.** The court construes the whole will by the light of the knowledge of words and expressions, evidence to explain which may have been admitted, and of the persons and things described by the will and the facts and circumstances there mentioned which have been identified by the evidence of the material circumstances (*c*); but evidence is not admitted to enable the court to construe a will where the words themselves require no interpretation, but the difficulty is only in the construction of the sentence in which the words occur (*d*).

Where matter  
in doubt  
not one of  
description.

Where, therefore, the matter in doubt does not relate to the persons and things described by the will, then even though it can

testator, and that he did not know of the existence of the former, but without reference to the evidence of intention, the question of admissibility of which was not decided. In *Wells v. Wells* (1874), L. R. 18 Eq. 504, JESSEL, M.R., at p. 506, and in *Merrill v. Morton* (1881), 17 Ch. D. 382, MALINS, V.-C., at p. 386, dissented from *Grant v. Grant* (1870), L. R. 5 C. P. 380, 727, Ex. Ch., on the question of the meaning of "nephew," as not being given its ordinary sense; see, however, *In the Goods of Ashton*, [1892] P. 83, *per* JEUNE, J., at pp. 86, 87; *Re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83, C. A., *per* A. L. SMITH, L.J., at p. 87. As to the general rule with regard to the ordinary meaning of words, see p. 655, *post*; and with regard to relationships, p. 739, *post*.

(*t*) *Douglas v. Fellows* (1853), Kay, 114, *per* WOOD, V.-C., at p. 120, citing *Fox v. Collins* (1761), 2 Eden, 107 (bequest to "the said A. C.," there being two of the name mentioned in the will); *Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620, C. A. (bequest of "my 140 shares," where testatrix had 240 partly paid and forty fully paid).

(*a*) *Strode v. Russel (Lady)* (1708), 2 Vern. 621, *per* TRACY, J., at p. 624; see p. 680, *post*.

(*b*) *Doe d. Allen v. Allen* (1840), 12 Ad. & El. 451, 455; and see *Langham v. Sanford* (1816), 19 Ves. 641, *per* Lord ELDON, L.C., at pp. 649, 650; *Dwyer v. Lysaght* (1812), 2 Ball & B. 156, 162.

(*c*) Thus, a gift "to A. or B." where A. and B. represent persons ascertained by description, cannot be construed until it is known who A. and B. respectively are, and in what relation, if any, the persons represented by B. stand to those represented by A., so as to be able to supply what is the contingency to be understood as involved in the word "or" (*Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200, *per* JOYCE, J., at p. 203; *Re Sibley's Trusts* (1877), 5 Ch. D. 494, 499); see p. 728, *post*.

(*d*) *Higgins v. Dawson*, [1902] A. C. 1, 10, 11; *Smith v. Conder* (1878), 9 Ch. D. 170, 172. As, for instance, to prove to which of two antecedents a given relative pronoun was intended to refer (*Castledon v. Turner* (1745), 3 Atk. 257; see note (*e*), p. 655, *post*); or to rebut a presumption which arises from the construction of words simply *quâ* words (*Coote v. Boyd, Coote v. Coote* (1789), 2 Bro. C. C. 521, *per* Lord THURLOW, L.C., at p. 526).

be shown by evidence that the intention of the testator was different from that shown by the language of the will, the language of the will, if clear, must settle the rights of the parties (*e*).

Where the meaning of the will is ambiguous, or there is a question of construction of an executory trust (*f*), the court, for the purpose of construction generally, resorts to the surrounding circumstances as a help in ascertaining the meaning, and places itself in the testator's position, in order to avoid attributing to him a capricious or unreasonable intention (*g*).

**1249.** Although, as a general rule, the interpretations put upon a will by the parties claiming under it are irrelevant (*h*), yet in the case of ancient wills the court may consider the contemporary or modern usage of persons acting under the will as explaining its terms, on the ground that it is to be presumed that persons who were concerned have not been committing a breach of trust from the commencement to the present time (*i*); but this is done only in cases where the meaning is doubtful (*k*).

**1250.** In construing wills, the events which might possibly have happened after the date of the will are to be considered as well as those which did happen (*l*); but the ascertainment of the testator's intention shown by the will cannot be varied by events which occur afterwards (*m*).

**1251.** Where the words of the will aided by evidence of the material facts of the case, or evidence of his intention where admissible under the above rules (*n*), are insufficient to determine the testator's meaning, no evidence is admissible to prove or

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testator's  
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Usage of  
persons acting  
under a will.

Events which  
might have  
happened.

Evidence of  
intention  
excluded.

(*e*) *Higgins v. Dawson*, [1902] A. C. 1, 8, 9, 10; S. C., *sub nom. Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756, 763, 764, C. A.; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512, 519. Certain early cases, such as *Pendleton v. Grant* (1705), 1 Eq. Cas. Abr. 230, pl. 2 (evidence as to meaning of "as," used ambiguously), where evidence of intention was held admissible, must be considered overruled.

(*f*) *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543, 561.

(*g*) *Belaney v. Belaney* (1867), 2 Ch. App. 138, 142; *Hensman v. Fryer* (1867), 3 Ch. App. 420, 424; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 876; *Gordon v. Gordon* (1871), L. R. 5 H. L. 254, 273; *Leslie v. Rother (Earl)*, [1894] 2 Ch. 499, 514, C. A.; *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, 429, 431, C. A. (construction of shifting clause); see p. 669, *post*. Compare Wigram, *Extrinsic Evidence*, 3rd ed., p. 51, cited in note (*i*), p. 640, *ante*, and criticised on this point by Hawkins in *Juridical Society Papers*, Vol. II., pp. 298, 318.

(*h*) A mistake as to the construction of a will is not a mistake of law (*Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 223, 234; *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, 111, C. A.); see title MISTAKE, Vol. XXI., p. 4.

(*i*) *A.-G. v. Sidney Sussex College* (1869), 4 Ch. App. 722, *per* Lord HATHERLEY, L.C., at p. 732. As to this rule generally, in case of deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 451; and in the case of gifts to charities, see title CHARITIES, Vol. IV., p. 154.

(*k*) *A.-G. v. Rochester Corporation* (1854), 5 De G. M. & G. 797, 822, C. A.

(*l*) *Boreham v. Bignall* (1850), 8 Hare, 131, 137; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 109; *Harding v. Nott* (1857), 7 E. & B. 650, 657, 658.

(*m*) *Re Clark's Trusts* (1863), 32 L. J. (CH.) 525, *per* WOOD, V.-C., at p. 529.

(*n*) See pp. 637, 646, *ante*.

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struction.

Matters  
binding on  
donee by  
his under-  
taking.

explain what the testator intended (*o*); and the gift is void for uncertainty (*p*).

SUB-SECT. 5.—*Evidence of Obligations of the Donee.*

**1252.** In certain cases evidence is admissible to prove matters not disclosed by the will, which are binding on a donee under an express or implied undertaking on his part, made with the testator. Thus, where a gift in a will is either absolute (*q*) or upon trusts or conditions not disclosed by the will (*r*), and it can be proved (*s*) that either before (*t*) or after (*a*) the date of the will, during the testator's lifetime (*b*), the donee received from the testator a communication of certain trusts or conditions to be attached to the gift and to be binding on the donee (*c*), and that the donee accepted the gift on those trusts and conditions, either by his express agreement or by his silence (*d*), and thereby

(*o*) *Lansdown's (Lord) Case* (1712), 10 Mod. Rep. 96, 99, 100; *Herbert v. Reid* (1810), 16 Ves. 481, 489 (evidence admitted not to prove intention as to a servant's legacy, but to prove the fact of service).

(*p*) Wigram, *Extrinsic Evidence*, 3rd ed., p. 83, Proposition VI.; as to cases where the descriptions are uncertain, see p. 643, *ante*.

(*q*) *Burney v. Macdonald* (1845), 15 Sim. 6; *Russell v. Jackson* (1852), 10 Hare, 204; *Re Spencer's Will* (1887), 57 L. T. 519, C. A.

(*r*) As, for instance, where they either are said to be known to the donee, or are shown by some other document (*Crook v. Brooking* (1688), 2 Vern. 50, 108; *Pring v. Pring* (1689), 2 Vern. 99; *Smith v. Attersoll* (1826), 1 Russ. 266; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; *Re Huxtable, Huxtable v. Crawford*, [1902] 2 Ch. 793, C. A.; and see *Johnson v. Ball* (1851), 5 De G. & Sm. 85, explained in *Re Fleetwood, Sidgreaves v. Brewer, supra*, at pp. 603, 604).

(*s*) The trusts and conditions may be established either on the confession of the donee (*Re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220, C. A.; *Re Huxtable, Huxtable v. Crawford, supra*), or against him by evidence *aliunde* (*Podmore v. Gunning* (1836), 7 Sim. 644); but in all cases the evidence must show conduct of the donee showing acceptance (*French v. French*, [1902] 1 I. R. 172, H. L.; *Re Gardom, Le Page v. A.-G.*, [1914] 1 Ch. 663, C. A.).

(*t*) *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422, 430, 431.

(*a*) *Moss v. Cooper* (1861), 1 John. & H. 352, *per* Wood, V.-C., at p. 366: "a bargain before the will is not at all essential"; compare *Wekett v. Raby* (1725), 2 Bro. Parl. Cas. 386; *Morrison v. M'Ferran*, [1901] 1 I. R. 360.

(*b*) But not after his death (*Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531); compare *Re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591.

(*c*) For cases where the communications were not intended to be binding, see *Podmore v. Gunning, supra*; *Re Pitt Rivers, Scott v. Pitt Rivers*, [1902] 1 Ch. 403, C. A.; *Sullivan v. Sullivan*, [1903] 1 I. R. 193; and title TRUSTS AND TRUSTEES, p. 21, *ante*.

(*d*) The acceptance may be made expressly or silently, as where the donee does not dissent on the communication being made to him (*Russell v. Jackson* (1852), 10 Hare, 204; *Moss v. Cooper, supra*, at pp. 370, 371); but in the latter case the evidence of acceptance must leave no doubt in the mind of the tribunal (*French v. French, supra*, at p. 213); as to acceptance by conduct, compare title CONTRACT, Vol. VII., pp. 350, 351 (formation of a contract). It has been said that the doctrine should not be applied to the case of a person who has shown no complicity in getting the will made and who, upon the first communication which he received on the subject, sought to induce the testator to make a different arrangement; see *McCormick v. Grogan* (1869), L. R. 4 H. L. 82, *per* Lord HATHERLEY, L.C., at p. 93.



induced the testator to make the gift, or to leave the gift already made unrevoked, then evidence of these trusts or conditions is admissible, except in so far as such evidence would contradict the will (e).

In such cases evidence is admitted, not as completing the incomplete will of the testator, or otherwise showing his intention (f), but as evidence of the obligation accepted by and binding on the donee (g), and is admitted only to prevent fraud on his part (h); such obligation in some cases may make the donee a trustee (i).

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Object of  
such  
evidence.

SUB-SECT. 6.—*Evidence to Support and Rebut Presumptions of Fact.*

**1253.** In cases where according to equitable doctrines a presumption on an inference from the facts of the case is raised (k), as in the case of the presumptions against double portions, or with respect to satisfaction of portions by legacies and of legacies by portions (l), parol evidence is admissible to repel the presumption, and counter-evidence is then admissible to support it (m). Where,

Evidence  
relating to  
certain pre-  
sumptions.

(e) *Re Huxtable, Huxtable v. Crawford*, [1902] 2 Ch. 793, C. A.; *O'Brien v. Condon*, [1905] 1 I. R. 51, where trusts were completely disclosed by the will.

(f) *Burney v. Macdonald* (1845), 15 Sim. 6, where SHADWELL, V.-C., at p. 12, said that he could not look at certain letters signed by devisees either as testamentary instruments or as evidence of the testator's intention; they were extrinsic to the will, and expressed, not his will, but theirs. In cases where the evidence proves a secret trust, the beneficiaries under that trust do not take under the will, but under the trust (*O'Brien v. Condon, supra*); but the effect may be to compel the trustee to give effect to the secret trust as if the property therein comprised had been specifically bequeathed by the will to the *cestui que trust* (*Re Maddock, Llewellyn v. Washington*, [1902] 2 Ch. 220, C. A.).

(g) *Re Spencer's Will* (1887), 57 L. T. 519, 521, C. A. It is accordingly essential to show the communication of the trust or condition by the donee and acceptance by him (*Jones v. Badley* (1868), 3 Ch. App. 362; *Re Pitt Rivers, Scott v. Pitt Rivers*, [1902] 1 Ch. 403, C. A., per VAUGHAN WILLIAMS, L.J., at p. 407; see *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615, 625). A test in such cases is, therefore, to consider the case as unaffected by the Statute of Frauds (29 Car. 2, c. 3) or the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), and then to inquire whether a trust or obligation has been imposed by the testator and accepted by the donee in such a way that a court of equity would enforce it as binding on the donee (*Jones v. Badley, supra*, per Lord CAIRNS, L.C., at p. 364).

(h) *McCormick v. Grogan* (1869), L. R. 4 H. L. 82, 89, 97; *Re Stead, Witham and Andrew*, [1900] 1 Ch. 237; *Re Pitt Rivers, Scott v. Pitt Rivers, supra*.

(i) See, generally, title TRUSTS AND TRUSTEES, p. 21, *ante*. As to the cases where such evidence of acceptance by one of several donees, taking concurrently, makes the other donees trustees, see *ibid.*, p. 22, *ante*.

(k) Hawkins, Wills, 2nd ed., Preface, p. ix, explains that these anomalous cases arose on account of the equitable doctrines in question being derived from the civil law, where parol evidence of intention to rebut inferences from rules of construction was admissible. In all cases the rules appear to be presumptions of fact, and not to arise out of the words of the will; see note (n), p. 650, *post*.

(l) See title EQUITY, Vol. XIII., pp. 131 *et seq.*

(m) *Hurst v. Beach* (1821), 5 Madd. 351, per LEACH, V.-C., at p. 360; *Hall v. Hill* (1841), 1 Dr. & War. 94; *Kirk v. Eddowes* (1844), 3 Hare, 509, per WIGRAM, V.-C., at p. 517; *Barrs v. Fewkes* (1865), 11 Jur. (N. S.) 669, per WOOD, V.-C.; *Re Tussaud's Estate, Tussaud v. Tussaud* (1878),

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struction.

however, the presumptions arise from the construction of the words of the will simply, no evidence can be admitted (*n*), nor is evidence admissible to raise such a presumption of fact (*o*). Such evidence is allowed, not as altering the will or proving the testamentary intention, but as proving some personal obligation on the part of the donee binding on his conscience (*p*), or as explaining acts and events taking place outside the will (*q*). Similarly, evidence is admissible to rebut, or to support when rebutted, resulting or constructive trusts (*r*), or the claims of an executor to a residue undisposed of as against the Crown (*s*) but not as against the next of kin (*t*).

Evidence as  
to gift to  
executor.

**1254.** Where a testator has expressed, outside his will, the intention of forgiving a debt, or making a gift of personal estate belonging to him, to one who upon his death becomes his executor, the intention meanwhile continuing unchanged, the executor is, it seems, entitled to hold the property for his own benefit, and the court has admitted extrinsic evidence of the intention (*a*); but this rule is not to be extended further, as, for example, to a mere promise to give on a future occasion (*b*).

SUB-SECT. 7.—*Character of the Evidence.*

Instructions  
for will.

**1255.** The instructions of the testator for the preparation of his will cannot be given in evidence to prove his intentions (*c*), except

9 Ch. D. 363, 373, 374, C. A.; and see title EQUITY, Vol. XIII., pp. 136, 139.

(*n*) *Coote v. Boyd*, *Coote v. Coote* (1789), 2 Bro. C. C. 521, *per* Lord THURLOW, L.C., at p. 527. Thus, the question whether legacies are cumulative or substitutional is a question of construction merely, and no evidence is admissible (*Hall v. Hill* (1841), 1 Dr. & War. 94; *Wilson v. O'Leary* (1872), 7 Ch. App. 448, 456; *contra*, *Hubbard v. Alexander* (1876), 3 Ch. D. 738, where the evidence was admitted to show the duplicate nature of the instruments). Such evidence would amount to a contradiction or amplification of the words of the will, and no evidence for this purpose is admissible; see p. 635, *ante*.

(*o*) *Re Tussaud's Estate*, *Tussaud v. Tussaud* (1878), 9 Ch. D. 363, C. A., *per* JAMES, L.J., at p. 373.

(*p*) *Re Shields*, *Corbould-Ellis v. Dales*, [1912] 1 Ch. 591, 599, 600, explaining *Hall v. Hill*, *supra*, and *Kirk v. Eddowes* (1844), 3 Hare, 509, 516, 520, and following *Fowkes v. Pascoe* (1875), 10 Ch. App. 343, *per* JAMES, L.J., at p. 350. As to evidence of personal obligations of the donee, see p. 648, *ante*.

(*q*) *Hall v. Hill*, *supra*, at p. 116.

(*r*) See title TRUSTS AND TRUSTEES, pp. 47 *et seq.*, *ante*.

(*s*) *Re Bacon's Will*, *Camp v. Coe* (1886), 31 Ch. D. 460; see titles DESCENT AND DISTRIBUTION, Vol. XI., p. 28; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 284, 285.

(*t*) *Love v. Gaze* (1845), 8 Beav. 472; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284.

(*a*) *Strong v. Bird* (1874), L. R. 18 Eq. 315; *Re Applebee*, *Leveson v. Beales*, [1891] 3 Ch. 422; *Re Stewart*, *Stewart v. McLaughlin*, [1908] 2 Ch. 251, 255, where the grounds of the rule are stated; *Re Pink*, *Pink v. Pink*, [1912] 2 Ch. 528, C. A.; *Re Goff*, *Featherstonhaugh v. Murphy* (1914), 136 L. T. Jo. 510.

(*b*) *Re Innes*, *Innes v. Innes*, [1910] 1 Ch. 188; and see, further, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 270.

(*c*) *Towers v. Moor* (1689), 2 Vern. 98; *Doe d. Hubbard v. Hubbard* (1850), 15 Q. B. 227; *Drake v. Drake* (1860), 8 H. L. Cas. 172.

in the cases named where evidence of intention is admissible (*d*), but may be admitted in any case as evidence identifying the donee and not as evidence of intention (*e*).

**1256.** Similar considerations apply to revoked wills (*f*), a draft of the will (*g*), letters (*h*), papers or sayings of the testator (*i*). Documents other than the will cannot be referred to for the purpose of affecting the construction of the will (*k*), except where they are admissible in evidence under the above rules (*l*) or are expressly referred to in the will (*m*).

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Other docu-  
ments of  
testator.

### SECT. 3.—General Principles of Construction.

#### SUB-SECT. 1.—*Intention Collected from the Will taken as a Whole.*

**1257.** The only principle of construction which is applicable without qualification to all wills (*n*), and overrides every other rule of construction, is as follows:—The intention of the testator is collected from a consideration of the whole will (*o*) taken in connection with any evidence properly admissible (*p*), and the meaning of the will and of every part of it is determined according to that intention (*q*).

Leading  
principle of  
construction.

(*d*) See p. 643, *ante*.

(*e*) *In the Estate of Hubbuck*, [1905] P. 129, 135; *Re Ofner, Samuel v. Ofner*, [1909] 1 Ch. 60, C. A.; and see *Re Bateman, Wallace v. Mawdsley* (1911), 27 T. L. R. 313, where such evidence was excluded.

(*f*) *Richardson v. Watson* (1820), 4 B. & Ad. 787; *Re Feltham's (Bridget) Will Trusts* (1855), 1 K. & J. 528, 532; *Re Waller, White v. Scoles* (1899), 80 L. T. 701, C. A.; *Re Smith, Smith v. Johnson* (1904), 20 T. L. R. 287.

(*g*) *Miller v. Travers* (1832), 8 Bing. 244; *Bradshaw v. Bradshaw* (1836), 2 Y. & C. (EX.) 72.

(*h*) *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 354.

(*i*) *Bertie v. Falkland* (1798), 1 Salk. 231 (papers etc.); *Strode v. Falkland (Lady)* (1708), 3 Rep. Ch. 90 [169]; *Bennet v. Davis* (1725), 2 P. Wms. 316, 318; *Herbert v. Reid* (1810), 16 Ves. 481, 490; *Leeds (Duke) v. Amherst (Earl)* (1844), 9 Jur. 359; *British Home and Hospital for Incurables v. Royal Hospital for Incurables* (1904), 90 L. T. 601, C. A.

(*k*) *Hughes v. Turner* (1835), 3 My. & K. 666, 697, 698 (revoked will); *Randall v. Daniel* (1857), 24 Beav. 193, 206; compare *Doe d. Brown v. Brown* (1809), 11 East, 441; *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L.

(*l*) See p. 643, *ante*.

(*m*) See p. 634, *ante*.

(*n*) The rule which in practice is applied first is the rule as to giving words their ordinary meaning; see *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 876; *Gorringe v. Mahlstedt*, [1907] A. C. 225, 227; and p. 655, *post*; but there are restrictions on that rule; see note (*b*), p. 655, *post*.

(*o*) *Baddeley v. Leppingwell* (1764), 3 Burr. 1533, 1541; *Thellusson v. Woodford, Woodford v. Thellusson* (1799), 4 Ves. 227, 329; *Martin v. Lee* (1860), 14 Moo. P. C. C. 142, 153; *Crumpe v. Crumpe*, [1900] A. C. 127, 130, 132.

(*p*) *Stanley v. Stanley* (1862), 2 John. & H. 491, 513; *Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138, 143. Although a will is unambiguous on the face of it, yet extrinsic circumstances may show that the words are to be given a meaning different from that they apparently signify (*Crook v. Whitley* (1857), 7 De G. M. & G. 490, *per* Lord CRANWORTH, L.C., at p. 495, giving as an instance the case of a gift to the children of a particular person where there are no children, but grandchildren; see note (*m*), p. 744, *post*).

(*q*) *Manning's Case* (1609), 8 Co. Rep. 93 b, 95 b ("the intention of the



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Form of expression considered, but unimportant.

Meaning given by will, used as dictionary.

**1258.** A will is, as a rule, generally construed as the court would construe any other document (*r*), subject to this, that if the intention is shown, the mode of expression of that intention (*s*) and the form and language of the will are unimportant. Thus, the want of the technical words which are necessary in some instruments for the purpose of giving expression to intention (*t*), or any error in grammar (*u*), or the want or inaccuracy of punctuation marks, is then immaterial (*w*); in all such cases a benevolent construction is adopted (*a*). The skill in drafting shown by the will is considered (*b*).

**1259.** For the purpose of ascertaining the intention the will is read, in the first place, without reference to or regard to the consequences of any rule of law or canon of construction (*c*).

devisor expressed in his will is the best expositor, director and disposer of his words"); *Doe d. Long v. Laming* (1760), 2 Burr. 1100, 1112. As to the general rule relating to intention, see p. 626, *ante*. "The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words and to supply the place of express words, in cases of difficulty or ambiguity" (*Re Haygarth, Wickham v. Haygarth*, [1913] 2 Ch. 9, *per* JOYCE, J., at p. 15, citing Hawkins, Wills, 2nd ed., p. 6; *Re Patterson, Dunlop v. Greer*, [1899] 1 I. R. 324).

(*r*) *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., *per* COTTON, L.J., at p. 876.

(*s*) *Cave v. Cave* (1762), 2 Eden, 139, 144.

(*t*) *Strong d. Cummin v. Cummin* (1759), 2 Burr. 767, 770; *Ralph v. Carrick*, *supra*; and see p. 764, *post*.

(*u*) *Falsa grammatica non nocet* (*Jones v. Morgan* (1773), as cited in *Lytton v. Lytton* (1793), 4 Bro. C. C. 441, 460 ("no matter what words the testator has made use of"); *Re Norman's Trust* (1853), 3 De G. M. & G. 965, 967, 968, C. A.; *Eden v. Wilson* (1852), 4 H. L. Cas. 257, 284; *Hall v. Warren* (1861), 9 H. L. Cas. 420, 427). At the same time, one must not divorce language from its ordinary meaning by introducing a mere suggestion of false grammar (*Gorringe v. Mahlstedi*, [1907] A. C. 225, 227).

(*w*) *Gordon v. Gordon* (1871), L. R. 5 H. L. 254, 276, approving *Sanford v. Raikes* (1816), 1 Mer. 646, 651; *Gauntlett v. Carter* (1853), 17 Beav. 586. The court may consider the punctuation used; see p. 633, *ante*.

(*a*) *In testamentis, benignior interpretatio facienda est* (Co. Litt. 112 a, b; *Jones v. Price* (1841), 11 Sim. 557, 565; *Lang v. Pugh* (1842), 1 Y. & C. Ch. Cas. 718, 725; *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35, 41; *Re Speakman, Unsworth v. Speakman* (1876), 4 Ch. D. 620, 625). The testator is then considered to be *inops consilii* (*Lewis v. Rees* (1856), 3 K. & J. 132, 146, 147).

(*b*) The fact that the will shows that it was drawn by the testator himself or by a skilled lawyer on his behalf is considered (*Richards v. Davies* (1863), 13 C. B. (N. S.) 69, 86, 861, Ex. Ch.; *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496, 499); and the fact may guide the court as to the force to be given to technical words (*Thellusson v. Rendlesham* (Lord), *Thellusson v. Thellusson, Hare v. Roberts* (1859), 7 H. L. Cas. 429, 486, 490, 498, 504); a testator who is *inops consilii* will be supposed to use words in a popular and not in a legal sense (*Forth v. Chapman* (1720), 1 P. Wms. 663, 666); but in all cases the principles of construction which are applicable are the same (*Weale v. Ollive* (No. 2) (1863), 32 Beav. 421, 423).

(*c*) *Hodgson v. Ambrose* (1780), 1 Doug. (K. B.) 337, 341; *Scarborough (Earl) v. Doe d. Savile* (1836), 3 Ad. & El. 897, 963, Ex. Ch.; *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524, *per* Lord ST. LEONARDS, L.C., at p. 545; *Macpherson v. Stewart* (1858), 28 L. J. (CH.) 177; *Green v. Gascoyne*

Words are given that meaning which is rendered necessary in the circumstances of the case by the context of the whole will (*d*), the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it (*e*). The will itself is taken as the dictionary from which the meaning of the words is ascertained (*f*), however inaccurate such meaning would be in ordinary or legal use (*g*). The only qualification on this application of the general principle is that a clear context is required in order to exclude the usual meaning of a word (*h*). Relative terms and other terms needing a context to make them intelligible can only be explained by the context (*i*).

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struction.

SUB-SECT. 2.—*Scope of the Will Considered in Doubtful Cases.*

**1260.** In cases where, in applying the last rule, a context is found which is sufficient to control the meaning of the words, but the words in such context are ambiguous, contradictory, or obscure, or where the words have no special meaning given them by the context, but have two or more meanings in ordinary use (*k*), the court adopts that construction which it considers that the testator, in the circumstances of the case, probably meant by the words of

Case of words  
ambiguous  
in context.

(1865), 4 De G. J. & Sm. 565, 569; *Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208, 213; *Aplin v. Stone*, [1904] 1 Ch. 543; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84, 89; *Edwards v. Edwards*, [1909] A. C. 275, 277. The rules of law are applied to the intention thus collected in order to see whether the court is at liberty to carry that intention into effect (*De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524, 545). A void limitation may be referred to in explanation of the testator's intention (*Martin v. Martin* (1866), L. R. 2 Eq. 404, 411 (but as to the rule of law stated in this case, see note (*m*), p. 831, *post*); *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231). It has been suggested, however, that less weight may be given to an indication in an inoperative clause (*Re Watkins, Maybery v. Lightfoot* (1913), 108 L. T. 237, 239, C. A. (reversed, *sub nom. Lightfoot v. Maybery*, [1914] W. N. 180, H. L.), as explained in *Re Johnson, Pitt v. Johnson* (1913), 30 T. L. R. 200, affirmed (1914), 30 T. L. R. 505, C. A.).

(*d*) *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526, 543; *King v. Rymill* (1898), 67 L. J. (P. C.) 107 ("lessees or holders of the present leases" included tenants by assignment); *Seale-Hayne v. Jodrell*, [1891] A. C. 304, 306; *Re Pinhorne, Moreton v. Hughes*, [1894] 2 Ch. 276, 278.

(*e*) *Higgins v. Dawson*, [1902] A. C. 1, *per* Lord HALSBURY, L.C., at pp. 3, 4; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 588.

(*f*) *Hill v. Crook* (1873), L. R. 6 H. L. 265, *per* Lord CAIRNS, at p. 285, followed in *Re Horner, Eagleton v. Horner* (1887), 37 Ch. D. 695, 703; *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590, 606, C. A.; *Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208, 213; *Re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, 419, C. A.; see *Re Wood, Wood v. Wood*, [1902] 2 Ch. 542, 546, C. A.; *Re Kiddle, Gent v. Kiddle* (1905), 92 L. T. 724, 725.

(*g*) Wigram, *Extrinsic Evidence*, 3rd ed., pp. 15, 30.

(*h*) *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526, 543.

(*i*) As, for instance, "residue" (*Singleton v. Tomlinson* (1878), 3 App. Cas. 404, 418; *Higgins v. Dawson, supra*); "survivor" (*Inderwick v. Tatchell*, [1903] A. C. 120, 123; and see p. 724, *post*). As to evidence in such cases, see p. 646, *ante*.

(*k*) The rule in the text can only be applied where it is a question of choice between two possible interpretations (*Giles v. Melsom* (1873), L. R. 6 H. L. 24, *per* Lord SELBORNE, L.C., at p. 31; *Gibbons v. Gibbons* (1881), 6 App. Cas. 471, 481, P. C.; *Re Boden, Boden v. Boden*, [1907] 1 Ch. 132, C. A., *per* FLETCHER MOULTON, L.J., at p. 145). It should not be applied where the normal meaning of the words offers no difficulty (*Re Boden, Boden v. Boden, supra*).

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struction.

the will (*l*), taking into account the general scope of the will and the general purpose of the testator (*m*).

The construction is not decided on mere conjecture or belief (*n*), but on judicial persuasion (*o*) of what is the intention of the testator, either expressly declared or collected by just reasoning upon the words of the will or evidenced by the surrounding circumstances where they can be called in aid (*p*).

Inferences  
from scope  
of will.

**1261.** The court makes any reasonable inference from a particular passage, comparing that inference with what is apparent in other parts of the will (*q*). This power of inference, however, is limited; a general intention not carried out by some appropriate words in the will itself cannot give the court the right to place the words there for the testator (*r*), and *a priori* reasoning upon what the testator would naturally intend cannot be allowed to weigh against the proper construction of the words used (*s*).

Reconcile-  
ment of parts  
of will.

**1262.** Where the language of the will is conflicting, the court attempts to reconcile successive provisions of the will without unduly straining its language and to make the whole consistent with the apparent general intention of the testator (*t*).

(*l*) *In obscuris, quod verisimilius* (*Key v. Key* (1853), 4 De G. M. & G. 73, 84, C. A.; *Tunaley v. Roch* (1857), 3 Drew. 720, 724, 725; *Adair v. Maitland* (1798), 7 Bro. Parl. Cas. 587, 592).

(*m*) *Blamford v. Blamford* (1615), 3 Bulst. 98, 103; *Mellish v. Mellish* (1798), 4 Ves. 45, 50; *Coard v. Holderness* (1855), 20 Beav. 147, 152, 156; *Prescott v. Barker* (1874), 9 Ch. App. 174, 187; *Re Whiteley, London (Bishop) v. Whiteley*, [1910] 1 Ch. 600. As to various canons of construction derived from the rule, see p. 665, *post*. As to this rule in the construction of executory trusts, where the testator has not been his own conveyancer, see *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543, 559, 569, 572; and title TRUSTS AND TRUSTEES, p. 22, *ante*.

(*n*) *Giles v. Melsom* (1873), L. R. 6 H. L. 24, 31; *Foley v. Burnell* (1783), 1 Bro. C. C. 274, 284; *Morrall v. Sutton* (1845), 1 Ph. 533, 540, 541; *Re Elliot, Kelly v. Elliot*, [1896] 2 Ch. 353, 356; *Inderwick v. Tatchell*, [1903] A. C. 120, 122; *Walford v. Walford*, [1912] A. C. 658, 664.

(*o*) *A.-G. v. Grote* (1827), 2 Russ. & M. 699, 700; *Barksdale v. Gilliat* (1818), 1 Swan. 562, 565.

(*p*) *Doe d. Brodbelt v. Thomson* (1858), 12 Moo. P. C. C. 116, *per* TURNER, L.J., at p. 127; *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, 429, 430, C. A. As to the evidence admissible, see p. 646, *ante*.

(*q*) *Law Union and Crown Insurance Co. v. Hill*, [1902] A. C. 263, 265; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 588.

(*r*) *Hunter v. A.-G.*, [1899] A. C. 309, 315, 317. As to implication, see p. 845, *post*.

(*s*) *Coltsmann v. Coltsmann* (1868), L. R. 3 H. L. 121, *per* LORD CAIRNS, L.C., at p. 130. The court is not at liberty to conjecture what the testator would have said if a particular state of things had been presented to his mind, which, it is apparent from the language he has used, had not occurred to him, and for which therefore it cannot be supposed that he intended to make any provision (*Martin v. Holgate* (1866), L. R. 1 H. L. 175, *per* LORD CHELMSFORD, at p. 186; *Scarborough (Earl) v. Doe d. Savile* (1836), 3 Ad. & El. 897, 962, Ex. Ch.; *Inderwick v. Tatchell*, *supra*, at p. 122).

(*t*) *Morrall v. Sutton*, *supra*, at p. 537; *Glendenning v. Glendenning* (1846), 9 Beav. 324, 326; *Cradock v. Cradock* (1858), 4 Jur. (N. S.) 626, 627; *Conquest v. Conquest* (1868), 16 W. R. 453; *Re Bedson's Trusts* (1885), 28 Ch. D. 523, 525, C. A.; *Taylor v. Sturrock (B.)*, *Sturrock (W.) v. Sturrock (B.)*, [1900] A. C. 225, 232, 233, C. A.; *Shields v. Shields*, [1910] 1 I. R. 116, 120 (absolute interest cut down to life interest). As to inconsistencies, see, further, p. 674, *post*.



SUB-SECT. 3.—Words *primâ facie* to be Given their Usual Sense.

## SECT. 3.

## General Principles of Construction.

Words given their usual sense.

**1263.** It is a general rule (*a*) that, subject to the foregoing rules (*b*), words are to be first read, in the case of ordinary words in their grammatical and ordinary sense (*c*), and in the case of legal and technical words in their legal and technical sense (*d*), and the usual rules of grammar are to be applied (*e*).

(*a*) "A rule of universal application, which admits of no exception, and which ought never under any circumstances to be departed from" (*Re Crawford's Trusts* (1854), 2 Drew. 230, *per* KINDERSLEY, V.-C., at p. 230; *Southgate v. Clinch* (1858), 4 Jur. (N. S.) 428, 429). "The most general of rules; a general rule of great utility" (*Gether v. Capper* (1855), 24 L. J. (C. P.) 69, 71). The rule applies to all wills (*Smith v. Butcher* (1878), 10 Ch. D. 113, *per* JESSEL, M.R., at p. 116). The rule comes from the Digest: *Non aliter a significatione verborum recedi oportet quam manifestum est aliud sensisse testatorem* (Marcellus in Dig., lib. 32, tit. 1, s. 69, cited in *Lowe v. Thomas* (1854), 5 De G. M. & G. 315, 317, C. A.).

(*b*) *Hamilton v. Ritchie*, [1894] A. C. 310, *per* Lord WATSON, at p. 313 ("unless the context of the instrument shows" etc.); and see *Gordon v. Gordon* (1871), L. R. 5 H. L. 254, *per* Lord CHELMSFORD, at p. 271 ("unless other parts of the will or the general scope and object of it" etc.). The rule as to giving the ordinary meaning to a word is thus not a hard and fast rule, since it is entirely subservient to the context of the will; see *Seale-Hayne v. Jodrell*, [1891] A. C. 304, *per* Lord HERSHELL, at p. 306. It has been said that the rule of construction, as enunciated in the cases cited in note (*i*), p. 656, *post*, deals only with the case of giving to words a meaning which they do not properly bear (*Cave v. Horsell*, [1912] 3 K. B. 533, C. A., *per* FLETCHER MOULTON, L.J., at p. 543); and again that it speaks not of the meaning of a word, but of a sentence, of a series of limitations in a will (*ibid.*, *per* BUCKLEY, L.J., at p. 544); and that where a word has two proper and recognised meanings, the rule must be greatly modified, even if it applies at all, and that in such cases the sense of a word in a particular passage must be decided by the context and the surrounding circumstances (*ibid.*, *per* FLETCHER MOULTON, L.J., at p. 543). It is submitted that these criticisms are met by stating the rule as in the text, *supra*. A word not in its ordinary meaning a technical word may have several senses and be used in one of them, in which it is technical (*Clayton v. Gregson* (1836), 5 Ad. & El. 302, 308).

(*c*) *Thellusson v. Woodford*, *Woodford v. Thellusson* (1799), 4 Ves. 227, *per* ARDEN, M.R., at p. 329, adopted in *Villar v. Gilbey*, [1907] A. C. 139, *per* Lord ATKINSON, at p. 147; *Poole v. Poole* (1804), 3 Bos. & P. 620, 627; *Church v. Mundy* (1808), 15 Ves. 396, 406; *Trevor v. Trevor* (1847), 1 H. L. Cas. 239, 264, 266, 267, 270; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013, 1023; *De Windt v. De Windt* (1866), L. R. 1 H. L. 87, 92; *Gibbons v. Gibbons* (1881), 6 App. Cas. 471, 479, P. C.; *Hamilton v. Ritchie*, *supra*, at p. 313; *Higgins v. Dawson*, [1902] A. C. 1, 12; *Gorringe v. Mahlstett*, [1907] A. C. 225, 227. The rule has been enunciated in a very large number of cases, and is sometimes described as the "golden" rule; it is applicable to all kinds of instruments; see *Re Levy, Ex parte Walton* (1881), 17 Ch. D. 746, 751, C. A.; *Caledonian Rail. Co. v. North British Rail. Co.* (1881), 6 App. Cas. 114, 131; *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 148, C. A.; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 434 *et seq.*

(*d*) *Aumblé v. Jones* (1709), 1 Salk. 238; *Buck d. Whalley v. Nurton* (1797), 1 Bos. & P. 53, 57; *Jesson v. Wright* (1820), 2 Bli. 1, 57, H. L.; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823; *Giles v. Melsom* (1873), L. R. 6 H. L. 24, 31; *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658, 672, 684; *Re Keane's Estate*, [1903] 1 I. R. 215; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552, 557.

(*e*) *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390, 393, C. A. Thus, relative pronouns and other relative expressions are *primâ facie* referable to the last antecedent (*Castledon v. Turner* (1745), 3 Atk. 257; *Adshhead v. Willetts* (1861), 29 Beav. 358, 361; *Re Williams, Gregory v. Muirhead* (1913), 134 L. T. Jo. 619). For an example to the contrary,

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When usual sense of words adhered to.

Effect of context and circumstances in excluding rule.

Where the words so interpreted are sensible in reference to the surrounding circumstances (*f*), that is to say, where these circumstances do not deprive the words of all reasonable application when so interpreted (*g*), this sense of the words must be adhered to (*h*); but where that course would lead to some absurdity or some repugnance or inconsistency with the declared intentions of the testator, collected from the whole of the will, the grammatical and ordinary or the technical sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further (*i*). In particular, to deprive words of their appropriate usual sense there must be sufficient to satisfy a judicial mind that they were meant to be used by the testator in some other sense, and to show what that other sense is (*k*), and the burden of proof lies on those who attribute to the words such other sense (*l*).

**1264.** There are, however, few words, if indeed there are any, which bear a meaning so exact that the reader can disregard the surrounding circumstances and the context in ascertaining the sense in which they are employed (*m*). If, therefore, the intention of the testator can be collected with reasonable certainty from the whole will, with the aid of extrinsic evidence of a kind properly admissible, that intention must have effect given to it beyond and even against the literal or ordinary sense of particular words and

see *Fox v. Collins* (1761), 2 Eden, 107. The construction of a will may thus be a question for a grammarian rather than for a lawyer (*Fenny d. Collings v. Ervestace* (1815), 4 M. & S. 58, 60; *Child v. Elsworth* (1852), 2 De G. M. & G. 679, 683, C. A.).

(*f*) As to the evidence, see pp. 637, 646, *ante*.

(*g*) *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, 525, H. L.

(*h*) Wigram, *Extrinsic Evidence*, 3rd ed., p. 17, Proposition II., adopted in *Croker v. Hertford (Marquis)* (1844), 4 Moo. P. C. C. 339, 364; and see *Re Cope, Cross v. Cross*, [1908] 2 Ch. 1, 4, C. A. ("without regard to the consequences"); *Swift v. A.-G.* (1910), [1912] 1 I. R. 133, 139, 140.

(*i*) *Warburton v. Loveland d. Ivie* (1828), 1 Hud. & B. 623, Ex. Ch., *per* BURTON, J., at p. 648, affirmed (1832), 2 Dow & Cl. 480, H. L., adopted in *Grey v. Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 106; and see *ibid.*, *per* Lord CRANWORTH, L.C., at p. 78; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68, 94, 114; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273, 284; *Thellusson v. Rendlesham (Lord)*, *Thellusson v. Thellusson, Hare v. Roberts* (1859), 7 H. L. Cas. 429, 454, 470, 472, 488, 490, 494, 519; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782, 793, 794, C. A.; *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, 117. It has been observed that this statement of the rule seemed to be involved in the above statement as to context, and to be but a means of showing by the context that the words were not used in their ordinary sense (*Thellusson v. Rendlesham (Lord)*, *Thellusson v. Thellusson, Hare v. Roberts*, *supra*, *per* Lord CRANWORTH, at p. 494; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192, *per* Lord BLACKBURN, at p. 205); and that by "an absurdity" could hardly be meant a result which the court thought ought not to have been the intention of the testator (*Rhodes v. Rhodes*, *supra*, *per* Lord BLACKBURN, at p. 205; see also *Long v. Lane* (1886), 17 L. R. Ir. 24, 35, C. A.).

(*k*) *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, *per* Lord WENSLEYDALE, at p. 877; *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658, 672.

(*l*) *Re Crawford's Trusts* (1854), 2 Drew. 230, *per* KINDERSLEY, V.-C., at p. 233.

(*m*) *Cave v. Horsell*, [1912] 3 K. B. 533, C. A., *per* BUCKLEY, L.J., at p. 543; *Hodgson v. Ambrose* (1780), 1 Doug. (K. B.) 337, 341; *Doe d. Andrew v. Lainchbury* (1809), 11 East, 290, 296.



expressions, and the court is not bound to adhere to the ordinary or legal meaning in such a case (*n*).

**1265.** The meaning of technical terms, excluding technical terms of English law, but including technical terms of foreign law or of science or art, is determined by evidence of experts (*o*).

The questions what are technical terms in English law and what are their technical meanings (*p*) are determined by the court with the aid, in certain cases, of the established canons of construction; in considering a technically drawn will, the Court regards the practice of conveyancers as not wholly irrelevant though not binding (*q*).

**1266.** The ordinary meaning of a word is the meaning given it by the ordinary usage of society (*r*), that is to say, the testator's society, of that class and period in which he lived and moved (*s*). If, therefore, the testator belonged to a district, trade, or business in which a particular word has a certain meaning given to it by an existing custom, then the ordinary meaning of the word under the rule is this customary meaning, and not the meaning generally given to it by the general English usage (*t*).

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struction.

Meaning of  
technical  
terms, how  
determined.

Ordinary  
meaning of  
words, how  
determined.

(*n*) *Vauchamp v. Bell* (1822), Madd. & G. 343, 347; *Livesey v. Livesey* (1849), 2 H. L. Cas. 419, per Lord COTTENHAM, L.C., at p. 432; *Key v. Key* (1853), 4 De G. M. & G. 73, 84, C. A.; *Ware v. Watson* (1855), 7 De G. M. & G. 248, 259, C. A.; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, per Lord CRANWORTH, L.C., at p. 871; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, per Lord ST. LEONARDS, at p. 99; *Pride v. Fooks* (1858), 3 De G. & J. 252, 266, C. A.; *Re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133, 136 ("the spirit is to prevail"). *Qui hæret in literâ, hæret in cortice* (2 Bl. Com. 379).

(*o*) *Re Cliff's Trusts*, [1892] 2 Ch. 229, 232 (foreign law).

(*p*) Examples of such technical words are "seised" (*Leach v. Jay* (1878), 9 Ch. D. 42, C. A.); "vested" (see p. 799, *post*); "plurality" (*Re Macnamara, Hewitt v. Jeans* (1911), 104 L. T. 771). As to technical and quasi-technical words describing property or donees, see pp. 699, 744, *post*. As to the use in wills of words appropriate to a conveyance under the Statute of Uses (27 Hen. 8, c. 10), see *Re Tanqueray-Willauwe and Landau* (1882), 20 Ch. D. 465, 478, C. A.; Tudor, L. C. Real Prop., 4th ed., pp. 307 *et seq.*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 281, note (*d*).

(*q*) *Re Athill, Athill v. Athill* (1880), 16 Ch. D. 211, 223, C. A.; *Re Edwards, Edwards v. Edwards*, [1894] 3 Ch. 644; see *Villar v. Gilbey*, [1907] A. C. 139, 152. In considering what are "usual" clauses, the court treats the question as one of fact, on which the evidence of conveyancers is accepted (*Re Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820, 822).

(*r*) *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, H. L., per COLERIDGE, J., at p. 537; *Parker v. Marchant* (1843), 1 Ph. 356, 360 ("the ordinary acceptance of language in the transactions of mankind").

(*s*) *M'Hugh v. M'Hugh*, [1908] 1 I. R. 155, 160 (not archaic or obsolete meaning).

(*t*) *Barksdale v. Morgan* (1693), 4 Mod. Rep. 185; *Re Steel, Wappett v. Robinson*, [1903] 1 Ch. 135 ("freeholds" by local usage included customary freeholds). The rule as to customary meaning prevails even though the words in their meaning according to general English usage would create no difficulty in applying the instrument to the facts (Underhill and Strahan, *Interpretation of Wills and Settlements*, 2nd ed., p. 21). The question whether a word has a customary meaning is one of fact, for the jury, if any (*Simpson v. Margitson* (1847), 11 Q. B. 23, 32). As to custom generally, see title CUSTOM AND USAGES, Vol. X., pp. 217 *et seq.*



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struction.

Evidence as  
to ordinary  
meaning.

Previous  
cases as to  
ordinary  
meaning.

The ordinary meaning of a word is not necessarily the etymological meaning (*u*), though there may be cases where the court refers to the etymological meaning of a word as a guide (*a*).

Where no specific meaning is unambiguously given to a word by the context (*b*), the court may consult dictionaries of good reputation (*c*) and may receive evidence of the meaning ordinarily given to the word (*d*).

**1267.** The ordinary meaning, and therefore legal interpretation, of words may vary from time to time according to the usages of the community (*e*); and there are often many meanings applied in common use to any given word (*f*). Accordingly, it has been frequently a matter for judicial decision in the construction of wills and other documents what is, or was, at a given time the ordinary meaning of a particular word, or the secondary meanings which are or were capable of being given to it.

Examples.

**1268.** Amongst the words and expressions of common use in wills, the meaning of which in common use, or as affected by various contexts, has been the subject of judicial determination (*g*), are the following (*h*), namely: "entitled" (*i*), "marriage" (*k*), "minority" (*l*),

(*u*) *Shore v. Wilson, Hewley's (Lady) Charities* (1842), 9 Cl. & Fin. 355, 527, H. L.

(*a*) *Parr v. Parr* (1833), 1 My. & K. 647, 648 ("devolve").

(*b*) The court does not look at evidence to prove the meaning where the meaning is plain and unambiguous on the face of the document; compare *De la Warr (Earl) v. Miles* (1881), 17 Ch. D. 535, 588, 589, C. A.

(*c*) The court is not bound by the dictionary; see *Grieves v. Rawley* (1852), 10 Hare, 63, 65; *Re Feeney, Inglis v. Birmingham Corporation* (1908), 24 T. L. R. 314.

(*d*) *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176, C. A. As to evidence as to meaning generally, see p. 634, *ante*.

(*e*) *Shore v. Wilson, Hewley's (Lady) Charities, supra*, at p. 527; *Re Rayner, Rayner v. Rayner, supra*, at p. 185.

(*f*) See *Cave v. Horsell*, [1912] 3 K. B. 533, C. A. As, for instance, the words "family" (see p. 747, *post*), "money" (see p. 705, *post*), etc. In *Pigg v. Clarke* (1876), 3 Ch. D. 672, JESSEL, M.R., at p. 674, said that "every word which has more than one meaning has a primary meaning, and if it has a primary meaning, you want a context to find another"; as to such cases see, further, note (*b*), p. 655, *ante*.

(*g*) As to how far such decisions are followed, see *Re Rayner, Rayner v. Rayner, supra*; *Re Athill, Athill v. Athill* (1880), 16 Ch. D. 211, C. A., *per* JESSEL, M.R., at p. 223.

(*h*) For other examples, in the case of words describing donees or property, see pp. 699, 744, *post*.

(*i*) The word may mean entitled in possession, or entitled in interest (*Chorley v. Loveband* (1863), 33 Beav. 189; *Re Grylls' Trusts* (1868), L. R. 6 Eq. 589; *Umbers v. Jaggard* (1870), L. R. 9 Eq. 200; *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, 223, C. A.; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Whiter, Windsor v. Jones* (1911), 105 L. T. 749).

(*k*) The word *primâ facie* refers to a marriage valid in law (*Falkland (Viscount) v. Bertie* (1697), 2 Vern. 333, 336; *In the Estate of M'Loughlin* (1878), 1 L. R. Ir. 421, C. A.; *Allen v. Wood* (1834), 1 Bing. (N. C.) 8).

(*l*) The word *primâ facie* refers to the period under twenty-one years of age (*Maddison v. Chapman* (1858), 4 K. & J. 709, 724), but may refer to a conventional minority, as, for instance, up to twenty-five years of age, or the time during which the testator has kept the child out of full control of his property (*Milroy v. Milroy* (1844), 14 Sim. 48; *Fraser v. Fraser* (1863), 1 New Rep. 430).

“testamentary expenses” or “executorship expenses” (*m*), “unmarried” (*n*).

SUB-SECT. 4.—*Every Word, if possible, to have its Effect.*

**1269.** Subject to the preceding rules, the will should be so construed that every word should have its effect (*o*). The court has no right to disregard a word, if some meaning can be given to it (*p*), and that meaning is not contrary to some intention plainly expressed in other parts of the will (*q*); and the court does not as a rule impute to the testator that he uses additional words without some additional purpose or without any purpose at all (*r*).

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struction.

Effect to  
every word.

(*m*) These terms are ordinarily synonymous (*Sharp v. Lush* (1879), 10 Ch. D. 468, 470) denoting the expenses incident to the proper performance of the duty of the executor (*ibid.*), as to which see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 240 *et seq.* Costs in proceedings properly brought to administer the testator's estate are included (*Morrell v. Fisher* (1851), 4 De G. & Sm. 422; *Miles v. Harrison* (1874), 9 Ch. App. 316; *Penny v. Penny* (1879), 11 Ch. D. 440) except so far as increased by the administration of the real estate (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 350), but including costs of inquiries to determine the persons entitled to a legacy where the difficulty is caused by the language of the testator himself (*Re Groom, Booty v. Groom*, [1897] 2 Ch. 407). As to payments for estate duties, see *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280; *Porte v. Williams*, [1911] 1 Ch. 188; *Re Hudson, Spencer v. Turner*, [1911] 1 Ch. 206; and title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 219, note (*i*), 220, note (*m*); see also *Broughton (Lord) v. Poulett (Lord William)* (1855), 19 Beav. 119 (expenses of executing the trusts).

(*n*) The word naturally means, in the case of a bachelor or spinster (*Pratt v. Mathew* (1886), 22 Beav. 328), “never having been married” (*Heywood v. Heywood* (1860), 29 Beav. 9, 16; *Re Sergeant, Mertens v. Walley* (1884), 26 Ch. D. 575; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; *Dalrymple v. Hall* (1881), 16 Ch. D. 715; *Roberts v. Kilmore (Bishop)*, [1902] 1 I. R. 333; *Re Collyer, Collyer v. Back* (1907), 24 T. L. R. 117; and see *Re Thistlewayte's Trust* (1855), 24 L. J. (CH.) 712, C. A.), but may mean “not having a spouse at the time contemplated in the will” (*Clarke v. Colls* (1861), 9 H. L. Cas. 601; *Re Chant, Chant v. Lemon*, [1900] 2 Ch. 345; see title SETTLEMENTS, Vol. XXV., pp. 583, 584). As to a gift to unmarried children, see *Jubber v. Jubber* (1839), 9 Sim. 503; *Hall v. Robertson* (1853), 4 De G. M. & G. 781, C. A.

(*o*) *Blamford v. Blamford* (1615), 3 Bulst. 98, 103 (“every string ought to give his sound”); *Barker v. Giles* (1725), 2 P. Wms. 280, 282; *King v. Burchell* (1759), 1 Eden, 424, 432; *Collet v. Lawrence* (1791), 1 Ves. 268, 269; *Thellusson v. Woodford, Woodford v. Thellusson* (1799), 4 Ves. 227, 329; *Milsom v. Awdry* (1800), 5 Ves. 465, 467; *Doe d. Tyrrell v. Lyford* (1816), 4 M. & S. 550, 558; *Hastings v. Hane* (1833), 6 Sim. 67, 71; *Morrell v. Sutton* (1845), 1 Ph. 533, 536; *Neathway v. Reed* (1853), 3 De G. M. & G. 18, 23, C. A.; *King v. Cleaveland* (1859), 4 De G. & J. 477, 488, C. A.; *Clarke v. Colls* (1861), 9 H. L. Cas. 601, *per* Lord CRANWORTH, at p. 612; *Parker v. Tootal* (1865), 11 H. L. Cas. 143, 159; *Best v. Stonehewer* (1865), 2 De G. J. & Sm. 537, 541; *Massy v. Rowen* (1869), L. R. 4 H. L. 288, *per* Lord CAIRNS, at p. 301: “In acting under that canon of construction you must . . . ascertain what was the purpose for which the testator introduced the word . . . into his disposition”: *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, 943; *Rickerby v. Nicholson*, [1912] 1 I. R. 343, 347.

(*p*) *Re Croxon, Croxon v. Ferrers*, [1904] 1 Ch. 252, 258 (“lawfully” assume, in name and arms clause); *Heasman v. Pearse* (1871), 7 Ch. App. 275, 283.

(*q*) *Doe d. Baldwin v. Rawding* (1819), 2 B. & Ald. 441, *per* ABBOTT, C.J., at p. 448, and *per* HOLROYD, J., at p. 451; *Constantine v. Constantine* (1801), 6 Ves. 100, 102; *Reeves v. Brymer* (1799), 4 Ves. 692, 698.

(*r*) *Oddie v. Woodford* (1825), 3 My. & Cr. 584, *per* Lord COTTENHAM, L.C.,

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struction.

Rule is  
subject to  
previous  
rules.

**1270.** This rule is a general rule (*s*), but is not inflexible (*t*); according to the context (*a*), or by reasoning from the scope of the will (*b*), words may be rejected (*c*), or may be regarded as merely explanatory, expressing what would otherwise have been true under the will (*d*). Further, there need be no departure made from the rule giving words their usual meaning merely because they are in that sense only surplusage (*e*), or because other words, inconsistent with their use in that sense but insufficient to give them any other sense, may have to be rejected (*f*).

SUB-SECT. 5.—*Appropriate Canons of Construction to be Applied.*

Office of  
canons of  
construction.

**1271.** The court applies certain established canons of construction (*g*) in cases where they are respectively appropriate (*h*). These canons seek to lay down what inferences ought in doubtful cases to be drawn, as a general rule, from particular indications of intention (*i*); some more especially determine what meaning should in general be given to particular words and expressions which have acquired a technical or quasi-technical nature (*k*); and others

at p. 614; *Quarm v. Quarm*, [1892] 1 Q. B. 184, 186, 189; and see *Foxwell v. Van Grutten* (1900), 82 L. T. 272, H. L.

(*s*) "The rule ought not to be departed from, unless it is apparent that by adhering to it we should be defeating the intention as collected from the context" (*Sayer v. Bradley* (1856), 5 H. L. Cas. 873, 899).

(*t*) *Martin v. Holgate* (1866), L. R. 1 H. L. 175, *per* Lord CRANWORTH, L.C., at p. 185, where the rule was encountered by another rule that "we are not to construe a gift as contingent unless the context requires us to do so"; *Clarke v. Colls* (1861), 9 H. L. Cas. 601, 613, 618.

(*a*) See pp. 653, 656, *ante*.

(*b*) See p. 653, *ante*.

(*c*) See p. 675, *post*.

(*d*) *McLachlan v. Taitt* (1860), 2 De G. F. & J. 449, *per* Lord CAMPBELL, L.C., at p. 454; *Re Walton's Estate* (1856), 8 De G. M. & G. 173, C. A., *per* KNIGHT BRUCE, L.J., at p. 175; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782, 794, C. A.

(*e*) *Monk v. Mawdsley* (1827), 1 Sim. 286, 290, 291; *Taylor v. Beverley* (1844), 1 Coll. 108, 116; *Craik v. Lamb* (1844), 1 Coll. 489, 493, 494; *Re Kirkbride's Trusts* (1866), L. R. 2 Eq. 400; *Giles v. Melsom* (1873), L. R. 6 H. L. 24, 33, 34; *Palmer v. Orpen*, [1894] 1 I. R. 32, 38; *Roberts v. Kilmore (Bishop)*, [1902] 1 I. R. 333, 339. The objection of surplusage has weight only when the presence of such word or phrase would be unusual or unaccountable if it were not specially inserted for the purpose of altering the meaning of the sentence (*Re Boden, Boden v. Boden*, [1907] 1 Ch. 132, C. A., *per* FLETCHER MOULTON, L.J., at p. 143).

(*f*) As to technical words, see *Jesson v. Wright* (1820), 2 Bli. 1, H. L.; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, and other cases cited, with reference to the application of the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b, in title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 230, note (*a*).

(*g*) *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., *per* COTTON, L.J., at p. 876: "We are bound to have regard to any rules of construction which have been established by the courts, and subject to that we are bound to construe the will as trained legal minds would do"; *Re Bedson's Trusts* (1885), 28 Ch. D. 523, 525, 526, C. A.; *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483, *per* BUCKLEY, J., at p. 490; and see note (*t*), p. 662, *post*. As to the canons of construction which have been established and certain special forms of the general rules discussed in the text as applied in special cases, see pp. 665 *et seq.*, *post*.

(*h*) See p. 662, *post*.

(*i*) As, for instance, the rules as to the effect of a gift over on failure of issue, and the rules as to implication of limitations; see pp. 833, 845, *post*.

(*k*) *Davenport v. Coltman* (1842), 12 Sim. 588, 591; *Grey v. Pearson*



determine in what manner particular common forms of disposition are to be effectuated, where the testator has not, fully and unambiguously, disclosed his intentions (*l*).

**1272.** The system of canons of construction, whether English or foreign, applied by the court varies according to the circumstances and the testator's intention (*m*). A testator may expressly or impliedly show an intention that his meaning is to be ascertained according to some known system of jurisprudence; and such intention, if the provisions of the will and the circumstances admit, has effect given to it, irrespective of the domicile or nationality of the testator (*n*). Similarly, the fact that the testator uses the English language, with or without the use of technical terms borrowed from the law of England, is considered in discovering the testator's intention even when the property dealt with and the validity and effect of his dispositions of that property are affected by a foreign law (*o*).

Where such an intention is not expressed or inferred, the court acts upon certain presumptions (*p*) which define the system to be applied (*q*).

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struction.

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(1857), 6 H. L. Cas. 61, 79; *Greville v. Browne* (1859), 7 H. L. Cas. 689, 703; *Re Bawden, National Provincial Bank of England v. Cresswell, Bawden v. Cresswell*, [1894] 1 Ch. 693, *per* KEKEWICH, J., at pp. 697, 698 ("the dictionary is to be found in those decisions"); *Barracrough v. Cooper* (1905), [1908] 2 Ch. 121, n., 124, H. L.

(*l*) *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590, 610, C. A. (previous cases useful "when they put an interpretation on common forms"). As, for instance, the rule in *Andrews v. Partington* (1791), 3 Bro. C. C. 401 (see p. 718, *post*), which is grounded on the inconsistency of the directions in the will (see note (*b*), p. 719, *post*); and the rule in *Wild's Case* (1599), 6 Co. Rep. 16 b, 17 a; see p. 787, *post*.

(*m*) The general principles of construction (see pp. 651 *et seq.*, *ante*) appear to apply to all wills, whether English or foreign, as being common to every system of jurisprudence; compare *Di Sora (Duchess) v. Phillipps* (1863), 10 H. L. Cas. 624, 628, 629, n., 633; *Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607, 611, 613.

(*n*) *Raphael v. Boehm, Cockburn v. Raphael* (1852), 22 L. J. (CH.) 299 (testator domiciled in India disposing of movables by express reference to the law of inheritance in Great Britain); *Bradford v. Young* (1883), 29 Ch. D. 617, 623, 625, C. A.; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442, 453; see title CONFLICT OF LAWS, Vol. VI., p. 230.

(*o*) See *Studd v. Cook* (1883), 8 App. Cas. 577, 593, 600, 601; *Re Baker's Settlement Trusts, Hunt v. Baker*, [1908] W. N. 161; *Re Bonnefoi, Surrey v. Perrin*, [1912] P. 233, 238, 239, C. A. But the doctrines of English courts of equity are not imported into the construction of such a will (*McGibbon v. Abbott* (1885), 10 App. Cas. 653, 658, P. C.); see also *Re Miller, Bailie v. Miller*, [1914] 1 Ch. 511.

(*p*) The rule, for example, that a will of movables is to be construed with reference to the law of the domicile of the testator "is a mere canon of interpretation which should not be adhered to when there is any reason from the nature of the will or otherwise to suppose that the testator wrote it with reference to the law of some other country" (Dicey, *Conflict of Laws*, 1st ed., p. 695; 2nd ed., p. 679, adopted in *Re Price, Tomlin v. Latter*, *supra*, *per* STIRLING, J., at p. 452; *Re D'Este's Settlement Trusts, Poulter v. D'Este*, [1903] 1 Ch. 898, *per* BUCKLEY, J., at p. 900).

(*q*) As to the property disposed of, if immovable, see title CONFLICT OF LAWS, Vol. VI., p. 220, and if movable, *ibid.*, p. 230; as to the distinction between movable and immovable for this purpose, see *ibid.*, pp. 196 *et seq.*; as to the wills of personal estate of British subjects and others see Wills Act 1861 (24 & 25 Vict. c. 114), s. 3: title CONFLICT

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struction.

Application  
of English  
canons of  
construction.

Use of words  
in ordinary  
sense.

The court may be informed of the appropriate foreign canons of construction by evidence (*r*).

In cases where the will is to be construed according to English rules, but is written in a foreign language, the court only looks at the effect of that language in order to ascertain what are the equivalent expressions in English (*s*).

**1273.** The canons of construction of wills in English law are not lightly departed from in cases where they are applicable (*t*); but, on the other hand, are to be followed only when the testator has not clearly expressed his own intention and has not given any other guide to the court (*a*). All these canons therefore are of the nature of presumptions only (*b*), and are subject to any contrary intention (*c*) disclosed by the will, as construed in accordance with the principles above stated (*d*).

If in particular the language of the will can be read in its ordinary and natural sense (*e*) so as to be sensible with respect to the surrounding circumstances, no rule or canon of construction is applicable to ascertain the intention (*f*), and no reliance can be placed on former decisions of the court on similar or even identical words in other wills (*g*).

OF LAWS, Vol. VI., p. 230. As to the ascertainment of the donees, see *ibid.*, pp. 220, note (*e*), 231, notes (*k*), (*l*).

(*r*) See p. 635, *ante*.

(*s*) *Reynolds v. Kortright* (1854), 18 Beav. 417, *per* ROMILLY, M.R., at p. 426; compare *Baring v. Ashburton* (1886), 54 L. T. 463.

(*t*) *Blann v. Bell* (1852), 2 De G. M. & G. 775, 781, C. A.; *Wake v. Varah* (1876), 2 Ch. D. 348, 357, C. A.; and see note (*g*), p. 660, *ante*; *A.-G. v. Jefferys*, [1908] A. C. 411, 413, 414. The ground on which these rules are followed is either that certainty in judicial decisions is attained (*Jesson v. Wright* (1820), 2 Bli. 1, H. L., *per* Lord REDESDALE, at p. 56; *Doe d. Clarke v. Ludlam* (1831), 7 Bing. 275, 279; *Morrall v. Sutton* (1845), 1 Ph. 533, 536; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 108; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 884), or that the object is to make it possible to advise confidently on titles (*Roddy v. Fitzgerald*, *supra*, at p. 875), or that it is to be assumed that lawyers draw instruments according to the known state of the law, which includes these canons from time to time adopted by the court in the construction of wills, and the testator must be supposed to have used his words in the sense so fixed (*Re Bawden*, *National Provincial Bank of England v. Cresswell*, *Bawden v. Cresswell*, [1894] 1 Ch. 693, 697, 698; *Greville v. Browne* (1859), 7 H. L. Cas. 689, 703; *Kingsbury v. Walter*, [1901] A. C. 187, 189). It has been suggested that they were invented to give effect to what is in average instances the intention of the testator (*Re Inman*, *Inman v. Rolls*, [1893] 3 Ch. 518, *per* KEKEWICH, J., at p. 520).

(*a*) *Limpus v. Arnold* (1884), 15 Q. B. D. 300, 302, C. A.; *Re Coward*, *Coward v. Larkman* (1887), 57 L. T. 285, 287, C. A.; *Re Hamlet*, *Stephen v. Cunningham* (1888), 39 Ch. D. 426, 434, C. A.; *Re Stone*, *Baker v. Stone*, [1895] 2 Ch. 196, 200, C. A.

(*b*) It is pointed out in *Lee v. Pain* (1845), 4 Hare, 201, *per* WIGRAM, V.-C., at pp. 216, 217, that the word "presumption" in this sense is not used in a strict and accurate sense, but as denoting an inference in favour of a given construction of particular words.

(*c*) *Singleton v. Tomlinson* (1878), 3 App. Cas. 404, 423: "they are fixed subject to a very important qualification as to intention."

(*d*) See pp. 651 *et seq.*, *ante*.

(*e*) See p. 655, *ante*.

(*f*) *Leader v. Duffey* (1888), 13 App. Cas. 294, 301, 303; *Inderwick v. Tat-chell*, [1903] A. C. 120, 122; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84, 88.

(*g*) *Gorringe v. Mahlstedt*, [1907] A. C. 225, 226; and see *Macculloch v. Anderson*, [1904] A. C. 55, 60; *Chapman v. Perkins*, [1905] A. C. 106,

**1274.** Certain rules, however, which affect the construction of wills of real estate, but are not true rules of construction, operate independently of and even contrary to a testator's intention—namely, the rules (*h*) that, except in cases where the Contingent Remainders Act, 1877 (*i*), is applicable, no limitation capable of taking effect as a contingent remainder is to be held to take effect as an executory devise (*k*); and that a class of devisees taking under such a gift must be closed at the time when the remainder takes effect (*l*).

With respect to personal estate, there are no such technical rules to prevent the intention of the testator being literally carried into effect (*m*), where not otherwise contrary to law.

**1275.** Previous cases on the construction of other wills are considered by the court, particularly where the question relates to real property (*n*); but no weight is given to them (*o*), except in so far as they lay down some such canon of construction (*p*) applicable to the case before the court (*q*), or are based on reasoning which commends itself to the court.

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Certain rules applicable to real estate.

Consideration of previous decisions.

108; *Re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640, 653, C. A.; *Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222, 228, 232, C. A.; *Re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369, 373, C. A.; *Re Cope, Cross v. Cross*, [1908] 2 Ch. 1, 3, C. A.; as to former decisions, see, generally, the text, *infra*.

(*h*) *White v. Summers*, [1908] 2 Ch. 256; *Cunliffe v. Branker* (1876), 3 Ch. D. 393, 399, C. A.; *Luddington v. Kime* (1697), 1 Ld. Raym. 203, 207.

(*i*) 40 & 41 Vict. c. 33.

(*k*) *Purefoy v. Rogers* (1671), 2 Wms. Saund. 380, 388; *Carwardine v. Carwardine* (1758), 1 Eden, 27; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 232.

(*l*) *Blackman v. Fysh*, [1892] 3 Ch. 209, 223, 224.

(*m*) *Audsley v. Horn* (1859), 1 De G. F. & J. 226, *per* Lord CAMPBELL, L.C., at p. 237.

(*n*) *Miles v. Harford* (1879), 12 Ch. D. 691, 698; *Morgan v. Thomas* (1882), 9 Q. B. D. 643, 644, C. A.; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314, 318. The fact that the testator's intention as to a blended gift of real and personal estate is defeated by these rules so far as regards the real estate does not prevent effect being given to his intention as to the personal estate (*Holmes v. Prescott* (1864), 10 Jur. (N. S.) 507; *White v. Summers, supra*, at p. 264).

(*o*) *Roe d. Dodson v. Grew* (1767), 2 Wils. 322, 324; and see the cases cited in note (*g*), p. 662, *ante*.

(*p*) *Doe d. Smith v. Fleming* (1835), 2 Cr. M. & R. 638, *per* Lord ABINGER, C.B., at p. 651; *Re Ingle's Trusts* (1871), L. R. 11 Eq. 578, 586, 587; *Waring v. Currey* (1873), 22 W. R. 150; *Singleton v. Tomlinson* (1878), 3 App. Cas. 404, 415, 423; *Re Jackson's Will* (1879), 13 Ch. D. 189, 194; *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590, 610, C. A.; *Re Morgan, Morgan v. Morgan, supra*, at p. 232; *Walford v. Walford*, [1912] A. C. 658, 664. It has been said that the true way to construe a will is to form an opinion apart from the cases, and then see whether the cases require a modification of that opinion; not to begin by considering how far it resembles other wills on which decisions have been given (*Re Tredwell, Jeffray v. Tredwell, supra, per* KAY, L.J., at pp. 659, 660; *Re Blantern, Lowe v. Cooke*, [1891] W. N. 54, C. A., adopted in *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, *per* JOYCE, J., at p. 941; *Re Williams, Metcalf v. Williams*, [1914] 1 Ch. 219, 222, affirmed [1914] 2 Ch. 61, C. A.). As to the authority in general of judicial decisions, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 210 *et seq.*

(*q*) Sometimes the rules of another system of jurisprudence become of



SECT. 3.  
General  
Principles  
of Con-  
struction.

How far  
previous cases  
binding.

Although the court may follow a previous decision on another will where the language was identical with or very similar to that in the will under consideration and where no real distinction exists between the cases (*r*), yet the mere fact of similarity of language does not bind the court to adopt a similar construction (*a*); the surrounding circumstances may be different in every case and may give a different meaning to the words (*b*), and it is the principles of construction exemplified, rather than the particular decisions themselves, that are followed (*c*). One judge is not bound to follow another on questions of mere verbal interpretation (*d*); and further, even when the established canons of construction are honestly applied, two minds may fairly differ (*e*).

authority; thus, in many cases, in the construction of wills of personal estate, the court follows the maxims of the civil law, which were sometimes introduced by ecclesiastical courts having jurisdiction in probate matters, including the greater part of the rules as to legacies (*Monkhouse v. Holme* (1783), 1 Bro. C. C. 298, 300; *Hanson v. Graham* (1801), 6 Ves. 239; *Tudor, L. C. Real Prop.*, 4th ed., p. 440; *Leeming v. Sherratt* (1842), 2 Hare, 14, 17; *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290, 299; *Key v. Key* (1853), 4 De G. M. & G. 73, 85, C. A.). As regards the citation of Scotch cases, they are available as authorities for the general principles of construction of wills, which are the same in both countries (*Young v. Robertson* (1865), 4 Macq. 314, H. L.; *Hickling v. Fair*, [1899] A. C. 15, 26, 36). Further, similar canons of construction in some cases exist in the two systems of jurisprudence; see *Taylor v. Graham* (1878), 3 App. Cas. 1287, 1293; but it cannot be said that every canon of construction in England is part of the law of Scotland (*Hickling v. Fair*, *supra*, at p. 25).

(*r*) *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 875; *Thorpe v. Thorpe* (1862), 1 H. & C. 326, 336, 337; *Lightfoot v. Burstall* (1863), 1 Hem. & M. 546, 549; *Doe d. Penwarden v. Gilbert* (1821), 6 Moore (C. P.), 268, 281 ("literally and substantially the same").

(*a*) *Cormack v. Copous* (1853), 17 Beav. 397, 402; *Hood v. Clapham* (1854), 19 Beav. 90, 94; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273, 284. "The nonsense of one man cannot be a guide for that of another" (*Smith v. Coffin* (1795), 2 Hy. Bl. 444, 450; see also *Re Nolan, Sheridan v. Nolan*, [1912] 1 I. R. 416, 420).

(*b*) *Doe d. Long v. Laming* (1760), 2 Burr. 1100, 1112; *Sayer v. Bradley* (1856), 5 H. L. Cas. 873, 894; *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 108; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 764; *Re Coley, Hollinshead v. Coley*, [1903] 2 Ch. 102, 109, C. A.; compare, for example, *Douglas (Lord) v. Chalmer* (1795), 2 Ves. 501, with *Hinckley v. Simmons* (1798), 4 Ves. 160 (both cases remarked upon by Lord ELDON, L.C., in *Cambridge v. Rous* (1802), 8 Ves. 14, 22).

(*c*) *Re Booth, Booth v. Booth*, [1894] 2 Ch. 282, 285 ("the reasoning of them commends itself to my mind"). "All the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have by judges of high authority been applied in cases more or less similar" (*Waite v. Littlewood* (1872), 8 Ch. App. 70, *per* Lord SELBORNE, L.C., at p. 73).

(*d*) *Re Veale's Trusts* (1876), 4 Ch. D. 61, *per* JESSEL, M.R., at p. 68, describing this rule as "the rule laid down by the House of Lords in *Jenkins v. Hughes*" (1860), 8 H. L. Cas. 571. "On a question of mere construction, even the decision of the Appeal Court on similar grounds is not binding on another court, and much less on a court of equal jurisdiction" (*Hack v. London Provident Building Society* (1883), 23 Ch. D. 103, C. A., *per* JESSEL, M.R., at p. 111).

(*e*) *Vickers v. Pound* (1858), 6 H. L. Cas. 885, *per* Lord WENSLEYDALE, at p. 899; *Re Veale's Trusts*, *supra*; *Selby v. Whittaker* (1877), 6 Ch. D. 239, 245, C. A.; see, accordingly, *Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431, C. A., where the members of the court agreed as to the principles

## Part XIV.—Canons of Construction Applicable in Special Cases.

### SECT. 1.—*Canons Relating to the Scope of the Will.*

#### SUB-SECT. 1.—*Presumption against Intestacy.*

**1276.** A testator may well intend to die partially intestate; when he makes a will, he is testate only so far as he has expressed himself in his will (*f*). Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or even partially intestate, provided that on a fair and reasonable construction there is ground for a contrary conclusion (*g*). In pursuance of an intention to avoid intestacy found in a will, or in pursuance of this presumption, the ordinary sense of words has often been departed from in the construction of wills (*h*).

The force, however, of the presumption varies according to the context and the circumstances (*i*).

### SECT. 1.

#### Canons Relating to the Scope of the Will.

Presumption  
in doubtful  
cases.

Force of the  
presumption.

to be applied, but differed as to the result; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 876; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192, 204, P. C.

(*f*) *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570, C. A., per ROMER, L.J., at p. 574; *Webber v. Stanley* (1864), 16 C. B. (N. S.) 698, 760; *Jackson v. Craig* (1851), 15 Jur. 811 (property wholly undisposed of); and see p. 518, ante.

(*g*) *Doe d. Wall v. Langlands* (1811), 14 East, 370, 372, 373; *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35, 40, 41; *Re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133, 136; *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483, 489; *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390, C. A., per Lord ESHER, M.R., at p. 393: "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will." For examples of references to the leaning against intestacy in doubtful cases, see *Royle v. Hamilton* (1799), 4 Ves. 437, 439; *Vauchamp v. Bell* (1822), Madd. & G. 343, 348; *Dobson v. Banks* (1863), 32 Beav. 259, 260; *Re Salter, Farrant v. Carter* (1881), 44 L. T. 603, 604; *Re Henton, Henton v. Henton* (1882), 30 W. R. 702; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314, 319; *Re Monck's (Lady) Will, Monck v. Croker*, [1900] 1 I. R. 56, C. A.

(*h*) It has been said, however, that although avoiding intestacy is thus to be regarded in construing doubtful expressions, it is not enough to induce the court to give an unnatural meaning to a word, or to construe plain words otherwise than according to their plain meaning (*Re Benn, Benn v. Benn* (1885), 29 Ch. D. 839, 847, C. A.; *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570, 574, C. A.; see *Pinney v. Marriott* (1863), 32 Beav. 643).

(*i*) *Hall v. Hall*, [1892] 1 Ch. 361, 367, C. A. (the fact that the objects of the testator's bounty were his wife and all his children, his eldest son being treated alike with the rest, is in favour of a universal disposition of all the testator's property); and see *Lachlan v. Reynolds* (1852), 9 Hare, 796, 799; *O'Toole v. Browne* (1854), 3 E. & B. 572, 585; *Re Bassett's Estate, Perkins v. Fladgate* (1872), L. R. 14 Eq. 54, 57. The presumption applies especially to property which the testator has got at the date of the will, but is not so strong as regards property which he has not yet acquired at that date (*Re Methuen and Blore's Contract* (1881), 16 Ch. D. 696, 698, 699). The inference from a devise of the whole legal fee simple of freehold land to

## SECT. 1.

**Canons  
Relating to  
the Scope of  
the Will.**

Application  
to gap in  
interests  
created.

Application  
to gifts  
illegal on one  
construction.

Limits for  
presumption.

**1277.** Where the will shows an intention of the testator to dispose of the whole of his real and personal estate, but as regards the interests created the will admits of two constructions, according to one of which the will operates as a complete disposition of the whole, but according to the other the will creates a chasm, the court inclines to take the words in the former sense (*k*).

In cases where, according to one construction of the words of an ambiguous will, a gift would be void as illegal, and a partial intestacy would arise, this presumption is an additional (*l*) reason for an alternative construction avoiding that illegality (*m*).

**1278.** The presumption, however, gives no assistance to the court where the contest is not between testacy and intestacy, but between two gifts in the same will (*n*). Further, it is not enough to satisfy the court that intestacy was not intended (*o*); in order to oust the title of the persons claiming on intestacy it must be shown distinctly that there are words in the will sufficient to constitute a gift of the property in question (*p*), expressly or by implication, to some particular donee (*q*), and the burden of proof is on the alleged donee (*a*) to that extent (*b*).

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trustees is in favour of a complete disposition of the equitable interest (*Cuthbert v. Robinson* (1882), 51 L. J. (CH.) 238; and compare note (*p*), p. 775, *post*).

(*k*) *Ibbetson v. Beckwith* (1735), Cas. temp. Talb. 157, 161; *Philipps v. Chamberlaine* (1798), 4 Ves. 51, 59 ("when the residue is given every presumption is to be made that the testator did not die intestate"); *Booth v. Booth* (1799), 4 Ves. 399, 407 ("every intendment is to be made against holding a man to die intestate who sits down to dispose of the residue of his property"); *Milsom v. Awdry* (1800), 5 Ves. 465, 466; *Bolger v. Mackell* (1800), 5 Ves. 509, 513; *Leake v. Robinson* (1817), 2 Mer. 363, 386 ("There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy as to any part of the testator's property"); *Goodman v. Goodman* (1847), 1 De G. & Sm. 695, 699; *Wiggins v. Wiggins* (1852), 2 Sim. (N. S.) 226, 233; *Re Liverpool Dock Acts, Re Colthead's Will Trusts* (1852), 2 De G. & J. 690, 692; *Bentley v. Oldfield* (1854), 19 Beav. 225, 232; *Gosling v. Gosling* (1859), John. 265, 274; *Fay v. Fay* (1880), 5 L. R. Ir. 274, 282.

(*l*) As to the presumption against illegality, see p. 667, *post*.

(*m*) *Montgomerie v. Woodley* (1800), 5 Ves. 522; *Taylor v. Frobisher* (1852), 5 De G. & Sm. 191; *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389; *Re Bevan's Trusts* (1887), 34 Ch. D. 716, 718; *Re Coppard's Estate, Howlett v. Hodson* (1887), 35 Ch. D. 350, as explained in *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266, 270.

(*n*) *Re Price, Price v. Newton*, [1905] 2 Ch. 55, *per* FARWELL, J., at p. 58.

(*o*) As to introductory statements in a will to this effect (for example, "as to all my worldly estate"), see *Ibbetson v. Beckwith*, *supra*; *Jackson v. Hogan* (1776), 3 Bro. Parl. Cas. 388; *Goodright d. Baker v. Stocker* (1792), 5 Term Rep. 13; *Doe d. Bates v. Clayton* (1806), 8 East, 141, 147; *Doe d. Wall v. Langlands* (1811), 14 East, 370, 372; *Pocock v. Lincoln (Bishop)* (1821), 6 Moore (C. P.), 159; *Hughes v. Pritchard* (1877), 6 Ch. D. 24, 27, C. A.

(*p*) *Enokin v. Wylie* (1862), 10 H. L. Cas. 1, 18, 21.

(*q*) *Hall v. Warren* (1861), 9 H. L. Cas. 420, 433, 435; *Drake v. Drake* (1860), 8 H. L. Cas. 172, 180; *Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626, 634; as to implication, see, further, p. 845, *post*.

(*a*) *Wilce v. Wilce* (1831), 7 Bing. 664, 672; *Hall v. Warren*, *supra*, at p. 435.

(*b*) Where, however, it is shown that a testator has manifested an



It is a peremptory rule of law (*c*) (and not merely a rule of construction) that the heir-at-law is not to be disinherited, nor are the next of kin to be deprived of their statutory right of succession, unless by express words or necessary implication in the will, that is to say, by a will clearly and unambiguously indicating the intention of the testator to leave his property to someone else (*d*), in such a way that there is certainty both in the subjects and objects of the gift, and the manner in which the gift takes effect (*e*). A gift uncertain in any of these respects is void (*f*).

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

SUB-SECT. 2.—*Presumptions of Legality and of Knowledge of the Effect of Words.*

**1279.** The construction of the will is in the first place considered quite apart from the question of the legality of the provisions of the will (*g*). If the words of the will are plain, they cannot be struck out (*h*) or taken in a sense different from that which they plainly bear (*i*) for the purpose of escaping from the consequences of invalidity under some rule of law, or even because it appears

No departure  
from plain  
words to  
escape  
illegality.

intention of giving property to a certain extent, there is an end of the claim of the heir-at-law, except upon the construction of the gift (*Awee v. Melkuish* (1780), 1 Bro. C. C. 519, 522), and the burden of proof is then shifted to the heir or persons entitled on the testator's intestacy (*Midland Counties Rail. Co. v. Oswin* (1844), 1 Coll. 74, *per* KNIGHT BRUCE, V.-C., at p. 78).

(*c*) *Doe d. Hick v. Dring* (1814), 2 M. & S. 448, *per* Lord ELLENBOROUGH, C.J., at p. 454; *Hall v. Warren* (1861), 9 H. L. Cas. 420, 436. Regarded as a rule of construction, this rule would be in favour of intestacy, whereas the true presumption is against intestacy; see p. 665, *ante*. In old cases, however, the rule was applied as a rule of construction, so far as the heir was concerned, and to this extent the authority of these cases is open to doubt; see, for example, *Piggot v. Penrice* (1717), Prec. Ch. 471, compared with *Doe d. Gillard v. Gillard* (1822), 5 B. & Ald. 785, in *Hamilton Corporation v. Hodsdon* (1847), 6 Moo. P. C. C. 76, 86.

(*d*) *Hall v. Warren*, *supra*, at pp. 428, 433, 435; *Thomas d. Evans v. Thomas* (1796), 6 Term Rep. 671, 676, 677; *Doe d. Cock v. Cooper* (1801), 1 East, 229, 236 (referring to the rule as the rule in *Comber v. Hill* (1734), 2 Stra. 969); *Constantine v. Constantine* (1801), 6 Ves. 100, 102; *Kellett v. Kellett* (1815), 3 Dow, 248, 254, H. L.; *Doe d. Ashforth v. Bower* (1832), 3 B. & Ad. 453, 459; *Fitch v. Weber* (1848), 6 Hare, 145; *Underwood v. Wing* (1855), 4 De G. M. & G. 633, 658, affirmed, *sub nom. Wing v. Angrave* (1860), 8 H. L. Cas. 183; *Milsome v. Long* (1857), 3 Jur. (N. S.) 1073, 1074; *Hall v. Hall*, [1892] 1 Ch. 361, 365, C. A.

(*e*) *Mohun v. Mohun* (1818), 1 Swan. 201; *A.-G. v. Sibthorp* (1830), 2 Russ. & M. 107; *Richardson v. Watson* (1833), 4 B. & Ad. 787; *Hoffman v. Hankey* (1834), 3 My. & K. 376; *Curtis v. Luken* (1842), 5 Beav. 147, 156; *Flint v. Warren* (1847), 15 Sim. 626; *Re Exmouth (Viscount), Exmouth (Viscount) v. Praed* (1883), 23 Ch. D. 158; *Buckley v. Buckley* (1887), 19 L. R. Ir. 544; *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936. As to uncertainty in the donee, see p. 536, *ante*; and title TRUSTS AND TRUSTEES, p. 18, *ante*.

(*f*) As to construction with regard to uncertainty, see p. 678, *post*. A condition may be void for uncertainty, and the gift may take effect free from the condition; see p. 584, *post*.

(*g*) See note (*c*), p. 652, *ante*.

(*h*) *Heasman v. Pearse* (1871), 7 Ch. App. 275, 283; *Re Coyte, Coyte v. Coyte* (1887), 56 L. T. 510, 513.

(*i*) *A.-G. v. Williams* (1794), 2 Cox, Eq. Cas. 387, 388; *Thellusson v. Woodford* (1799), 4 Ves. 227, 329; *Mainwaring v. Beevor* (1849), 8 Hare, 44, 48; *Speakman v. Speakman* (1850), 8 Hare, 180, 186; *Pearks v.*

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

Presumption  
in ambiguous  
cases.

What rules  
of law con-  
sidered.

Legal effect  
of words.

that the testator may have misunderstood the legal effect of the various species of gifts, and may have used language the legal interpretation of which may not carry out the intentions he had in his mind (*k*).

Where, however, the meaning of the will is ambiguous, and the will appears according to one construction to offend against some rule of law and to be partially invalid, but is fairly capable of another construction which avoids the objection, the latter is presumed to be the intention of the testator (*a*). The court has an inclination to believe, if reasonably possible, that the testator did not intend to transgress the law (*b*).

**1280.** For the purposes of ascertaining the intention, those rules which prevailed when the will was made, and with reference to which the will may be fairly presumed to have been framed, must be observed (*c*), except in cases where the testator by his will expressly or impliedly refers to the law as existing at his death (*d*).

An Act of Parliament passed subsequent to the date of a will does not usually affect the ascertainment of the testator's intentions (*e*), although it may affect the legal operation of those intentions (*f*).

**1281.** The fact that when the testator desires to produce a particular disposition he shows himself able to choose words clearly apt by law to produce that result gives rise to a presumption that where he uses other words of doubtful import he does not wish to produce that result (*g*). The expression of that which even if not

*Moseley* (1880), 5 App. Cas. 714, 719; *Tatham v. Drummond* (1864), 4 De G. J. & Sm. 484, 486; *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693.

(*k*) *Higgins v. Dawson*, [1902] A. C. 1, 11; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 159; *Nunn v. Hancock* (1868), 16 W. R. 818, 819, C. A.

(*a*) *Martelli v. Holloway* (1872), L. R. 5 H. L. 532, 548; *Pearks v. Moseley*, *supra*, at p. 719; *Von Brockdorff v. Malcolm* (1885), 30 Ch. D. 172, 179; *Re Pounder, Williams v. Pounder* (1886), 56 L. J. (CH.) 113, 114; *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, 943; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502, 506, C. A.; *Re Stamford and Warrington (Earl)*, *Payne v. Grey*, [1912] 1 Ch. 343, 365, C. A. *Benigne faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat* (*Roe d. Wilkinson v. Tranmarr* (1758), Wiles, 682, 684).

(*b*) *Leach v. Leach* (1843), 2 Y. & C. Ch. Cas. 495, *per* KNIGHT BRUCE, V.-C., at p. 499.

(*c*) *Re March, Mander v. Harris* (1884), 27 Ch. D. 166, 169, C. A.

(*d*) See *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297 (gift of property by reference to law of mortmain, construed as that at the death); *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 732 ("free from duty" included duties imposed after the will).

(*e*) *Jones v. Ogle* (1872), 8 Ch. App. 192, *per* Lord SELBORNE, L.C., at p. 195.

(*f*) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685, 688, citing *Re Bridger, Brompton Hospital for Consumption v. Lewis*, *supra*; *Hastuck v. Pedley* (1874), L. R. 19 Eq. 271, 274, explained in *Re March, Mander v. Harris*, *supra*, at p. 169, and followed in *Constable v. Constable* (1879), 11 Ch. D. 681, 686; *Re Llanover (Baroness)*, *Herbert v. Freshfield* (2), [1903] 2 Ch. 330. As to the construction of statutes in general, see title STATUTES, Vol. XXVII., pp. 126 *et seq.*

(*g*) *Langston v. Langston* (1834), 2 Cl. & Fin. 194, 242, H. L.; *Martin v.*

expressed would be implied by law has no independent legal effect on the interests created; but as the whole will is considered, such expressions may be of importance in discovering the intention of the testator (*h*).

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

SUB-SECT. 3.—*Presumption that the Will is Rational and not Capricious.*

**1282.** A testator has a right to be capricious if he chooses (*i*); if, therefore, the words used by the testator are unambiguous in the context, the sense given to the words by the context cannot be departed from, nor is the court induced to put a meaning on them different from that which the court judicially determines to be their meaning on account of any difficulty or inconvenience in carrying out the intention (*k*), or because they lead to consequences which are generally considered capricious (*l*), unusual (*m*), unjust (*n*), harsh or unreasonable (*o*).

Testator's  
right to be  
capricious.

**1283.** Without some clear expression of intention on the part of a testator, however, the court does not attribute to him a capricious intention (*p*), or a whimsical or harsh result to his dispositions (*q*), where the words of his will can be read otherwise. Accordingly if the language used in a will admits of two constructions, according

Presumption  
in ambiguous  
cases.

*Welstead* (1848), 18 L. J. (CH.) 1, 5; *Welland v. Townsend*, [1910] 1 I. R. 177, 181, following *Jury v. Jury* (1882), 9 L. R. Ir. 207.

(*h*) *Expressio eorum quæ tacite insunt nihil operatur* (Co. Litt. 205 a); see *Lee v. Pain* (1845), 4 Hare, 201, 221.

(*i*) *Hart v. Tulk* (1852), 2 De G. M. & G. 300, 315, C. A.; *Boosey v. Gardener* (1854), 5 De G. M. & G. 122, 124; *Varley v. Winn* (1856), 2 K. & J. 700, 707; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 589, 592; *Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426, 434, C. A.; *Crawford's Trustees v. Fleck*, [1910] S. C. 998, 1009. A testator's bounty is absolute and without control as to motive (*Occleston v. Fullalove* (1874), 9 Ch. App. 147, 161).

(*k*) *Driver d. Frank v. Frank* (1814), 3 M. & S. 25, per DAMPIER, J., at pp. 30, 31; *Defflis v. Goldschmidt* (1816), 1 Mer. 417, 419, 420; *Bernard v. Mountague* (1816), 1 Mer. 422, 431; *Smith v. Streatfield* (1816), 1 Mer. 358, 360; *Gaskell v. Harman* (1801), 6 Ves. 159; (1805), 11 Ves. 489, 497; *Elwin v. Elwin* (1803), 8 Ves. 547, 554, 555; *Martineau v. Briggs* (1875), 45 L. J. (CH.) 674, H. L.; *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, 321, C. A.

(*l*) *Wharton v. Barker* (1858), 4 K. & J. 483, 503; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68, per Lord CRANWORTH, at p. 89, adopted in *Bathurst v. Errington* (1877), 2 App. Cas. 698, per Lord CAIRNS, L.C., at p. 709; *Selby v. Whittaker* (1877), 6 Ch. D. 239, 245, C. A.; *Hickling v. Fair*, [1899] A. C. 15, 33, 38; *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66, 70, C. A.

(*m*) *Van Grutten v. Foxwell, Foxwell v. Van Grutten*, [1897] A. C. 658, 678.

(*n*) *Inderwick v. Tatchell*, [1903] A. C. 120, 123, 126.

(*o*) *Abbott v. Middleton, Ricketts v. Carpenter, supra*; *Bathurst v. Errington, supra*; *Mason v. Robinson* (1825), 2 Sim. & St. 295, 299 (irrational dispositions); *Re Pollard's Estate* (1863), 3 De G. J. & Sm. 541, 553, C. A. (dispositions in part unusual, in part eccentric); *Martin v. Holgate* (1866), L. R. 1 H. L. 175, 189.

(*p*) *Hillersdon v. Lowe* (1843), 2 Hare, 355, 366; *Hart v. Tulk, supra*, at p. 313; *Thellusson v. Rendlesham (Lord)*, *Thellusson v. Thellusson, Hare v. Roberts* (1859), 7 H. L. Cas. 429, 497, 498.

(*q*) *Barracrough v. Cooper* (1905), [1908] 2 Ch. 121, n., 125, H. L.; *Vickers v. Pound* (1858), 6 H. L. Cas. 885, 897; *Bathurst v. Errington, supra*, at p. 714.



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to one of which the property disposed of will go in a rational, convenient and ordinary course of succession, and according to another in an irrational and inconvenient course, such that the court is driven to the conclusion that the testator is acting capriciously, without any intelligible motive, and contrary to the ordinary mode in which men act in similar cases, the court leans towards the former as what was intended, although a meaning is thereby given to the words different from their ordinary meaning (*a*).

SUB-SECT. 4.—*Presumption Favouring Relatives or Persons having a Claim on the Testator.*

Presumptions  
in favour of  
children.

**1284.** There is no presumption in the case of a will, as there is in the case of a marriage settlement (*b*), that the children of the testator are intended to be provided for or to have equal benefits (*c*), and the only guide to the court in this respect is the testator's language (*d*).

Express but  
ambiguous  
provisions for  
testator's  
family.

**1285.** If, however, the language in a will expressly providing for the testator's family is ambiguous (*e*), the court, so far as it can, prefers that construction which will most benefit the testator's family generally, on the ground that this must more nearly correspond with his intention (*f*). Thus, the court construes the will so as to include as many children as possible (*g*), and to vest their

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(*a*) *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68, *per* Lord CRANWORTH, at p. 89; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 592; S. C., *sub nom. Jenkins v. Herries* (1819), 4 Madd. 67, *per* LEACH, V.-C., at p. 82; *Atkinson v. Holtby* (1863), 10 H. L. Cas. 313, 330; *Sidney v. Wilmer* (1863), 4 De G. J. & Sm. 84, 103; *Gordon v. Gordon* (1871), L. R. 5 H. L. 254, 279, 284; *Bathurst v. Errington* (1877), 2 App. Cas. 698, 709, 711; *Selby v. Whittaker* (1877), 6 Ch. D. 239, 248, C. A.; *Locke v. Dunlop* (1888), 39 Ch. D. 387, 393, C. A.; *Re Hudson, Hudson v. Hudson* (1882), 20 Ch. D. 406, 417; *Bowman v. Bowman*, [1899] A. C. 518, 528; *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66, 70, C. A.; *Hordern v. Hordern*, [1909] A. C. 210, 215, P. C.; *Re Jones, Lewis v. Lewis*, [1910] 1 Ch. 167, 172, 173.

(*b*) As to the presumption in construction of articles for settlements, see title SETTLEMENTS, Vol. XXV., pp. 538 *et seq.* Without attributing to him a capricious mode of dealing, a testator "may have reasons to induce him to make a great difference in the disposition of his property with respect to his different children . . . in a settlement there is no reason for making a distinction in benefiting the objects, while in a will there may be" (*Re Crosse* (1863), 9 Jur. (N. S.) 429, *per* KINDERSLEY, V.-C., at p. 430).

(*c*) *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590, 605, C. A., affirmed, *sub nom. Seale-Hayne v. Jodrell*, [1891] A. C. 304.

(*d*) *Abbott v. Middleton, Ricketts v. Carpenter*, *supra*, *per* Lord CRANWORTH, at p. 93; *Tucker v. Harris* (1832), 5 Sim. 538, 543 ("there is no supposition that any person can be intended to take except those who are described as takers").

(*e*) It is only in ambiguous cases that the rule is applicable (*Bright v. Rowe* (1834), 3 My. & K. 316, 322).

(*f*) *Farrant v. Nichols* (1846), 9 Beav. 327, 330; *Bythessea v. Bythessea* (1854), 23 L. J. (CH.) 1004, 1006; *Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426, 433, 434, C. A.

(*g*) *Bouverie v. Bouverie* (1847), 2 Ph. 349, 351; *Lee v. Lee* (1860), 1 Drew. & Sm. 85, 87; *White v. Hill* (1867), L. R. 4 Eq. 265, 271; *Williams v. Haythorne, Williams v. Williams* (1871), 6 Ch. App. 782, 785.

interests on attaining twenty-one (*h*), and so as not to make the interests of children who attain twenty-one dependent upon surviving their parents, according to the presumption especially applicable to gifts of portions in a settlement (*i*).

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**1286.** Similarly, also, where the words of the will are ambiguous, the court may sometimes be assisted by the presumptions that, in the absence of special circumstances, relatives of equal degree are of equal importance to a testator as recipients of his bounty (*k*), and that as a rule a testator does not pass over a near relative for the purpose of benefiting more remote relatives, or over any relative or other person having a claim on him (*l*), or with whom he was intimate (*m*), for the purpose of benefiting relatives having no claim or strangers (*n*). The latter presumption, however, gives no assistance to the court in a contest between persons related in equal degree to the testator (*o*), nor are any of these presumptions applicable unless their application will accord with the actual words of the will (*p*).

In favour of  
relatives, and  
persons  
intimate with  
testator etc.

**1287.** The heir (*q*), or head of a family in order of inheritance, is favoured by the court (*r*) in certain cases of ambiguity (*s*) in

In favour of  
heir or next  
of kin.

(*h*) As to the rule of construction, see title SETTLEMENTS, Vol. XXV., p. 577; *Waller v. Stevenson* (1912), 56 Sol. Jo. 666, H. L.

(*i*) The rule in *Emperor v. Rolfe* (1749), 1 Ves. Sen. 208, and *Howgrave v. Cartier* (1814), 3 Ves. & B. 79, 91 (as to which rule see title SETTLEMENTS, Vol. XXV., pp. 593, 594), which applies to wills (*Hallifax v. Wilson* (1809), 16 Ves. 168, 172; *Jackson v. Dover* (1864), 2 Hem. & M. 209, 215; *Re Knowles, Nottage v. Buxton* (1882), 21 Ch. D. 806; *Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426, 433, C. A.; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200, *per* JOYCE, J., at p. 204 ("in case of ambiguity or doubt that construction is to be favoured which will allow of a child who takes a vested interest making such provision as is usual for his family"); *Duffield v. M'Master*, [1906] 1 I. R. 333, C. A.); although the different character of a will is a circumstance to be weighed in applying the rule (*Farrer v. Barker* (1852), 9 Hare, 737, 744; *Tucker v. Harris* (1832), 5 Sim. 538, 543). As to whether the rule applies to grandchildren, or other persons to whom the testator is not *in loco parentis*, see *Farrer v. Barker, supra*; *Re Hamlet, Stephen v. Cunningham, supra*, affirming S. C., 38 Ch. D. 183, 190.

(*k*) *Hewet v. Ireland* (1718), 1 P. Wms. 426; *Swift v. Swift* (1863), 32 L. J. (CH.) 479, 480; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 590 (similar course of devolution presumed in transmission of estate to families of great-nephews of testator); *Heasman v. Pearse* (1871), 7 Ch. App. 275, 284; *Selby v. Whittaker* (1877), 6 Ch. D. 239, C. A., *per* JAMES, L.J., at p. 249; *Re Walbran, Milner v. Walbran*, [1906] 1 Ch. 64, 66 (gift to one nephew and the children of another nephew).

(*l*) *Re Gregory's Settlement and Will* (1865), 34 Beav. 600, 602 (testator's godson preferred to his brother, the description applying partly to both).

(*m*) *Careless v. Careless* (1816), 1 Mer. 384, 389; see accordingly the cases cited in note (*k*), p. 640, *ante*, where evidence of the testator's degrees of intimacy with the various claimants to his gifts was admitted.

(*n*) As to the modern statutory rule relating to revocation of a will on marriage, see p. 562, *ante*.

(*o*) *Re Price, Price v. Newton*, [1905] 2 Ch. 55, 58.

(*p*) *Beaudry v. Barbeau*, [1900] A. C. 569, 575, P. C.

(*q*) As to devises to the heir, see p. 537, *ante*.

(*r*) This appears at one time to have been a principle of public policy at common law; see *Wild's Case* (1599), 6 Co. Rep. 16 b, 17 a; Pollock and Maitland, *History of English Law*, Vol. II., p. 326.

(*s*) "If the language of the will is plain, it must be given effect to, and

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construction (*a*); and a similar favour is shown to next of kin or persons claiming under the Statutes of Distribution (*b*). This appears, however, only to be the case where it is desired to avoid holding the will void for uncertainty (*c*). The general rule is that the heir and next of kin take, not under any presumed intention of the testator, but for want of any clear indication of his intention that someone else is to take (*d*).

SUB-SECT. 5.—*General and Particular Intention; the Cy-près Doctrine.*

General and  
particular  
intention.

**1288.** It is sometimes regarded as a binding rule of construction (*e*) that where the court finds upon the face of a will a clear, general or paramount intention (*f*) to which effect can be given, and a particular or subordinate intention to which, by reason of some rule of law, the court cannot wholly or partially give effect, or which is inconsistent with (*g*) or does not carry out all the intentions which the testator has or is presumed to have, then the particular intention must be rejected or modified, and the general intention of the testator carried into effect (*h*). The application of this rule is

cannot be made to bend to a supposed predilection in favour of male offspring" (*Fulford v. Hardy*, [1909] A. C. 570, P. C., *per* Lord DUNEDIN, at p. 574).

(*a*) The heir, or head of a family in order of inheritance, has been held to take under limitations to the "nearest" or "nearest and most deserving" of that family (*Thellusson v. Rendlesham (Lord)* (1859), 7 H. L. Cas. 429, 512; *Power v. Quealy* (1878), 2 L. R. Ir. 227, affirmed 4 L. R. Ir. 20, C. A.; and see *Doe d. Winter v. Ferratt* (1843), 9 Cl. & Fin. 606, H. L.; *Chapman's Case* (1574), Dyer, 333 b), unless the context of the will shows that the testator did not intend the order of inheritance (*Thomason v. Moses* (1842), 5 Beav. 77).

(*b*) As to the meaning of "relations" or "representatives," see pp. 757, 758, *post*.

(*c*) As to uncertainty, see p. 678, *post*.

(*d*) *Mills v. Farmer* (1815), 19 Ves. 483, 484. As to the rule against disinheritance the heir etc., see, further, pp. 666, 667, *ante*.

(*e*) The rule is said to be an extension, and in its origin merely descriptive of the operation of the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b (*Doe d. Gallini v. Gallini* (1833), 5 B. & Ad. 621, *per* DENMAN, C.J., at p. 640; *Kavanagh v. Morland* (1853), Kay, 16, *per* WOOD, V.-C., at p. 25); see *Jenkins v. Herries* (1819), 4 Madd. 67, where the doctrine is discussed; and note (*i*), p. 673, *post*. The examples of the application of the rule in the text, *infra*, show, however, that the rule is of wider significance; it appears to be a corollary to the general principle enunciated on p. 651, *ante*.

(*f*) This phrase is used to express "the overriding intention . . . the intention that is to be collected from the whole instrument" (*Law Union and Crown Insurance Co. v. Hill*, [1902] A. C. 263, *per* Lord DAVEY, at p. 266; and see *ibid.*, *per* Lord HALSBURY, L.C., at p. 265).

(*g*) As to inconsistencies, see, further, p. 674, *post*.

(*h*) *Robinson v. Robinson* (1756), 1 Burr. 38, 50, affirmed, *sub nom. Robinson v. Hicks* (1758), 3 Bro. Parl. Cas. 180; *Roe d. Dodson v. Grew* (1767), 2 Wils. 322, 323, 324 (decisions of WILMOT, C.J.); *Doe d. Blandford v. Applin* (1790), 4 Term Rep. 82, 87; *Doe d. Candler v. Smith* (1798), 7 Term Rep. 531, 533; *Doe d. Cock v. Cooper* (1801), 1 East, 229, 234 (decisions of Lord KENYON, C.J.); *Doe d. Bosnall v. Harvey* (1825), 4 B. & C. 610, 620 (ABBOTT, C.J.); *Fetherston v. Fetherston* (1835), 3 Cl. & Fin. 67, 75, 76, H. L. (Lord BROUGHAM); *Monypenny v. Dering* (1852), 2 De G. M. & G. 145, 173 (Lord ST. LEONARDS); *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526, 543 (Lord KINGSDOWN); *Habergham v. Ridehalgh* (1870), L. R. 9 Eq. 395, 400 (JAMES, V.-C.); *Hampton v. Holman* (1877), 5 Ch. D.



not agreed upon, however, and it has been said (*i*) in cases where the testator used technical words of limitation, and other words showing that the donees were intended to take in a different way from that which the law allows, that the rule is more correctly stated in the same terms as the general rule concerning the meaning of technical words (*k*).

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**1289.** This rule, however, has given rise to the *cy-près* doctrine, under which the intention of the testator is effectuated as nearly as may be consistently with certain rules of law (*l*).

Established  
applications  
of the rule.

Further, where there is a devise to several persons in succession in words sufficient to pass to each of them the fee simple or the whole interest of the testator, the court, in order to give effect to the general intention, construes the gift as of successive estates tail (*m*).

183, 190 (JESSEL, M.R.); *Re Sharp, Maddison v. Gill*, [1908] 2 Ch. 190, 196, C. A. (BUCKLEY, L.J.); see also *Murthwaite v. Jenkinson* (1824), 2 B. & C. 357; *Thellusson v. Woodford* (1799), 4 Ves. 227, *per* ARDEN, M.R., at p. 329, citing cases under the *cy-près* doctrine); Gilbert, *Uses and Trusts* (ed. Sugden), 39, n.; Co. Litt. 271 b, note 1 (viii.).

(*i*) *Jesson v. Wright* (1820), 2 Bli. 1, H. L., *per* Lord REDESDALE, at pp. 56, 57; *Doe d. Gallini v. Gallini* (1833), 5 B. & Ad. 621, 640 (where it was said that the doctrine was incorrect and vague, and liable to lead to erroneous results), affirmed (1835), 3 Ad. & El. 340, 347, Ex. Ch.; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, where Lord WENSLEYDALE, at p. 877, considered that, notwithstanding the use of the terms "general" and "particular" intent by Lord ELDON, L.C., in *Jesson v. Wright*, *supra*, at p. 51, the doctrine had been put an end to by Lord REDESDALE'S opinion in *Jesson v. Wright*, *supra*, Hayes, *Principles for Expounding Dispositions of Real Estate*, 1st ed., pp. 44, 106, Jarman on Wills, 1st ed., Vol. II., pp. 280, 405, and by *Doe d. Gallini v. Gallini*, *supra*, and thought that the use of the terms had better be discontinued. In *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658, Lord MACNAGHTEN, at p. 671, described the doctrine as "most unsatisfactory" etc.

(*k*) It is submitted that the rule in the text. *supra*, is not intended to interfere with the application of that general rule, but assists the court only in cases where the application of that general rule itself would lead to contradiction or absurdity (see the exception to the general rule as stated by Lord WENSLEYDALE in the cases cited in note (*i*). p. 656, *ante*, as, for instance, where in a gift there are two sets of technical words, such that their technical meanings cannot at the same time be given to them with consistency); and that the rule is in effect "where something has to be sacrificed, it is to be seen what is the least sacrifice to be made, and what will best effectuate the intention of the testator" (*Ashton v. Adamson* (1841), 1 Dr. & War. 198, *per* SUGDEN, L.C., at p. 208).

(*l*) As to this doctrine in relation to gifts to successive generations of unborn issue, see title PERPETUITIES, Vol. XXII., pp. 367 *et seq.*; as to the administration *cy-près* of funds given on charitable trusts, see title CHARITIES, Vol. IV., p. 190. The foundation of the latter is given by Lord ELDON, L.C., in *Mills v. Farmer* (1815), 19 Ves. 483, at p. 486, as that "although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the court does not hold that the mode is of the substance of the legacy; but will effectuate the gift to charity as the substance"; and see *Lyons (Mayor) v. Advocate-General of Bengal* (1875), 1 App. Cas. 91, 113, P. C. The principle thus cannot be applied to a charitable gift where there is no general charitable intention (*Re University of London Medical Sciences Institute Fund*, *Fowler v. A.-G.*, [1909] 2 Ch. 1, C. A.; and title CHARITIES, Vol. IV., p. 198).

(*m*) *Studdert v. Von Steiglitz* (1889), 23 L. R. Ir. 564, 573 (followed in

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Clear words  
not controlled  
by subsequent  
ambiguous  
words.

Similarly, it is settled law that where the court finds, on consideration of the whole will, an absolute gift to a donee in the first instance (*n*) and trusts are engrafted or imposed on the absolute interest (*a*) which fail, either for lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary donee or persons entitled on intestacy as the case may be (*b*).

SUB-SECT. 6.—*Inconsistencies; Alteration of the Words of the Will.*

**1290.** Subject to the intention shown by the whole will (*c*), words clear and unambiguous in themselves cannot be qualified by other words, unless the latter show a very clear exposition of the testator's meaning (*d*); nor can the effect of such words be set aside because there is reason to suppose that they do not produce the effect which the testator intended they should produce (*e*); and in the endeavour to read the will as a consistent whole, and to reconcile the various

*Re Pennefather, Savile v. Savile*, [1896] 1 I. R. 249, 263), following *Ginger d. White v. White* (1742), Willes, 348, *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613, 629, C. A., *Kershaw v. Kershaw* (1854), 3 E. & B. 845, *Hennessey v. Bray* (1863), 33 Beav. 96, 100, and *Watkins v. Frederick* (1865), 11 H. L. Cas. 358, 366, and explaining *Foster v. Romney (Lord)* (1809), 11 East. 594, *Purcell v. Purcell* (1840), 2 Dr. & War. 219, n., and *Bevan v. White* (1844), 7 I. Eq. R. 473. A name and arms clause is an important element in ascertaining the general intention in such a case (*Studdert v. Von Steiglitz* (1889), 23 L. R. Ir. 564, 582).

(*n*) For examples of cases where the rule could not be applied for want of an absolute gift in the first instance, see *Scawin v. Watson* (1847), 10 Beav. 200; *Lassence v. Tierney* (1849), 1 Mac. & G. 551; *Re Corbett's Trusts* (1860), John. 591; *Savage v. Tyers* (1872), 7 Ch. App. 356.

(*a*) As distinct from a clause not merely modifying the enjoyment under the absolute gift, but diminishing that estate or totally substituting a new gift (*Gompertz v. Gompertz* (1846), 2 Ph. 107; *Lassence v. Tierney*, *supra*, at p. 561; *Re Richards, Williams v. Gorvin* (1883), 50 L. T. 22, 23; *Re Wilcock, Kay v. Dewhurst*, [1898] 1 Ch. 95, 98, 99).

(*b*) *Hancock v. Watson*, [1902] A. C. 14, *per* Lord DAVEY, at p. 22; *Lassence v. Tierney*, *supra*, at p. 561; for applications of the principle, see *Whittell v. Dudin* (1820), 2 Jac. & W. 279; *Hulme v. Hulme* (1839), 9 Sim. 644; *Mayer v. Townsend* (1841), 3 Beav. 443; *Campbell v. Brownrigg* (1843), 1 Ph. 301; *Ridgway v. Woodhouse* (1844), 7 Beav. 437; *Bradford v. Young* (1885), 29 Ch. D. 617, C. A.; *FitzGibbon v. McNeill*, [1908] 1 I. R. 1; *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1910] 1 Ch. 329, 334 (bequest of share of residue of a child on the trusts of a settlement which contained an ultimate trust for the testator); as to cases where the trusts were void for remoteness, see title PERPETUITIES, Vol. XXII., pp. 353, note (*b*), 359, note (*o*). This doctrine does not apply, however, to a gift subject to an independent gift over which fails (*Robinson v. Wood* (1858), 4 Jur. (N. S.) 625, following *Doe d. Blomfield v. Eyre* (1848), 5 C. B. 713, 746, Ex. Ch.; see note (*e*), p. 606, *ante*).

(*c*) See *Re Bagshaw's Trusts* (1877), 46 L. J. (CH.) 567, 569, C. A.

(*d*) *Boughton v. Boughton, Boughton v. James* (1848), 1 H. L. Cas. 406, *per* Lord COTTENHAM, L.C., at p. 434; *Doe d. Hearle v. Hicks* (1832), 8 Bing. 475, H. L.; *Bickford v. Chalker* (1854), 2 Drew. 327; *Goodwin v. Finlayson* (1858), 25 Beav. 65, *per* ROMILLY, M.R., at p. 68 ("a leading principle of construction"); *Kerr v. Clinton (Baroness)* (1869), L. R. 8 Eq. 4 2; *Conmy v. Cawley*, [1910] 2 I. R. 465, C. A.

(*e*) *Hardwicke (Earl) v. Douglas* (1840), 7 Cl. & Fin. 795, 815, H. L. As to the application of the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b. see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 229 *et seq.*



clauses with each other (*f*), a prior gift is not disturbed by a later gift in the same or a subsequent testamentary instrument, further than is necessary to give effect to the later gift (*g*).

**1291.** Words and limitations (*h*) may be supplied (*i*), changed (*k*), transposed (*l*), or rejected (*m*) when warranted by the immediate context or the general scheme of the will (*n*), but not unless it is

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(*f*) See p. 654, *ante*. As to how far a clause in a will is impliedly revoked by an inconsistent clause in a codicil, see pp. 566, 567, *ante*.

(*g*) As to this rule in connexion with codicils, see p. 567, *ante*.

(*h*) As to estates by implication arising under this rule, see p. 845, *post*.

(*i*) *Anon.* (1572), 1 And. 33 (gift in tail, and gift over on death of donee); *Atkins v. Atkins* (1591), Cro. Eliz. 248 (to S. and the heirs of his body, and after his decease to B. his eldest son and the heirs of his body); *Spalding v. Spalding* (1630), Cro. Car. 185 (gift over on death of eldest son in life of wife: "without issue" supplied); *Doe d. Leach v. Micklem* (1805), 6 East, 486; *Langston v. Langston* (1834), 2 Cl. & Fin. 194, H. L.; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68 ("in the event of my son dying": "without children" supplied); *Parker v. Tootal* (1865), 11 H. L. Cas. 143 ("first son of T. severally and successively in tail male": "and other sons" introduced); *Re Hunt, Davies v. Hetherington* (1890), 62 L. T. 753 (to sons at twenty-one and to daughters "who shall marry under that age": the words "shall attain that age or" were introduced); *Re Wroe, Frith v. Wilson* (1896), 74 L. T. 302; *Re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415, 430, C. A. ("such" supplied; and see the examples of gifts over on failure of issue, p. 833, *post*); S. C., *sub nom. Comiskey v. Bowring-Hanbury*, [1905] A. C. 84; *Munro v. Henderson*, [1907] 1 I. R. 440, affirmed, [1908] 1 I. R. 260, C. A.; *Newburgh v. Newburgh* (1825), Sugden, Law of Property, p. 367; *Re Broadwell, Mackenzie v. Readman* (1912), 134 L. T. Jo. 107; *Re Haygarth, Wickham v. Haygarth*, [1913] 2 Ch. 9.

(*k*) *Dent v. Pepys* (1822), Madd. & G. 350 (name of donee changed); *Hart v. Tulk* (1852), 2 De G. M. & G. 300, C. A. ("fourth" schedule changed by the court to "fifth"); *Re Northen's Estate, Salt v. Pym* (1884), 28 Ch. D. 153 (ultimate limitation changed, "estate" being read "C. estate"); *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496 (in a direction against vesting of settled chattels in a son or any person made tenant for life, "or" was read "of").

(*l*) *Luxford v. Cheeke* (1683), 3 Lev. 125; *Marshall v. Hopkins* (1812), 15 East, 309; *Marlborough (Duke) v. Godolphin (Lord)* (1750), 2 Ves. Sen. 61, *per* Lord HARDWICKE, L.C., at p. 74; *Chambers v. Brailsford* (1816), 19 Ves. 652, *per* Lord ELDON, L.C., at p. 653 (to make sense of a will otherwise insensible, and to make it take some effect rather than be totally void); *Hudson v. Bryant* (1845), 1 Coll. 681, 685.

(*m*) *Haws v. Haws* (1747), 3 Atk. 524, 525; *Smith v. Pybus* (1804), 9 Ves. 566; *Jones v. Price* (1841), 11 Sim. 557, 569; *Sherratt v. Bentley* (1834), 2 My. & K. 149, 157, 166; *Pasmore v. Huggins* (1855), 21 Beav. 103; *Smith v. Crabtree* (1877), 6 Ch. D. 591; *Smidmore v. Smidmore* (1905), 3 Commonwealth Law Reports, 344.

(*n*) *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526, 545, where the rule was stated as follows: "When the main purpose and intention of the testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with such intention though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions will be discarded or modified by the court." Particularly this is the case where it can be seen plainly that the expressions in question were inserted in the will by mistake (*Sims v. Doughty* (1799), 5 Ves. 243, *per* ARDEN, M.R., at p. 247). Where either or any of two or more alterations may be satisfactory, the court has to inquire which in the circumstances is most probably the intention (*Mason v. Baker* (1856), 2 K. & J. 567; *Wills v. Wills* (1875), L. R. 20 Eq. 342).



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Canons  
Relating to  
the Scope of  
the Will.

Examples.

"Or"  
changed  
to "and."

necessary (*o*), or merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument (*p*).

A common case where the court changes or supplies words is where two clauses in a will run parallel to each other (as in the case of clauses settling the separate shares of the donees) except for a difference which may have been caused by the omission of some words or other mistake in copying (*q*). Even in such a case, however, the court refuses to make any alteration where the clauses read as they stand are clear and unambiguous, and the suggestion of mistake rests only on conjecture (*r*).

There are many cases where "and" has been changed by the court into "or" (*s*), and *vice versâ* (*t*).

(*o*) *Eden v. Wilson* (1852), 4 H. L. Cas. 257, 284; *Peacock v. Stockford* (1853), 3 De G. M. & G. 73, 77 (not "if a sensible construction can be put upon the words"); *Abbott v. Middleton*, *Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68, *per* Lord St. LEONARDS, at p. 94; and see S. C. (1855), 21 Beav. 143, *per* ROMILLY, M.R., at p. 149 (when the change or insertion "is required to give to the whole sentence one uniform and consistent meaning, which without it would be irrational or repugnant," it must be made); *Langdale (Lady) v. Briggs*, *Ex parte Bacon*, *Ex parte Martineau* (1873), 28 L. T. 467, 469, affirmed, *sub nom. Martineau v. Briggs* (1875), 45 L. J. (CH.) 674, H. L. In *Hope v. Potter* (1857), 3 K. & J. 206, 209, WOOD, V.-C., classified the cases of supplying words into two categories: (i.) where there was a necessary implication to avoid an intestacy; (ii.) where a contingent limitation over is curtailed by, or is to be reconciled with, a previous gift, such as cases where "in default of issue" has been read "in default of such issue" (see p. 834, *post*).

(*p*) *Abbott v. Middleton*, *Ricketts v. Carpenter*, *supra*, at pp. 81, 114; *Hope v. Potter*, *supra*; *Campbell v. Bouskell* (1859), 27 Beav. 325.

(*q*) *Re Redfern*, *Redfern v. Bryning* (1877), 6 Ch. D. 133; *Re Northen's Estate*, *Salt v. Pym* (1884), 28 Ch. D. 153; *Phillips v. Rail* (1906), 54 W. R. 517.

(*r*) *Crawford's Trustees v. Fleck*, [1910] S. C. 998.

(*s*) *Hawes v. Hawes* (1747), 1 Ves. Sen. 13; *Jackson v. Jackson* (1749), 1 Ves. Sen. 217; *Burleigh v. Pearson* (1749), 1 Ves. Sen. 281; *Stubbs v. Sargon* (1837), 2 Keen, 255, 273; *Stapleton v. Stapleton* (1852), 2 Sim. (N. S.) 212; *Maynard v. Wright* (1858), 26 Beav. 285, where the alternative was that the will was void for uncertainty. For cases where the court declined to make the change, see *Malden v. Maine* (1855), 2 Jur. (N. S.) 206; *Grey v. Pearson* (1857), 6 H. L. Cas. 61; *Seccombe v. Edwards* (1860), 28 Beav. 440; *Malmesbury (Earl) v. Malmesbury (Countess)*, *Phillipson v. Turner* (1862), 31 Beav. 407; *Coates v. Hart*, *Borrett and Hart* (1863), 3 De G. J. & Sm. 504, 516, C. A.; *Barker v. Young* (1864), 33 Beav. 353; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; as to the change in gifts over, see, further, p. 826, *post*.

(*t*) *Plowd.* 188 b; *Nichols v. Tolley* (1700), 2 Vern. 388; *Read v. Snell* (1743), 2 Atk. 642, 645; *Eccard v. Brooke* (1790), 2 Cox, Eq. Cas. 213 (but see now the cases of substitutional gifts, p. 729, *post*); *Denn d. Wilkins v. Kemeys* (1808), 9 East, 366; *Horridge v. Ferguson* (1822), Jac. 583; *Green v. Harvey* (1842), 1 Hare, 428; *Parkin v. Knight* (1846), 15 Sim. 83; *Lachlan v. Reynolds* (1852), 9 Hare, 796, 798 (to "children living at that period or their heirs"); *Shand v. Kidd* (1854), 19 Beav. 310 (to a class, or the issue of those then dead); *Maude v. Maude* (1856), 22 Beav. 290; *Greenway v. Greenway* (1860), 2 De G. F. & J. 128, 129, C. A.; and for cases of the enumeration disjunctively of the objects of a power of appointment, see *Brown v. Higgs* (1799), 4 Ves. 708; (1800), 5 Ves. 495; S. C. (1803), 8 Ves. 561, 576 (affirmed (1813), H. L. (not reported)); see 18 Ves. 477, n.); *Longmore v. Broom* (1802), 7 Ves. 124; *Penny v. Turner* (1846), 15 Sim. 368; *Re White's Trusts* (1860), John. 656;

**1292.** If in the same will (*a*) there are two inconsistent and irreconcilable gifts, the rule is that if the court can find nothing else to assist in determining the question (*b*) the latter clause is to prevail, as being the last expression of the testator's wish (*c*).

This rule, however, is only used as a last resort, when all attempts to reconcile the various provisions of the will have failed (*d*); and it is subject, for example, to the application of the rule that a prior gift should not be disturbed further than is necessary for the purpose of giving effect to the later disposition (*e*). Thus, if there are two absolute gifts, one of all the testator's property or all his property of a certain description, and the other of portions of that property, the more general gift is confined to the residue of that property (*f*); and if there is a clear, unambiguous gift, and a subsequent clause, in terms applying to this gift, or to this and other gifts, and as so applied inconsistent with the intention taken as a whole, the subsequent clause is neglected, or applied only to other gifts with which it is not inconsistent (*g*).

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

In irreconcilable gifts, the last prevails.

Limits of last rule.

*Salisbury v. Denton* (1857), 3 Jur. (N. S.) 740; and see the cases in note (*f*), p. 729, *post*. For cases where the court refused to change "or" into "and," see *Penley v. Penley* (1850), 12 Beav. 547; *Whitcher v. Penley* (1846), 9 Beav. 477; *Blundell v. Chapman* (1864), 33 Beav. 648 (and see other cases of substitutionary gifts to children or issue, p. 729, *post*); *Hawksworth v. Hawksworth* (1858), 27 Beav. 1; *Re Woolley Wormald v. Woolley*, [1903] 2 Ch. 206; see, further, examples in cases of gifts over, p. 824, *post*.

(*a*) In cases of inconsistency between two wills of different dates revocation may be inferred; see p. 566, *ante*. Two wills of the same date, neither of which can be proved to be the last executed, are void for uncertainty so far as they are irreconcilable (*Phipps v. Anglesey* (Earl) (1751), 7 Bro. Parl. Cas. 443).

(*b*) *Doe d. Leicester v. Biggs* (1809), 2 Taunt. 109, 113 ("for want of a better reason"); *Re Bywater, Bywater v. Clarke* (1881), 18 Ch. D. 17, C. A., *per* JAMES, L.J., at p. 24.

(*c*) *Paramour v. Yardley* (1579), Plowd. 539, 541; *Fane v. Fane* (1682), 1 Vern. 30; *Ulrich v. Litchfield* (1742), 2 Atk. 372; *Sims v. Doughty* (1799), 5 Ves. 243, 247; *Constantine v. Constantine* (1801), 6 Ves. 100, 102; *Morrall v. Sutton* (1845), 1 Ph. 533, 536, 545; *Sherratt v. Bentley* (1834), 2 My. & K. 149, 157; *Brocklebank v. Johnson* (1855), 20 Beav. 205, 212, 213; and see *Hopkinson v. Ellis* (1846), 10 Beav. 169 (inconsistent directions as to payment of debts). *Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est* (Co. Litt. 112 b). It has been suggested that there is less reason for the application of the rule in a modern will than in a will under the Statutes of Wills, now repealed; see 7 Man. & G. 922, n.

(*d*) *Press v. Parker* (1825), 10 Moore (C. P.), 158, 167; *White v. Parker* (1835), 1 Bing. (N. C.) 573, 581; see *Marks v. Solomons* (1850), 19 L. J. (CH.) 555, reversing *S. C.* (1849), 18 L. J. (CH.) 234, where the principle of rejecting the first clause had been relied on; *Chapman v. Gilbert* (1853), 4 De G. M. & G. 366, C. A.; 2 Bl. Com. 380. As to the general rule of reading the will as a consistent whole, see pp. 651, 654, *ante*.

(*e*) *Munro v. Henderson*, [1907] 1 I. R. 440, *per* BARTON, J., at p. 442, affirmed, [1908] 1 I. R. 260, C. A.; *Kerr v. Clinton* (Baroness) (1869), L. R. 8 Eq. 462, 465.

(*f*) *Coke v. Bullock* (1604), Cro. Jac. 49; *Roe d. Snape v. Nevill* (1848), 11 Q. B. 466. If the more general gift is for life, the other gift may take effect at the end of the life interest (*Young v. Burdett* (1725), 5 Bro. Parl. Cas. 54).

(*g*) *Adams v. Clerke* (1725), 9 Mod. Rep. 154 (inconsistent directions as to payment of legacies); *Smith v. Pybus* (1804), 9 Ves. 566 (to three persons or the survivor of them "in the order they are now mentioned"); *Doe d. Spencer v. Pedley* (1836), 1 M. & W. 662; *Baker v. Baker* (1847), 6 Hare.

## SECT. 1.

Canons  
Relating to  
the Scope of  
the Will.Two residuary  
gifts in same  
will.Reconciling  
gifts of the  
same subject-  
matter.When a gift  
void for  
uncertainty.

Examples.

If there are two gifts in the same instrument, each sufficient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred (*h*).

In certain cases, where the inconsistency lies in a gift to one person and a subsequent gift in the same instrument of the same thing to another person, it has been held, in order to reconcile the gifts, that both the donees take the gift, either together as joint tenants or tenants in common (*i*), or in succession (*k*), according to the nature of the gift.

SUB-SECT. 7.—*Uncertainty.*

**1293.** The absurd or irrational nature of a disposition clearly expressed, and the difficulties and doubts in interpreting a disposition ambiguously expressed, are not enough to render the disposition void for uncertainty; it must in general be incapable of any clear, definite meaning (*l*).

**1294.** The following are kinds of gifts which are void for uncertainty:—

(1) Gifts which are wanting in particularity of expression, as to the subject (*m*) or object (*n*) of the gift, where no person is nominated

269 (“living” applied only to some of donees); *Bickford v. Chalker* (1854), 2 Drew. 327 (inconsistent directions as to vesting); *Re Bellamy’s Trust* (1862), 1 New Rep. 191 (“if living” applied to one only of several).

(*h*) *Davis v. Bennet* (1861), 30 Beav. 226; *Re Spencer, Hart v. Manston* (1886), 54 L. T. 597; *Johns v. Wilson*, [1900] 1 I. R. 342; *Re Isaac, Harrison v. Isaac*, [1905] 1 Ch. 427; and see *Kilvington v. Parker* (1872), 21 W. R. 121; *Bristow v. Mansfield*, [1882] W. N. 139. The context may show, however, that the second residuary gift is to include all lapsed legacies (*Re Jessop* (1859), 11 I. Ch. R. 424, explained in *Re Isaac, Harrison v. Isaac, supra*; *Davis v. Bennet, supra*). But where one gift is in the will and the other in a codicil, the court may conclude that there is a revocation of the gift in the will (*Hardwicke (Earl) v. Douglas* (1840), 7 Cl. & Fin. 795, H. L.).

(*i*) Co. Litt. 112 b, note (1), by Hargrave; Plowd. 541, n.; *Anon.* (1582), Cro. Eliz. 9; *Ridout v. Pain* (1747), 3 Atk. 486, per HARDWICKE, L.C., at p. 493. See this view commented on in *Sherratt v. Bentley* (1834), 2 My. & K. 149, per Lord BROUGHAM, L.C., at pp. 161, 162.

(*k*) See *Anon.* (1582), Cro. Eliz. 9, per ANDERSON, C.J.; *Gravenor v. Watkins* (1871), L. R. 6 C. P. 500, Ex. Ch., where the Court of Common Pleas construed the gift as a life estate and remainder in fee, and the Exchequer Chamber, without deciding on the nature of the first interest, held that the second was an estate in fee subject to the first; *Re Bagshaw’s Trusts* (1877), 46 L. J. (CH.) 567, C. A., where the second gift was to the children of the first taker.

(*l*) *Mason v. Robinson* (1825), 2 Sim. & St. 295, 298; *Doe d. Winter v. Perratt* (1843), 6 Man. & G. 314, 361, 362, H. L.; *Re Roberts, Repington v. Roberts-Gaven* (1882), 19 Ch. D. 520, 529, C. A.

(*m*) *Peck v. Halsey* (1726), 2 P. Wms. 387 (“some of my best linen”); *Jubber v. Jubber* (1839), 9 Sim. 503 (“a handsome gratuity”); and see *Re Campbell, Reading v. Hinde* (1910), 128 L. T. Jo. 548, where the testamentary document consisted of a list of names with sums of money; *Jones d. Henry v. Hancock* (1816), 4 Dow, 145, H. L.; *White v. White* (1908), 28 New Zealand Law Reports, 129 (“a small portion of what is left”). The word “all,” used as a substantive, is now regarded as not uncertain (*Re Shepherd, Michell v. Loram*, [1914] W. N. 65, not following *Bowman v. Milbanke* (1664), 1 Lev. 130).

(*n*) Compare *Murdoch v. Brass* (1904), 6 F. (Ct. of Sess.) 841 (omission of name); *Flint v. Warren* (1848), 15 Sim. 626; and see note (*n*), p. 536, *ante*.



by the testator or other means provided for giving particularity (*o*), or such means fail (*p*), and no canon of construction assists the court (*a*);

(2) Gifts which depend upon an infinite number of persons or things (*b*);

(3) Gifts which may have two or more alternative meanings, where there is nothing in the context or the admissible evidence (*c*), or any canon of construction (*d*), to assist the court in resolving the ambiguity (*e*);

(4) Gifts which are to be applied in perpetuity for purposes which cannot be construed as necessarily charitable (*f*), and include, without the possibility of severance, purposes for which a perpetual gift is not allowed (*g*).

**1295.** The court, however, adopts the benevolent rule that if there is ever so little reason in favour of one construction of an ambiguous devise more than another, this is at least nearer the intention of the testator than that the whole disposition should be void and the heir or next of kin let in (*h*); and that there is in general no objection where, from the context or the material circumstances of the case, the alleged uncertain matters can be ascertained to the satisfaction of the court (*i*). Thus, indefinite words added to a gift do not render it uncertain if the gift is substantially ascertained from the nature of the case (*k*); and no objection can arise where,

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

Canon of  
construction  
in ambiguous  
and other  
cases.

*Id certum est  
quod certum  
reddi potest.*

(*o*) See the text, *infra*.

(*p*) *Boyce v. Boyce* (1849), 16 Sim. 476 (devise to be ascertained by a person who was dead); *Jerningham v. Herbert* (1828), 4 Russ. 388 (devise to be ascertained by future act of testatrix made impossible by her lunacy).

(*a*) In *Re Bassett's Estate*, *Perkins v. Fladgate* (1872), L. R. 14 Eq. 54, 57; followed in *In the Will of Byrne*, *Byrne v. Byrne* (1898), 24 Victorian Law Reports, 832, the presumption against intestacy supplied the omission of any description of subject-matter. In *Mohun v. Mohun* (1818), 1 Swan. 201, a similar omission made the gift void.

(*b*) *Re Moore*, *Prior v. Moore*, [1901] 1 Ch. 936 ("all the persons living at my death").

(*c*) As to the evidence of circumstances admissible in such cases, whether for identification or otherwise, see pp. 637, 646, *ante*.

(*d*) See note (*s*), p. 645, *ante*.

(*e*) As, for instance, where the subject-matter is one of a number of things and the testator does not give the choice to the donee (*Asten v. Asten*, [1894] 3 Ch. 260, commenting on *Richardson v. Watson* (1833), 4 B. & Ad. 787). For examples, see note (*n*), p. 531, *ante*.

(*f*) As to the meaning of "charitable," see title CHARITIES, Vol. IV., pp. 105 *et seq.*

(*g*) As, for instance, gifts to "public" or "philanthropic" purposes, as to which see title CHARITIES, Vol. IV., pp. 148 *et seq.*, 155 *et seq.*; as to gifts to charities charged with another gift which fails, see *ibid.*, pp. 149 *et seq.*; and title TRUSTS AND TRUSTEES, pp. 18, 26, *ante*.

(*h*) *Doe d. Winter v. Perratt* (1843), 6 Man. & G. 314, H. L., *per Lord Brougham*, at p. 359; see *Bristow v. Bristow* (1842), 5 Beav. 289, 292; *Oddie v. Woodford* (1825), 3 My. & Cr. 584, followed in *Doe d. Angell v. Angell* (1846), 9 Q. B. 328, 354; *Stephens v. Powys* (1857), 1 De G. & J. 24.

(*i*) *Id certum est quod certum reddi potest* (*Adams v. Jones* (1852), 9 Hare. 485, 486). A blank in a description does not make it uncertain if certainty is given by the context and circumstances admissible in evidence (*Price v. Page* (1799), 4 Ves. 679; *Phillips v. Barker* (1853), 1 Sm. & G. 583; *Re Harrison*, *Turner v. Hellard* (1885), 30 Ch. D. 390, C. A.; *Furniss v. Phear* (1888), 36 W. R. 521).

(*k*) *Oddie v. Brown* (1859), 4 De G. & J. 179, 186, 194, C. A. ("or thereabouts"), explaining *Curtis v. Lukin* (1842), 5 Beav. 147 (until leases "nearly" expired).

SECT. 1.  
Canons  
Relating to  
the Scope of  
the Will.

Gifts stated  
in alternative.

Gift to one  
of a set of  
persons.

though the amount of the gift is indefinite, it is stated to be for a particular purpose and the court can by inquiry ascertain what is the sum sufficient or necessary to fulfil that purpose (*l*). Further, a testator may validly appoint persons who may select the objects of his bounty (*n*), even though an infinite number of objects is open to such selection (*n*), except in cases where objects are comprised for which a perpetual gift is not allowed by law (*o*).

Where the amount of the gift (*p*) is stated in the alternative, the gift may be construed, according to the presumption in favour of the donee (*q*), as of the larger amount (*r*); and a direction to apply a sum not exceeding a named amount for a particular purpose may be similarly construed as a gift of the named amount, after any discretion applying to the gift is spent (*s*).

**1296.** Where the donee is defined as one of a named set of persons, satisfying some description (as in the case of a gift to one of the sons of A.), and there are in existence several persons in the set, the gift is void for uncertainty (*t*); but where at the date of the will there are no persons in existence who are members of the set, or satisfy the description, then the gift may admit of being construed to mean the person who first becomes a member of the set or satisfies the description (*u*).

SECT. 2.—*Context and Meaning of Words.*

SUB-SECT. 1.—*Time to which a Will Refers.*

Time  
referred to.

**1297.** It is a matter of construction of the whole will whether a particular clause is intended to speak from the death of the testator, or the date of the execution of the will (*a*), or other time (*b*).

Words of  
futurity.

When the testator uses words of futurity (*c*) without clearly showing

(*l*) *Dundee Magistrates v. Morris* (1858), 3 Macq. 134, H. L.; *Broad v. Bevan* (1823), 1 Russ. 511, n., considered in *Abraham v. Alman* (1826), 1 Russ. 509, 516; *Jackson v. Hamilton, Hamilton v. Jackson* (1846), 3 Jo. & Lat. 702, 709 (sufficient to remunerate executors for their trouble); *Edwardes v. Jones* (No. 2) (1866), 35 Beav. 474.

(*m*) *Re Conn, Conn v. Burns*, [1898] 1 I. R. 337.

(*n*) As to gifts to a "family," see p. 747, *post*; as to gifts to "relations," see p. 757, *post*.

(*o*) *Blair v. Duncan*, [1902] A. C. 37; *Grimond (or MacIntyre) v. Grimond*, [1905] A. C. 124; see title CHARITIES, Vol. IV., pp. 117 *et seq.*

(*p*) As to cases of alternative donees, see p. 728, *ante*.

(*q*) See p. 763, *post*.

(*r*) *Seale v. Seale* (1715), 1 P. Wms. 290.

(*s*) *Thompson v. Thompson* (1844), 1 Coll. 381, 395, 397, following *Cope v. Wilmot* (1771), 1 Coll. 396, n.; *Gough v. Bull* (1847), 16 Sim. 45.

(*t*) *Dowset v. Sweet* (1753), Amb. 175.

(*u*) *Bate v. Amherst* (1663), T. Raym. 82; *Blackburn v. Stables* (1814), 2 Ves. & B. 367; *Powell v. Davies* (1839), 1 Beav. 532; *Ashburner v. Wilson* (1850), 17 Sim. 204. As to this rule in construing descriptions, see p. 714, *post*.

(*a*) *Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431, C. A., *per COZENS-HARDY, L.J.*, at p. 440, affirmed, *sub nom. Chapman v. Perkins*, [1905] A. C. 106.

(*b*) See *Re Bayliss's Trust* (1849), 17 Sim. 178 ("such as are married," meaning "shall be married at the date when the legacies are payable").

(*c*) Verbs used with the auxiliary "shall," however, as, for instance, in the phrase "persons who shall die in my lifetime," may not be used in their strictly grammatical sense, and may refer to events which, even if happening before the date of the will, are past at the testator's death, or

the time he contemplates, in a case where it is not a question of the real and personal estate comprised in the will (*d*), *primâ facie* those words should be read as speaking from the date of his making the will and not from the date of his death (*e*); but if the context shows that the testator could not mean the time of making the will as the time contemplated by him, then he must *primâ facie* mean the time of his death (*f*).

SECT. 2.  
Context and  
Meaning  
of Words.

**1298.** With regard to the time at which persons and things described by the will are to be ascertained according to their descriptions, the presumptions are that descriptions of the real and personal estate comprised in the will refer to the death of the testator (*g*), and that descriptions of donees taking as individuals refer to the date of the will (*h*).

Descriptions.

SUB-SECT. 2.—*Use of Same Words in Different Passages.*

**1299.** The force of the context may give different meanings to the same word when used in different parts of a will, and the court does not, merely because a word bears a special meaning in one clause, necessarily give to it the same meaning in another clause of the will, in itself clear, and not connected with the first clause (*i*). The presumption (*k*), however, is that a word used in one part of a will with some clear and definite meaning is intended to mean the same thing in another part of the will, where its meaning is not clear (*l*).

Presumption  
as to repeated  
words.

some other future time contemplated by the will. Thus, the above phrase may mean "persons who shall have died" etc. (*Loring v. Thomas* (1861), 1 Drew. & Sm. 497, 516; *Re Lambert, Corns v. Harrison*, [1908] 2 Ch. 117, 120; *Barraclough v. Cooper* (1905), [1908] 2 Ch. 121, n., 126, H. L.; and see *Christopherson v. Naylor* (1816), 1 Mer. 320; and the similar cases on settlements (*Hewet v. Ireland* (1718), 1 P. Wms. 426; *Manning v. Chambers* (1847), 1 De G. & Sm. 282; *Barnes v. Jennings* (1866), L. R. 2 Eq. 448).

(*d*) See p. 691, *ante*.

(*e*) *Bullock v. Bennett* (1855), 7 De G. M. & G. 283, C. A.; *Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431, *per* VAUGHAN WILLIAMS, L.J., at p. 436. Accordingly an event which happens before the date of the will is then not within the clause in question; and a phrase such as "persons who shall die in my lifetime" does not include persons dying before the date of the will (*Coulthurst v. Carter* (1852), 15 Beav. 421, 430; *Gorringe v. Mahlstedt*, [1907] A. C. 225; *Re Cope, Cross v. Cross*, [1908] 2 Ch. 1); contrast note (*c*), p. 680, *ante*.

(*f*) *Lomax v. Holmden* (1749), 1 Ves. Sen. 290, 296.

(*g*) See p. 691, *post*.

(*h*) See p. 714, *post*.

(*i*) *Doe d. Cock v. Cooper* (1801), 1 East, 229, 233; *Right d. Compton v. Compton* (1808), 9 East, 267, 272, 273; *Dalzell v. Welch* (1828), 2 Sim. 319 (issue); *Carter v. Bentall* (1840), 2 Beav. 551, 558; *Head v. Randall* (1843), 2 Y. & C. Ch. Cas. 231 (issue); *Williams v. Teale* (1847), 6 Hare, 239, 250 (issue); *Neathway v. Reed* (1853), 3 De G. M. & G. 18, 22, C. A. (surviving); *Hedges v. Harpur* (1846), 9 Beav. 479; S. C. (1858), 3 De G. & J. 129, C. A.; *Re Brooke, Edycean v. Archer*, [1903] A. C. 379, P. C.; and see *Re Warren's Trusts* (1884), 26 Ch. D. 208, *per* PEARSON, J., at p. 216 (case of a settlement).

(*k*) This rule, "like many other such canons of construction, is very far from universal, and will always require a good deal of care in the application of it to particular wills" (*Clifford v. Koe* (1880), 5 App. Cas. 447, *per* Lord SELBORNE, L.C., at p. 459).

(*l*) *Re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, C. A., *per* LINDLEY, M.R., at p. 418; *Edwards v. Edwards* (1849), 12 Beav. 97, *per* ROMILLY, M.R., at



SECT. 2.  
Context and  
Meaning  
of Words.

Different  
meanings  
according to  
subject-  
matter.

*Ejusdem*  
*generis* rule.

The words of a will must be construed with reference to the subject-matter (*m*), and a different meaning may be given to the same word when used with reference to real and with reference to personal property in a will, even in the same sentence (*n*).

SUB-SECT. 3.—*Ejusdem Generis* Rule.

**1300.** The *ejusdem generis* rule (*o*) as to the meaning of general words applies to wills as to other instruments, but is liable to be

p. 100; *Re Buckle, Williams v. Marson*, [1894] 1 Ch. 286, 288, C. A.; *Ridgeway v. Munkittrick* (1841), 1 Dr. & War. 84, *per* SUGDEN, L.C., at p. 93: "It is a well settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary"; *Re Brooke, Edyevean v. Archer*, [1903] A. C. 379, 384, P. C., where it was said that the *dictum* of SUGDEN, L.C., in *Ridgeway v. Munkittrick*, *supra*, was "asserted perhaps too positively as a general rule of construction"; *Leeming v. Sherratt* (1842), 2 Hare, 14, 25 (survivors); *Rhodes v. Rhodes* (1859), 27 Beav. 413, 417; *Haws v. Haws* (1747), 3 Atk. 524, 526.

(*m*) *Williams v. Jekyl, Elliot v. Jekyl* (1755), 2 Ves. Sen. 681, 683.

(*n*) *Forth v. Chapman* (1720), 1 P. Wms. 663, 667; *Sheffield v. Orrery* (Lord) (1745), 3 Atk. 282, 288; *Stafford* (Earl) *v. Buckley* (1751), 2 Ves. Sen. 170, 180; *Goodtitle d. Peake v. Pegden* (1788), 2 Term Rep. 720; *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126, 132; *Byng v. Strafford* (Lord) (1843), 5 Beav. 558, 568. The adverse comments on the rule in *Porter v. Bradley* (1789), 3 Term Rep. 143, 146; *Daintry v. Daintry* (1795), 6 Term Rep. 307; and *Roe d. Sheers v. Jeffery* (1798), 7 Term Rep. 589, 595, have been disapproved.

(*o*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 469. For examples where the general words were held to retain their ordinary signification, see *Kendall v. Kendall* (1828), 4 Russ. 360; *Arnold v. Arnold* (1834), 2 My. & K. 365 ("my wines and property in England"); *Ellis v. Selby* (1835), 7 Sim. 352, 364; *Fisher v. Hepburn* (1851), 14 Beav. 626; *Everall v. Broune* (1853), 1 Sm. & G. 368 ("other property, goods and articles"). For examples of the application of the *ejusdem generis* rule to wills, see *Trafford v. Berrige* (1729), 1 Eq. Cas Abr. 201, pl. 14 ("other things"); *Timewell v. Perkins* (1740), 2 Atk. 102 ("etc., or in any other thing"); *Stuart v. Bute* (Marquis) (1813), 1 Dow, 73, H. L. ("things"); *Wrench v. Jutting* (1841), 3 Beav. 521 ("other goods"); *Lamphier v. Despard* (1842), 2 Dr. & War. 59 ("other chattel property"); *Re Kendall's Trust* (1851), 14 Beav. 608 ("everything I die possessed of, namely . . ."); *Barnaby v. Tassell* (1870), L. R. 11 Eq. 363, 369 ("etc."); *Re Londesborough* (Lord), *Bridgman v. Fitzgerald* (Lord) (1880), 43 L. T. 408 ("objects of vertu or taste"). As to the construction of "etc.," see, further, *Steignes v. Steignes* (1730), Mos. 296; *Twining v. Powell* (1845), 2 Coll. 262; *Hertford* (Marquis) *v. Lowther* (Lord) (1843), 7 Beav. 1; *Re Andrew's Estate, Creasey v. Graves* (1902), 50 W. R. 471 (real estate included). The *ejusdem generis* rule has been applied to descriptions of any persons and things, as well as to descriptions of donees and of property; see, for example, in investment clauses, *Edwards v. Thompson* (1868), 38 L. J. (CH.) 65 ("any railway" restricted to English); *Re Castlehow, Lamonby v. Carter*, [1903] 1 Ch. 352 ("public company" restricted to English), with which compare *Re Stanley, Tennant v. Stanley*, [1906] 1 Ch. 131, where the context made no restriction; see, further, the examples of the meaning of "effects," p. 700, *post*. Although it is more difficult to infer that general words are cut down if there is an enumeration of only one species, or a slender enumeration of species of particulars (*Swinfen v. Swinfen* (No. 4) (1860), 29 Beav. 207; *Campbell v. M'Grain* (1875), 9 I. R. Eq. 397, *per* SULLIVAN, M.R., at p. 400), yet there is no rule that general words cannot be so cut down (*Northey v. Paxton* (1888), 60 L. T. 30; *Re O'Brien, O'Brien v. O'Brien*, [1906] 1 I. R. 649, 653, C. A.).

overridden by the operation of the presumption against intestacy (*p*). Where, therefore, the general words occur in a clause of the nature of a residuary gift, the ordinary larger meaning of the words is adhered to (*q*); but this consideration does not assist where the general words would in their larger meaning carry a residuary estate which is dealt with by another clause of the will (*r*).

SECT. 2.  
Context and  
Meaning  
of Words.

SUB-SECT. 4.—*Effect of Recitals or Other Statements.*

**1301.** If there are in the will no words amounting to a gift, or other indication of an intention to confer bounty, but merely words of erroneous recital or recognition of indebtedness or affection, the court considers that no intention of making a gift is disclosed by the will (*s*), and a recital showing that the testator considered that some person possessed a title to property independently of his own *prima facie* gives rise to the inference that the testator did not intend to make an actual disposition in favour of that person (*t*). On the other hand, a recital showing that the testator is under the impression that he has made a certain disposition is evidence of an intention inadvertently not expressed to make that gift (*a*). Accordingly in such a case the court may give effect to such intention if the other provisions of the will allow that course (*b*); and the inference from such a recital may be sufficient to overcome and correct the terms of an express gift to the person in question (*c*), provided (*d*) that the court is satisfied that there has been a mistake

Effect of  
recital as a  
gift.

(*p*) *Gibbs v. Lawrence* (1860), 30 L. J. (CH.) 170, 171; see *Re Kendall's Trusts* (1851), 14 Beav. 608; *Dean v. Gibson* (1867), L. R. 3 Eq. 713, following *Bridges v. Bridges* (1729), 8 Vin. Abr., tit. Devise (o. B.) 295, pl. 13; *Chalmers v. Storil* (1813), 2 Ves & B. 222 (cases of enumeration of particulars, "viz.," "consisting of"); *Chapman v. Chapman* (1876), 4 Ch. D. 800; *King v. George* (1877), 5 Ch. D. 627, C. A.; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594. As to this presumption, see p. 665, *ante*.

(*q*) *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290, 301; *Hodgson v. Jex* (1876), 2 Ch. D. 122; *Re Parrott, Parrott v. Parrott* (1885), 53 L. T. 12.

(*r*) *Woolcomb v. Woolcomb* (1731), 3 P. Wms. 112; *Mullins v. Smith* (1860), 1 Drew. & Sm. 204; *Smith v. Davis* (1866), 14 W. R. 942; *Campbell v. McGrain* (1875), 9 I. R. Eq. 397; *Re Miller, Daniell v. Daniell* (1889), 61 L. T. 365; *MacPhail v. Phillips*, [1904] 1 I. R. 155.

(*s*) *Re Rowe, Pike v. Hamlyn*, [1898] 1 Ch. 153, 160, C. A.; *Dashwood v. Peyton* (1811), 18 Ves. 27, 46; *Murdoch v. Brass* (1905), 6 F. (Ct. of Sess.) 841.

(*t*) *Adams v. Adams* (1842), 1 Hare, 537, 540, 541; *Ralph v. Watson* (1840), 9 L. J. (CH.) 328; *A.-G. v. Dillon* (1862), 13 I. Ch. R. 127, 133; *Re Lee, Gibbon v. Peele* (1910), 103 L. T. 103; compare *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348, C. A., and the cases on settlements (*Poulson v. Wellington* (1729), 2 P. Wms. 533; *Wilson v. Piggott* (1794), 2 Ves. 351, 355).

(*a*) *Adams v. Adams*, *supra*, at p. 541; *Re Smith* (1862), 2 John. & H. 594, 598, 599.

(*b*) *Bibin v. Walker* (1768), Amb. 661; *Farrer v. St. Catherine's College, Cambridge* (1873), L. R. 16 Eq. 19, 24.

(*c*) *Jordan v. Fortescue* (1847), 10 Beav. 259; *Milner v. Milner* (1748), 1 Ves. Sen. 106; *Re Margitson, Haggard v. Haggard* (1882), 48 L. T. 172, C. A.

(*d*) *Thompson v. Whitelock* (1859), 4 De G. & J. 490, 500; *Smith v. Fitzgerald* (1814), 3 Ves. & B. 2, *per* GRANT, M.R., at p. 8: "without denying that the recital of a gift as antecedently made may amount to a

SECT. 2.  
Context and  
Meaning  
of Words.

Explanation  
by recital.

Leading  
canons of  
construction  
as to accuracy.

in carrying out the testator's intention; otherwise the recital is treated as erroneous and is neglected (*e*).

**1302.** The rule that a recital unless it is obviously erroneous may be referred to by way of explanation of a gift in itself doubtful or ambiguous applies to wills (*f*).

SECT. 3.—*Inaccuracy of Descriptions in General.*

**1303.** If all the terms of description fit some particular subject, then, except by the context (*g*), they cannot be enlarged so as to include anything which part of those terms does not accurately fit (*h*), nor can they be restricted so as not to include some part of the subject accurately described (*i*).

On the other hand, if the words of description when examined do not fit with accuracy, and if there must be some modification of them (*k*) in order to place a sensible construction on the will, then the whole must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and generally how the subject intended by the testator can be identified (*l*), and for this purpose evidence of extrinsic facts may be regarded (*m*). In such cases the words are presumed to be a mis-

gift, the court ought to see very clearly that there is nothing in the will to which the recital can refer before it is turned into a distinct bequest: otherwise an inaccurate testator may be held to make a second bequest, when he has only made an incorrect reference to the first."

(*e*) *Gordon v. Hoffmann* (1834), 7 Sim. 29; *Mann v. Fuller* (1854), Kay, 624; *Re Arnold's Estate* (1863), 33 Beav. 163, 171; *Mackenzie v. Bradbury* (1865), 35 Beav. 617, 620; *Ives v. Dodgson* (1870), L. R. 9 Eq. 401.

(*f*) *Pullin v. Pullin* (1825), 10 Moore (C. P.), 464; *Darley v. Martin* (1853), 13 C. B. 683; *Grover v. Raper* (1856), 5 W. R. 134, followed in *Re Venn, Lindon v. Ingram*, [1904] 2 Ch. 52. Where the operative part is clear it is not cut down by a recital (*Culsha v. Cheese* (1849), 7 Hare, 236; *Savile v. Kinnaid* (1865), 11 Jur. (N. S.) 195). As to inaccurate recitals of the indebtedness of a donee, and the effect of a direction to bring sums into hotchpot, see p. 844, *post*. For the rules as to recitals in deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 459 *et seq*.

(*g*) See, for example, *Doe d. Harris v. Greathed* (1806), 8 East, 91.

(*h*) *Webber v. Stanley* (1864), 16 C. B. (N. S.) 698, Ex. Ch., dissenting from S. C., *sub nom. Stanley v. Stanley* (1862), 2 John. & H. 491; *Hardwick v. Hardwick* (1873), L. R. 16 Eq. 168, 175; *Whitfield v. Langdale* (1875), 1 Ch. D. 61, 74; *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, 323, C. A. See accordingly *Doe d. Brown v. Brown* (1809), 11 East, 441; *Doe d. Browne v. Greening* (1814), 3 M. & S. 171; *Doe d. Tyrrell v. Lyford* (1816), 4 M. & S. 550; *Okeden v. Clifden* (1826), 2 Russ. 309; *Miller v. Travers* (1832), 8 Bing. 244; *Homer v. Homer* (1878), 8 Ch. D. 758, C. A.; *Doe d. Hubbard v. Hubbard* (1850), 15 Q. B. 227, 245; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273.

(*i*) *Down v. Down* (1817), 1 Moore (C. P.), 80; *Pullin v. Pullin* (1825), 10 Moore (C. P.), 464; *Doe d. Templeman v. Martin* (1833), 4 B. & Ad. 770; *Doe d. Edwards v. Johnson* (1835), 5 Nev. & M. (K. B.) 281; *Corballis v. Corballis* (1882), 9 L. R. Ir. 309; *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (1914), 137 L. T. Jo. 315, H. L.

(*k*) As to the jurisdiction to modify the words of the will, see pp. 630, 675, *ante*.

(*l*) See, for example, *Doe v. Humphreys v. Roberts* (1822), 5 B. & Ald. 407; *Re Ofner, Samuel v. Ofner*, [1909] 1 Ch. 60, C. A. ("my grand-nephew Robert O."; name wrong).

(*m*) *Hardwick v. Hardwick*, *supra*; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314, 317; and see pp. 637, 640, *ante*.



description of a subject existing and with regard to which the will may validly operate (*n*). Where, however, the context shows that the testator was not merely misdescribing an actually existing subject, but was under an erroneous impression that the subject actually did exist as described, or that he could dispose of it, the gift may fail (*o*).

**1304.** A false description does not affect a gift if it is clear what is the subject described (*a*). Thus, where the description of either property or donee or other person or thing mentioned in the will (*b*) is wholly false, so that no known existing person or thing satisfies the description, but the context of the will and the circumstances of the case (*c*) show unambiguously who or what the testator meant, the description is rejected and the intention of the testator effectuated (*d*).

SECT. 3.  
Inaccuracy  
of Descrip-  
tions  
in General.

Description  
wholly wrong,  
but subject  
certain.

(*n*) The presumption is that a designation in general words of the property intended to be affected by a will refers *primâ facie* to that property only upon which the will is capable of operating (*Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705, 715, approving *Wentworth v. Cox* (1822), Madd. & G. 363, 364; *Baring v. Ashburton* (1886), 54 L. T. 463), and that the testator intended to dispose only of his own property; see title EQUIT, Vol. XIII., p. 121.

(*o*) As, for instance, where the context shows that the testator erroneously believed that he had such property as described, or where he had only the intention of acquiring it (*Evans v. Tripp* (1821), Madd. & G. 91; *Waters v. Wood* (1852), 5 De G. & Sm. 717; *Miller v. Woodside* (1872), 6 I. R. Eq. 546), or where the testator described persons whom he merely imagined were in existence, and who did not exist (*Delmare v. Robello* (1792), 1 Ves. 412; *Daubeney v. Coghlan* (1842), 12 Sim. 507).

(*a*) *Falsa demonstratio non nocet cum de corpore constat* (*Travers v. Blundell* (1877), 6 Ch. D. 436, 442, 444, C. A.). The last four words of this maxim are very important (*Re Brockett, Dawes v. Miller*, [1908] 1 Ch. 186, *per* JOYCE, J., at p. 194); the false description must be superadded to that which was clear before (*Thomas d. Evans v. Thomas* (1796), 6 Term Rep. 671, *per* Lord KENYON, C.J., at p. 676); it does not only apply, however, to cases where there is some incorrect description at the end of the sentence (*Cowen v. Truefitt, Ltd.*, [1899] 2 Ch. 309, 311, C. A.); and see the examples in the notes, *infra*. As to this rule in case of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465, 466. *Præsentia corporis tollit errorem nominis* (Bacon, Maxims, r. 24).

(*b*) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685 (direction to pay duty which had been abolished as regards particular legacies given).

(*c*) As to the reception of evidence in such cases, see p. 639, *ante*.

(*d*) For examples of the application of the rule to descriptions of donees, see *Masters v. Masters* (1718), 1 P. Wms. 421, 425; *Beaumont v. Fell* (1723), 2 P. Wms. 141; *A.-G. v. Rye Corporation* (1817), 7 Taunt. 546 (misdescription of corporation); *Queen's College, Oxford v. Sutton* (1842), 12 Sim. 521; *Hopkinson v. Ellis* (1842), 5 Beav. 34 ("rector" instead of "vicar"); *Bristow v. Bristow* (1842), 5 Beav. 289, 291; *Lee v. Pain* (1845), 4 Hare, 201, 253 ("Miss S. J." meant "Mrs. F. A. W."); *Douglas v. Fellows* (1853), Kay, 114; *Ellis v. Bartrum* (No. 2) (1857), 25 Beav. 109; *Re Waller, White v. Scoles* (1889), 80 L. T. 701. A gift to the children of A. may thus take effect in favour of the children of B. where the context and circumstances show them to have been intended (*Bradwin v. Harper* (1759), Amb. 374; *Bristow v. Bristow*, *supra*; *Camoy's (Lord) v. Blundell* (1848), 1 H. L. Cas. 778). As to illegitimate relatives taking under a gift, see p. 735, *post*; and for cases of misdescriptions of charities, see title CHARITIES, Vol. IV., p. 159. For examples of the application of the rule to descriptions of property or things, see *Re Cranfield, Mosse v. Cranfield*, [1895] 1 I. R. 80 ("money on deposit receipt" in A.

## SECT. 3.

Inaccuracy  
of Descriptions  
in General.

Description  
partly wrong  
applicable to  
one subject  
only.

**1305.** If there is in any part of a description a sufficient description of the subject-matter, with convenient certainty of what was intended, any erroneous addition or error in part of the description does not vitiate the gift(e). The characteristic of cases within this rule is that the description so far as it is false applies to no subject at all, and so far as it is true applies to one only(f).

bank, passed shares); *Re Weeding, Armstrong v. Wilkin*, [1896], 2 Ch. 364 (shares, as description of debentures); *Re Rowe, Pike v. Hamlyn*, [1898] 1 Ch. 153, C. A. ("sums owing" to donee); *Flood v. Flood*, [1902] 1 I. R. 538 (shares in railway company wrongly named); *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305 (real estate, as description of proceeds of sale).

(e) *Llewellyn v. Jersey (Earl)* (1843), 11 M. & W. 183, per PARKE, B., at p. 189 (as to a deed); *Morrell v. Fisher* (1849), 4 Exch. 591, per ALDERSON, B., at p. 604; *Goodright d. Lamb v. Pears* (1809), 11 East, 58; *Anderson v. Berkley*, [1902] 1 Ch. 936, 940. As to the application of the rule to the parcels of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465, 466.

(f) *Morrell v. Fisher, supra*; *Cowen v. Truefitt, Ltd.*, [1899] 2 Ch. 309, 312, C. A. Examples of the application of the rule to descriptions of donees will be found in *Ryall v. Hannam* (1847), 10 Beav. 536 (to "Elizabeth A., a natural daughter of" a named person, where the name and sex were incorrect), followed in *Re Reckitt's Trusts* (1853), 11 Hare. 299; *Ford v. Batley* (1853), 17 Beav. 303; *Stringer v. Gardiner* (1859), 4 De G. & J. 468, C. A. ("my niece E. S.": a great-grandniece, E. J. S., took); *Doe d. Gains v. Rouse* (1848), 5 C. B. 422 ("my wife C."); *Re Ingle's Trusts* (1871), L. R. 11 Eq. 578 ("my late nephew M."; he was living); *Thomson v. Eastwood* (1877), 2 App. Cas. 215, 229; *Re Bute (Marquess), Bute (Marquess) v. Ryder* (1884), 27 Ch. D. 196, 219; *Anderson v. Berkley*, [1902] 1 Ch. 936 ("to A.'s wife L.," where "wife" was rejected); *Re Hooper, Hooper v. Warner* (1903), 88 L. T. 160 ("to Percy H. son of C. H.," where christian name was rejected). Cases of inaccuracy in giving the number of a class of donees depend on construction as to whether the whole or part of the class are to take; see p. 742, post. For examples as to descriptions of property, see *Day v. Trig* (1715), 1 P. Wms. 286; *Door v. Geary* (1749), 1 Ves. Sen. 255 (stock, name wrong, amount right); *Mackinley v. Sison* (1837), 8 Sim. 561; *Power v. Lenehan* (1838), 2 Jo. Ex. Ir. 728; *Quennell v. Turner* (1851), 13 Beav. 240 (public funds "in my name," meaning in the name of trustees); *Drake v. Martin* (1856), 23 Beav. 89; *Ellis v. Ellis* (No. 2) (1858), 25 Beav. 482; *Rowlatt v. Easton* (1863), 11 W. R. 767; *Burbey v. Burbey* (1867), 15 L. T. 501; *Coltman v. Gregory* (1870), 40 L. J. (CH.) 352 (shares described as in joint names, in fact in testator's name only). As to descriptions of debts owing to the testator, see *Williams v. Williams* (1786), 2 Bro. C. C. 87; *Maybery v. Brooking* (1855), 7 De G. M. & G. 673, C. A.; *Wilson v. Morley* (1877), 5 Ch. D. 776; *Re Hodgson, Darley v. Hodgson*, [1899] 1 Ch. 666. References to particular parishes, streets, or other localities were rejected in *Owens v. Bean* (1678), Cas. temp. Finch, 395 (parish right, county wrong); *Hastead v. Searle* (1699), 1 Ld. Raym. 728; *Brown v. Longley* (1732) 2 Eq. Cas. Abr. 416, pl. 14; *Doe d. Beach v. Jersey (Earl)* (1818), 1 B. & Ald. 550; (1825) 3 B. & C. 870; *Newton v. Lucas* (1836), 1 My. & Cr. 391; *Gauntlett v. Carter* (1853), 17 Beav. 586; *Armstrong v. Buckland* (1854), 18 Beav. 204; *Tann v. Tann* (1863), 2 New Rep. 412; *Harman v. Gurner* (1866), 35 Beav. 478, where, however, there was evidence of habitual misdescription by the testator; *Homer v. Homer* (1878), 8 Ch. D. 758, C. A.; *Re Mayell, Foley v. Ward* [1913] 2 Ch. 488. References to occupation were rejected in *Blague v. Gold* (1638), Cro. Car. 447, 473; *Goodtittle d. Paul v. Paul* (1760), 2 Burr. 1089; *Marshall v. Hopkins* (1812), 15 East, 309, where the words were transposed; *Goodtittle d. Radford v. Southern* (1813), 1 M. & S. 299; *Nightingall v. Smith* (1846), 1 Exch. 879; *Doe d. Campton v. Carpenter* (1850), 15 Jur. 719; *White v. Birch* (1867), 36 L. J. (CH.) 174, dissenting from *Doe d. Parkin v. Parkin* (1814), 5 Taunt. 321;



**1306.** If, however, it is doubtful upon the words of the will whether they import a false reference or demonstration, or whether they are words of restraint that limit the generality of former words, the court never presumes error or falsehood, and the latter construction is preferred (*g*). If, therefore, there exists some subject as to which all the demonstrations are true, and some as to which part are true and part false, the words are considered to be words of true restriction, so that they refer to that subject only as to which all the demonstrations are true (*h*).

SECT. 3.  
Inaccuracy  
of Descrip-  
tions  
in General.

Description  
wholly true  
as to one  
subject,  
partly true as  
to another.

*Hardwick v. Hardwick* (1873), L. R. 16 Eq. 168. References to a particular tenure, such as freehold, leasehold etc., were rejected in *Denn d. Wilkins v. Kemeys* (1808), 9 East, 366; *Doe d. Dunning v. Cranstoun (Lord)* (1840), 7 M. & W. 1; *Nelson v. Hopkins* (1852), 21 L. J. (CH.) 410; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314; *Re Steel, Wappett v. Robinson*, [1903] 1 Ch. 135, where, however, there was evidence of local usage; and compare *Saxton v. Saxton* (1879), 13 Ch. D. 359. References to mode of acquisition were rejected in *Hill v. St. John* (1775), 3 Bro. Parl. Cas. 375; *Welby v. Welby* (1813), 2 Ves. & B. 187, 191; *Harrison v. Hyde* (1859), 4 H. & N. 805; *Cooch v. Walden* (1877), 46 L. J. (CH.) 639; *Sealy v. Stawell* (1868), 2 I. R. Eq. 326, 348; see also *Thorp v. Tomson* (1588), 2 Leon. 120; *Girdlestone v. Creed* (1853), 10 Hare, 480, 487. Reference to acreage or quantity was rejected in *Whitfield v. Langdale* (1875), 1 Ch. D. 61, 76, 77.

(*g*) *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram* (Bacon, Maxims, Reg. 13); *Morrell v. Fisher* (1849), 4 Exch. 591, *per* ALDERSON, B., at p. 604; *Doe d. Ashforth v. Bower* (1832), 3 B. & Ad. 453, 459; *Nightingall v. Smith*, (1846) 1 Exch. 879, 886; *Re Brockett, Daves v. Miller*, [1908] 1 Ch. 186, 190. When this rule is applied, all the words must be wholly true for the restricted subject identified. Thus, if there are leading words of description identifying a subject as a whole, and not merely any part of that subject, and words are added descriptive of situation, occupation, or the like, which are true for only part of that subject, and there is no other indication of intention to give part only, then the whole is held to pass (*Paul v. Paul* (1760), 1 Wm. Bl. 255, 256; *Hardwick v. Hardwick, supra*, at pp. 176, 177); compare the cases cited on p. 686, *ante*, under the rule as to *falsa demonstratio*, which is the rule then applied, and not the rule in the text, *supra*.

(*h*) *Morrell v. Fisher, supra*; *Ridge v. Newton* (1842), 2 Dr. & War. 239; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273, 282, 283, 287; *Gilliat v. Gilliat* (1860), 28 Beav. 481; *Pedley v. Dodds, Dodds v. Pedley* (1866), L. R. 2 Eq. 819; *O'Connor v. O'Connor* (1870), 1 R. 4 Eq. 483; *Millar v. Woodside* (1872), 6 I. R. Eq. 546; *Re Bennett, Ex parte Kirk* (1877), 5 Ch. D. 800, C. A. For examples of the application of the rule with regard to references to tenure, see *Roe d. Conolly v. Vernon* (1804), 5 East, 51; *Doe d. Brown v. Brown* (1809), 11 East, 441; *Stone v. Greening* (1843), 13 Sim. 391; *Hall v. Fisher* (1844), 1 Coll. 47 (but see as to the last two cases, *Re Bright-Smith, Bright-Smith v. Bright-Smith, supra*; *Hallett v. Hallett* (1898), 14 T. L. R. 420, C. A.; and the cases cited in note (*f*), p. 686, *ante*); *Quennell v. Turner* (1851), 13 Beav. 240; *Mathews v. Mathews* (1867), L. R. 4 Eq. 278. With regard to references to occupation, see *Higham v. Baker* (1853), Cro. Eliz. 15; *Doe d. Parkin v. Parkin* (1814), 5 Taunt. 321; *Morrell v. Fisher, supra*; *Doe d. Renow v. Ashley* (1847), 10 Q. B. 663; *Doe d. Hubbard v. Hubbard* (1850), 15 Q. B. 227; *Whitfield v. Langdale* (1875), 1 Ch. D. 61, 80; *Homer v. Homer* (1878), 8 Ch. D. 758, C. A.; *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, C. A. With regard to references to locality, see *White v. Vitty* (1826), 2 Russ. 484; *Moser v. Platt* (1844), 14 Sim. 95; *Attwater v. Attwater* (1853), 18 Beav. 330; *Evans v. Angell* (1858), 26 Beav. 202; *Webber v. Stanley* (1864), 16 C. B. (N. S.) 698; *Lambert v. Overton* (1864), 11 L. T. 503; *Smith v. Ridgway* (1866), L. R. 1 Exch. 331, Ex Ch.; *Keogh v. Keogh* (1874), 8 I. R. Eq. 179. With regard to references to mode of acquisition or title, see *Roe d. Ryall v. Bell* (1800), 8 Term Rep. 579; *Roe d. Conolly v. Vernon* (1804), 5 East, 51;



## SECT. 3.

Inaccuracy  
of Descriptions  
in General.

Description  
partly true  
as to each of  
two or more  
subjects.

Enumeration  
of particulars.

Designation  
by name or  
description.

Designation  
by both  
name and  
description.

**1307.** If the description is not strictly applicable to any person or thing, but is applicable partly to one person or thing and partly to another, the court may inquire into the material circumstances of the case for the purpose of deciding whether the testator intended to make the gift applicable to the one or the other (*i*).

**1308.** Where some subject-matter is given under a denomination applicable to the whole, and then words are added, on the principle of enumeration, which do not completely enumerate and exhaust all the particulars which are included under the antecedent denomination, the question is which is the predominant description (*k*). If the subsequent description is meant to substitute a definite and precise statement for an antecedent generality, the subsequent description must be read as explanatory and if necessary as restrictive of the prior general description (*l*), otherwise the general description is given its full effect (*a*).

**1309.** A donee has been often sufficiently designated by a nickname or erroneous name proved to have been used by the testator, or by a name gained by reputation and known to the testator (*b*); and property may be sufficiently described by the description the testator was wont to use (*c*).

Where the donee is designated by name and description, if there is a person who has the name, and the description is incorrect for

*Wilkinson v. Bewicke* (1853), 3 De G. M. & G. 937; *Cave v. Harris, Harris v. Cave* (1887), 57 L. T. 768. For an example with regard to descriptions of donees, see *Wrightson v. Calvert* (1860), 1 John. & H. 250.

(*i*) *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 349; *Bradshaw v. Bradshaw* (1836), 2 Y. & C. (EX.) 72; *Adams v. Jones* (1852), 9 Hare, 485; *Re Hooper, Hooper v. Warner* (1903), 88 L. T. 160; for criticisms on this rule, see *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, 369; for examples as to the names of donees, see *Rowlatt v. Easton* (1863), 2 New Rep. 262; *British Home and Hospital for Incurables v. Royal Hospital for Incurables* (1904), 90 L. T. 601.

(*k*) *West v. Lawday* (1865), 11 H. L. Cas. 375, 384; *Travers v. Blundell* (1877), 6 Ch. D. 436, 441, 443, C. A.; *Hardwick v. Hardwick* (1873), L. R. 16 Eq. 168.

(*l*) *Re Brockett, Dawes v. Miller*, [1908] 1 Ch. 186, per JOYCE, J., at p. 195 (devise of "all the real estate" to which the testatrix was entitled under a will, "namely," certain parcels), following the cases concerning the enumeration of parcels in a conveyance by way of schedule; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 468; compare *D'Aglie v. Fryer* (1841), 12 Sim. 1; *Glanville v. Glanville* (1863), 33 Beav. 302.

(*a*) *West v. Lawday*, *supra*; *Matthews v. Maude* (1830), 1 Russ. & M. 397; *Reeves v. Baker* (1854), 18 Beav. 372 ("all my property whether freehold or personal"); *Re Roberts, Kiff v. Roberts* (1886), 55 L. T. 498, C. A. ("all my property, leasehold and freehold"); *Roberts v. Thorp* (1911), 56 Sol. Jo. 13.

(*b*) *Rivers's Case* (1737), 1 Atk. 410 (illegitimate sons described as "my sons"); *Gynes v. Kemsley* (1742), Freem. (K. B.) 293; *Dowset v. Sweet* (1753), Amb. 175; and see *Edge v. Salisbury* (1749), Amb. 70, 71; *Baylis and Church v. A.-G.* (1742), 2 Atk. 239; *Goodinge v. Goodinge* (1749), 1 Ves. Sen. 231; *Parsons v. Parsons* (1791), 1 Ves. 266; *Lee v. Pain* (1844), 4 Hare, 201, 251, 252; *Andrews v. Andrews* (1885), 15 L. R. Ir. 199, C. A.; *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255. As to reputation of legitimacy, see p. 542, *ante*.

(*c*) Compare *Doe d. Beach v. Jersey (Earl)* (1825), 3 B. & C. 870 ("my Briton Ferry estate," not an estate locally situated in a township or parish of B. F.); and see the cases cited in note (*u*), p. 642, *ante*.

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Inaccuracy  
of Descriptions  
in General.

him and all others, the latter is neglected (*d*). There is no rule, however, that, without any evidence to prove an error of description, the mere name should prevail; in order that the rule may be applicable it is necessary first to show that there is an error in description (*e*). In similar cases, where a description is correct and sufficient, an incorrect name may be neglected (*f*). In cases where either the name alone or the description alone is sufficient to identify a subject, and they do not identify the same subject, then, according to the circumstances of the case, the description and not the name (*g*), or the name and not the description (*h*), may prevail. The name in fact is only a description (*i*), and the question is to determine which portion of the whole description is to prevail (*k*). A test often adopted by the court in such a case is to inquire whether the testator was in the circumstances more liable to err when he described the donee by name or when he attempted to point him out by some further adjunct; and the court adopts that description which in each instance appears to be least open to error (*l*).

**1310.** Descriptions must be construed according to the usual

Effect of  
change of  
circum-  
stances at  
death.

(*d*) *Veritas nominis tollit errorem demonstrationis* (Bacon, Maxims, reg. 24); *Giles v. Giles*, *Penfold v. Penfold* (1836), 1 Keen, 685; *Doe d. Gains v. Rouse* (1848), 5 C. B. 422; *Ford v. Batley* (1853), 23 L. J. (CH.) 225.

(*e*) *Drake v. Drake* (1860), 8 H. L. Cas. 172, per Lord CAMPBELL, L.C., at p. 179, adopted in *Charter v. Charter* (1874), L. R. 7 H. L. 364, per Lord CAIRNS, L.C., at pp. 380, 381; as to the difficulties in applying this rule, see *Camoy's (Lord) v. Blundell* (1848), 1 H. L. Cas. 778; *Garland v. Beverley* (1878), 9 Ch. D. 213, 218, 219. The court does not conjecture that an error existed (*Mostyn v. Mostyn* (1854), 5 H. L. Cas. 155).

(*f*) *Pitcairne v. Brase* (1679), Cas. temp. Finch, 403; *Dowset v. Sweet* (1753), Amb. 175; *Stockdale v. Bushby* (1813), Coop. G. 229.

(*g*) *Garth v. Meyrick* (1779), 1 Bro. C. C. 30; *Smith v. Coney* (1801), 6 Ves. 42; *Doe d. Le Chevalier v. Huthwaite* (1820), 3 B. & Ald. 632; *Camoy's (Lord) v. Blundell*, *supra*; *Adams v. Jones* (1852), 9 Hare, 485; *Bradshaw v. Bradshaw* (1836), 2 Y. & C. (EX.) 72; *Re Blackman* (1852), 16 Beav. 377; *Re Feltham's Trusts* (1855), 1 K. & J. 528; *Hodgson v. Clarke* (1860), 1 De G. F. & J. 394, 397, C. A.; *Re Nunn's Trusts* (1875), L. R. 19 Eq. 331; *Re Hooper, Hooper v. Warner* (1902), 88 L. T. 160. Thus, if there is a person for whom the name is accurate, but the testator was not intimate with him, and a person for whom the name is inaccurate, but the description is sufficient to identify him, and the testator was intimate with him, the latter person is held to be designated (*Charter v. Charter* (1874), L. R. 7 H. L. 364; *In the Goods of Brake* (1881), 6 P. D. 217; *In the Goods of Chappell*, [1894] P. 98; *Re Blake's Trusts*, [1904] 1 I. R. 98).

(*h*) *Newbolt v. Pryce* (1844), 14 Sim. 354; *Garner v. Garner* (1860), 29 Beav. 114; *Gillett v. Gane* (1870), L. R. 10 Eq. 29; *Farrer v. St. Catherine's College, Cambridge* (1873), L. R. 16 Eq. 19; *Garland v. Beverley* (1878), 9 Ch. D. 213; *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255.

(*i*) A description of legatees as those before "named" in the will, although primarily referring to those mentioned by name, may denote persons merely specified or mentioned by another description (*Bromley v. Wright* (1849), 7 Hare, 334; *Re Holmes' Trusts* (1853), 1 Drew. 321; *Seale-Hayne v. Jodrell*, [1891] A. C. 304, 306, 309).

(*k*) *Bernasconi v. Atkinson* (1853), 10 Hare, 345, 351.

(*l*) *Ibid.*, at pp. 351, 352, approved in *Re Fry, Mathews v. Freeman* (1874), 22 W. R. 813, C. A.; *Re Blayney's (Lord) Trust* (1875), 9 I. R. Eq. 413; *Re Lyon's Trusts* (1879), 48 L. J. (CH.) 245.

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tions  
in General.

rules as to the circumstances taken into account (*m*); but where a person or body who once satisfied the description no longer existed at the date of the will, another person or body existing at the date of the will, and satisfying the description inaccurately but sufficiently, may, nevertheless, be entitled under the gift (*n*).

An accurate description of a donee by name is not as a rule affected in the case of a person by a change of name before the testator's death (*o*); or in the case of a society, corporation, or body, by a change of name or reorganisation, if the donee substantially exists in the same nature as at the date of the will (*p*). By the terms of the will, however, the qualification of possessing a specified name (*q*) at the death of the testator (*r*), or at the time of payment or vesting (*s*), or at some other time (*t*), may be a condition of the gift taking effect at all.

Accuracy  
of generic  
description  
of property.

A gift which accurately describes property of a generic nature (*u*) belonging to the testator at the date of the will does not fail where the description is sufficiently apt to indicate particular property belonging to the testator at his death, though as a description of such property it is inaccurate; and the latter property accordingly passes under the gift (*a*), the inaccuracy being then of no importance (*b*). Where, out of several properties alleged to satisfy the description at the death, one only accurately satisfies it (*c*), that property only passes under the gift (*d*). Where no property at all is

(*m*) As to property, see p. 691, *post*; as to donees, see pp. 713 *et seq.*, *post*.

(*n*) *Dowset v. Sweet* (1753), Amb. 175 (see note (2) thereto); *Dooley v. Mahon* (1877), 11 I. R. Eq. 299; and see the cases cited in note (*m*), p. 644, *ante*; as to a legacy to a non-existing or dissolved charitable institution, see title CHARITIES, Vol. IV., pp. 156, 160, 161; *Re Magrath, Histed v. Queen's University of Belfast*, [1913] 2 Ch. 231.

(*o*) As to change of name in general, see title NAME AND ARMS, CHANGE OF, Vol. XXI., pp. 349 *et seq.*

(*p*) *Re Joy, Purday v. Johnson* (1888), 60 L. T. 175 (amalgamation of two donee societies); *Re Wedgwood, Sweet v. Cotton*, [1914] 2 Ch. 245; *Re Donald, Moore v. Somerset*, [1909] 2 Ch. 410 (gift for benefit of volunteer, yeomanry, and militia units, substantially existing as the Territorial Force; see title ROYAL FORCES, Vol. XXV., p. 62, note (*h*); and compare *Re Andrews, Dunedin Corporation v. Smyth* (1910), 29 New Zealand Law Reports, 43 (effect of introduction of compulsory service)).

(*q*) The word "name" may be used in a figurative sense, as meaning "stock" (*Pyot v. Pyot* (1749), 1 Ves. Sen. 335 (where a change of name by marriage did not exclude); *Doe d. Wright v. Plumtre* (1820), 3 B. & Ald. 474, 482; *Carpenter v. Bott* (1847), 15 Sim. 606; *Re Maher, Maher v. Toppin*, [1909] 1 I. R. 70, C. A.).

(*r*) *Bon v. Smith* (1596), Cro. Eliz. 532 (marriage before testator's death: not entitled); *Jobson's Case* (1597), Cro. Eliz. 576 (marriage after testator's death: entitled).

(*s*) *Doe d. Wright v. Plumtre*, *supra*.

(*t*) As, for instance, at birth; so that the name is the family name (*Barlow v. Bateman* (1735), 2 Bro. Parl. Cas. 272; *Leigh v. Leigh* (1808), 15 Ves. 92).

(*u*) *I.e.*, subject to increase or diminution; see p. 692, *post*.

(*a*) *Cooch v. Walden* (1877), 46 L. J. (CH.) 639; *Saxton v. Saxton* (1879), 13 Ch. D. 359.

(*b*) See p. 686, *ante*.

(*c*) As to the canon of construction in such a case, see p. 687, *ante*.

(*d*) *Re Portal and Lamb* (1885), 30 Ch. D. 50, C. A.; *Emuss v. Smith* (1848), 2 De G. & Sm. 722; *Cave v. Harris, Harris v. Cave* (1887), 57 L. T. 768; *Re Potter, Stevens v. Potter* (1900), 83 L. T. 405; and see *Webb v.*



sufficiently described by the words of the will at the death of the testator the gift fails (*e*), except that in cases where the testator had neither at the date of the will nor at his death property accurately described by the words of the will, the court may from the circumstances be able to infer what was meant to be described, and the gift does not necessarily fail (*f*); in the case of bequests of personal estate, the gift may take effect as a general legacy (*g*).

In case of a description of a specific property existing at the date of the will, the whole of that property may pass under the gift, notwithstanding that the description at the date of the death applies accurately to part only of that property (*h*).

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tions  
in General.

Accuracy  
of specific  
descriptions.

#### SECT. 4.—*Descriptions of Property.*

##### SUB-SECT. 1.—*Circumstances taken into Account.*

**1311.** By statute (*i*), a modern will (*k*) must be construed, with reference to the real estate and personal estate comprised in it (*l*), to

Will speaks  
from death  
as to prop-  
erty.

*Byng* (1855), 1 K. & J. 580, 594 (after-acquired property held not to pass under the name testatrix was wont to use as to other property); *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563.

(*e*) *Barber v. Wood* (1877), 4 Ch. D. 885; *Re Knight, Knight v. Burgess* (1887), 34 Ch. D. 518.

(*f*) *Re Jameson, King v. Winn*, [1908] 2 Ch. 111, 116; *King v. Wright* (1845), 14 Sim. 400; *Flood v. Flood*, [1902] 1 I. R. 538.

(*g*) *Seewood v. Mildmay* (1799), 3 Ves. 306; *Lindgren v. Lindgren* (1846), 9 Beav. 358 (as to which cases see note (*g*), p. 642, *ante*); *Findlater v. Lowe*, [1904] 1 I. R. 519.

(*h*) *Re Evans, Evans v. Powell*, [1909] 1 Ch. 784; compare *Re Willis, Spencer v. Willis, supra*.

(*i*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24. This provision has no application to descriptions of donees; see note (*k*), p. 714, *post*. With regard to personal estate there was a rule before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), that a will spoke from death (*Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431, 436, C. A.). With regard to real estate, in wills not subject to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26) the descriptions of property spoke from the date of the will, unless the contrary intention was shown; see note (*g*), p. 517, *ante*.

(*k*) The rule now applies to wills of married women; see p. 535, *ante*; and title HUSBAND AND WIFE, Vol. XVI., p. 380.

(*l*) Including property subject to a power exercised by the will (see title POWERS, Vol. XXIII., p. 43); even where the will purports to exercise a power over property which at the testator's death has become his absolute property (*Re James, Hole v. Bethune*, [1910] 1 Ch. 157). The meaning of this phrase was discussed in *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, C. A., *per* TURNER, L.J., at p. 431 ("so far as the will comprises dispositions of real and personal estate"); *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646, 657 ("a very different thing from saying that the will is for all purposes to speak"); *Re Gillins, Inglis v. Gillins*, [1909] 1 Ch. 345, *per* WARRINGTON, J., at p. 349. The Act "does not say that we are to construe whatever a man says in his will as if it were made on the day of his death. . . . When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which is to outweigh the other, but only that the property is to be comprised in the will. The question remains which clause carries the property, the residuary or the specific devise" (*Re Portal and Lamb* (1885), 30 Ch. D. 50, C. A., *per* LINDLEY, L.J., at p. 55). A release of debts to a specified person is within the statutory provision (*Everett v. Everett* (1877), 7 Ch. D. 428, C. A.; and see *Re Mitchell, Freelove v. Mitchell*, [1913] 1 Ch. 201 (claim made by testator's executors to indemnify against claims under his guarantee made after his death not included)). The question whether this rule applies to

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 Property.

Application  
 to generic  
 descriptions.

Contrary  
 intention.

speak and take effect as if it had been executed immediately before the death of the testator (*m*), and as if the condition of things to which it refers in this respect is that existing immediately before the death of the testator (*a*), unless a contrary intention appears by the will.

In a case, therefore, where the thing given is generic (*b*), and may increase, diminish, or otherwise change during the testator's life, so that the description may from time to time apply to different amounts of property of like nature or to different objects, then the effect of the presumption, if applicable, is that the property answering the description at the death of the testator passes under the gift (*c*).

No contrary intention is shown by the mere use of a possessive adjective (*d*) in the case of such a generic gift (*e*); nor by a description of the property as being that of which the testator is

exceptions from gifts was raised in *Hughes v. Jones* (1863), 1 Hem. & M. 765, 770; and as to descriptions of things not comprised in the will, compare *Re Williams, James v. Williams* (1910), 26 T. L. R. 307 (direction to pay debts of chapels held not confined to debts owing at death of testator).

(*m*) *Higgins v. Dawson*, [1902] A. C. 1, 7.

(*a*) *Re Wells' Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646, 657, 658 (date of will and subsequent instrument).

(*b*) *Goodlad v. Burnet* (1855), 1 K. & J. 341, 349; *Re Slater, Slater v. Slater*, [1906] 2 Ch. 480, 485. The Act does not merely apply, however, to a residuary gift; it applies to specific gifts (*Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, 436, 437, C. A.; *Re Ord, Dickinson v. Dickinson* (1879), 12 Ch. D. 22, 25, C. A.). As to the effect of a general devise of the testator's real or personal property in exercising a general power, see p. 618, *ante*: title POWERS, Vol. XXIII., pp. 29 *et seq.*

(*c*) As, for instance, where the testator acquired further property of the same kind (*Langdale (Lady) v. Briggs, supra*, at pp. 414, 432, C. A. ("all my freehold lands" and "all my leasehold lands" included those held at death); *Trinder v. Trinder* (1866), L. R. 1 Eq. 695 ("my shares in the Great Western Railway" included shares purchased subsequently); *Lysaght v. Edwards* (1876), 2 Ch. D. 499, 505 (general gift of real estate); *Everett v. Everett* (1877), 7 Ch. D. 428, C. A. (release of debts owing was a release of debts contracted after date of will); *Re Russell, Russell v. Chell* (1882), 19 Ch. D. 432 (bequest of testator's share in partnership passed whole business, testator having bought out his partners before death); or where the property came into a different condition, but still satisfied the description (*Saxton v. Saxton* (1879), 13 Ch. D. 359 ("my term and interest in the leasehold dwelling-house" specified: purchase of reversion to leasehold); *Re Gillins, Inglis v. Gillins*, [1909] 1 Ch. 345 ("twenty-five shares" passed only shares as subdivided after the date of the will), explained, however, as a case of a general legacy in *Re Clifford, Mallam v. McFie*, [1912] 1 Ch. 29, 31; and compare *Millard v. Bailey* (1866), L. R. 1 Eq. 378, as explained in *Re Gibson, Mathews v. Foulsham* (1866), L. R. 2 Eq. 669; *Re M'Affee, Mack v. Quirey*, [1909] 1 I. R. 124). A gift of the testator's lands in a certain locality thus *primâ facie* passes all the lands he has in that locality at the time of his death (*Doe d. York v. Walker* (1844), 12 M. & W. 591 ("all the lands of which I am seised"); *Re Ord, Dickinson v. Dickinson, supra* ("my leasehold houses situate at C."); *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297, C. A., *per DAVEY, L.J.*, at p. 302).

(*d*) *Goodlad v. Burnet, supra*; *Ferguson v. Ferguson* (1872), 6 I. R. Eq. 199 ("my stock in trade and debts accruing therefrom"); *Re Ord, Dickinson v. Dickinson, supra*; *Re Russell, Russell v. Chell, supra*.

(*e*) Such a possessive adjective may, however, be an indication that the gift is not generic; see *Goodlad v. Burnet, supra*, at pp. 348, 349; and note (*i*), p. 693, *post*.



seised or possessed (*f*). A description of the property as that which the testator “now” owns or occupies, according to the circumstances (*g*), may, but, it appears, *primâ facie* does not (*h*), show such a contrary intention as to exclude after-acquired property of the specified nature.

This statutory rule, however, does not affect a description of some specific thing existing at the date of the will (*i*).

SUB-SECT. 2.—*Accessories Follow the Principal Gift.*

**1312.** It is a rule applicable to a gift by will (*k*) as well as to a grant by deed (*l*) that, along with the subject-matter of any gift, all rights and benefits, which are necessary and essential (*m*) elements in the reasonable enjoyment of that subject-matter in the state in which it is given (*n*), are *primâ facie* impliedly conferred (*o*). This

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tions of  
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follow the  
principal gift.

(*f*) *Doe d. York v. Walker* (1884), 12 M. & W. 591.

(*g*) *Cole v. Scott* (1849), 1 Mac. & G. 518, where, however, the testator distinguished certain property which should be vested in him at his death; *A.-G. v. Bury* (1701), 1 Eq. Cas. Abr. 201; *Hutchinson v. Barrow* (1861), 6 H. & N. 583; *Williams v. Owen* (1863), 2 New Rep. 585; *Re Edwards, Rowland v. Edwards* (1890), 63 L. T. 481. As to *Cole v. Scott*, *supra*, see *Re Farrer's Estate* (1858), 8 I. C. L. R. 370, 377, 378; and the cases in note (*h*), *infra*.

(*h*) *Wagstaff v. Wagstaff* (1869), L. R. 8 Eq. 229 (“which I now possess” said to be equivalent to “which I possess”); *Hepburn v. Skirving* (1858), 4 Jur. (N. S.) 651, where it was held that “now” must by the statute be understood to refer to the death; *Re Midland Rail. Co.* (1865), 34 Beav. 525; *Re Ashburnham, Gaby v. Ashburnham* (1912), 107 L. T. 601 (“all my effects at present at A.”; no contrary intention); but compare *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, C. A., *per* TURNER, L.J., at p. 437; see also *Re Ord, Dickinson v. Dickinson* (1879), 12 Ch. D. 22, C. A. (“subject to the annuity now charged thereon”); *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, C. A., *per* NORTH, J., at pp. 107, 108; *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563, 568; in the two last cases the words “and in which I now reside” were treated as a mere additional description of the property, and not a vital or essential part of the description cutting down the earlier words, which alone were read as applied to the circumstances existing at the testator’s death, and thereupon these words were rejected. As to whether there is any principle, however, on which the court may so reject these words, compare *Magee v. Lavell* (1874), L. R. 9 C. P. 107, 113; and pp. 686, 687, *ante*. As to the effect in general of adverbs of time in a will, compare p. 680, *ante*.

(*i*) *Emuss v. Smith* (1848), 2 De G. & Sm. 722, 733, 736 (“my brown horse”; “the land which I purchased”); *Douglas v. Douglas* (1854), Kay, 400 (money “which has been charged” on certain lands); *Re Gibson, Mathews v. Foulsham* (1866), L. R. 2 Eq. 669, 672 (“my 1000 N. B. R. shares”; “my Holy Family”); *Re Portal and Lamb* (1885), 30 Ch. D. 50, C. A. (“my cottage and land”); *Cave v. Harris, Harris v. Cave* (1887), 57 L. T. 768, 770; *Re Evans, Evans v. Powell*, [1909] 1 Ch. 784 (“house and effects known as C. Villa”); *Re Alexander, Bathurst v. Greenwood*, [1910] W. N. 94, C. A.

(*k*) *Pearson v. Spencer* (1863), 3 B. & S. 761, Ex. Ch.; *Phillips v. Low*, [1892] 1 Ch. 47, 51; *Milner's Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208, 219; and see *Taws v. Knowles*, [1891] 2 Q. B. 564, C. A.

(*l*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 470.

(*m*) *Palmer v. Fletcher* (1663), 1 Lev. 122.

(*n*) See *Physey v. Vicary* (1847), 16 M. & W. 484 (road to house not included); *Ewart v. Cochrane* (1861), 4 Macq. 117, 122, H. L.

(*o*) *Shep. Touch.* (ed. Preston) 89; compare title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 470.



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implication does not necessarily arise from construction, but from the circumstance of necessary dependence shown by the facts of the case; and when all surrounding circumstances which may legitimately be inquired into are known the result may be different or the extent of the implied gift controlled (*p*).

SUB-SECT. 3.—General Descriptions of Property.

All testator's  
interests  
included.

**1313.** A description of property of any kind in a general manner, such as "lands," "personal estate," and the like, not identifying any particular item of such property, *primâ facie* (*q*) includes all interests, legal or equitable (*r*), vested or contingent (*s*), in possession, reversion, remainder, or expectancy (*t*), in property of that kind (*a*), capable of being so disposed of (*b*) by the will of the testator; and

(*p*) *Phillips v. Low*, [1892] 1 Ch. 47, 50, 51; *Birmingham, Dudley, and District Banking Co. v. Ross* (1888), 38 Ch. D. 295, 308, 311, 315.

(*q*) For an example of a contrary intention shown by the will taken as a whole, see *Teatt v. Strong* (1760), 3 Bro. Parl. Cas. 219. Such a contrary intention must amount to an intention to exclude such interests, as distinct from an absence of the intention to include them (*Doe d. Cholmondeley (Lord and Lady) v. Weatherby* (1809), 11 East, 322, 333; *Doe d. Pell v. Jeyes* (1830), 1 B. & Ad. 593, 600; *Doe d. Howell v. Thomas* (1840), 1 Man. & G. 335, 344).

(*r*) Thus, a general devise of the testator's lands, or lands in a particular locality, includes lands contracted to be purchased and not actually conveyed to him (*Atcherley v. Vernon* (1725), 10 Mod. Rep. 578; *Greenhill v. Greenhill* (1711), 2 Vern. 679; *Holmes v. Barker* (1816), 2 Madd. 462); for other general descriptions of property, see *Collison v. Girling* (1838), 4 My. & Cr. 63, 75 ("my stock"); *Re Stevens, Stevens v. Keily*, [1888] W. N. 110 ("my estate share and interest" in a business). A description of stock of or to which the testator may "be possessed or entitled" at his death does not ordinarily include stock purchased on his instructions but after his death (*Thomas v. Thomas* (1859), 27 Beav. 537).

(*s*) *Ingilby v. Amcotts* (1856), 21 Beav. 585.

(*t*) *Wheeler v. Walroone* (1647), Aleyn, 28; *Ridout v. Pain* (1747), 3 Atk. 486, 492; *Re Egan, Mills v. Penton*, [1899] 1 Ch. 688 ("money in my possession" passed reversionary interest); *Doe d. Howell v. Thomas, supra*; *Tennent v. Tennent* (1844), 1 Jo. & Lat. 379, 389 (fact that property is limited to the same uses as the land under the uses of which the testator's interest arises is not sufficient to exclude that interest); *Alliston v. Chapple* (1860), 6 Jur. (n. s.) 288 (remainder in specific real estate given by the same will); *Church v. Mundy* (1808), 15 Ves. 396. Similarly, an unsettled reversion in settled lands passes under a gift of "lands not settled" (*Glover v. Spendlove* (1793), 4 Bro. C. C. 337; *Cooke v. Gerrard* (1667), 1 Lev. 212; *Chester v. Chester* (1727), 3 P. Wms. 56; *A.-G. v. Vigor* (1803), 8 Ves. 256; *Jones v. Skinner* (1835), 5 L. J. (CH.) 87; *Incorporated Society v. Richards* (1841), 1 Dr. & War. 258); and "property not included in" a certain settlement may include an absolute interest under an ultimate trust in that settlement (*O'Reilly v. Smyth* (1851), 1 I. Ch. R. 349; *Re Green, Walsh v. Green* (1893), 31 L. R. Ir. 338); but expressions of this kind are equivocal, capable of meaning either the lands comprised in the settlement, or so much of the whole interest in the lands as is not subject to the settlement (*Ford v. Ford* (1848), 6 Hare, 486, 494; *Incorporated Society v. Richards, supra*, at pp. 280, 281; *Goodtill d. Daniel v. Miles* (1805), 6 East, 494).

(*a*) As to mortgages and leasehold interests with regard to a gift of "lands," see, further, p. 704, *post*. As to growing crops, see note (*t*), p. 521, *ante*.

(*b*) As to the exercise of an after-acquired general power by words of a general description, see title POWERS, Vol. XXIII., p. 43; as to when an after-acquired special power can be so exercised, see *ibid.*, p. 44.

general descriptions of property are *primâ facie* construed in their general sense (*c*), but are capable of being controlled by the context, for example, under the *ejusdem generis* rule (*d*).

A description of property, which in its usual sense is apt to include kinds of property of both real and personal nature, is not made applicable to real estate only or to personal estate only by reason that the limitations are more applicable to that particular kind of property, or are even inapplicable to any but that particular kind of property (*e*), although that is an indication to be considered in connexion with the whole context (*f*).

A general description of chattels, which is made the subject of a gift for life and other interests in succession, is not construed as including chattels consumed in the use of them, unless the intention is clearly shown in the context (*g*).

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Limitations applicable to one kind of property only.

#### SUB-SECT. 4.—Descriptions of Property by Locality.

**1314.** A description of property by its locality (*h*) does not in general include property in any other locality at the death of the

Descriptions by locality.

(*c*) See p. 655, *ante*.

(*d*) As to the *ejusdem generis* rule, see p. 682, *ante*; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 469, 470.

(*e*) As, for instance, gifts of property, or of a residue of estates and effects and similar gifts (*Doe d. Burkitt v. Chapman* (1789), 1 Hy. Bl. 223; *Morgan d. Surnam v. Surnam* (1808), 1 Taunt. 289; *Ackers v. Phipps* (1835), 3 Cl. & Fin. 665, 691, H. L.; *Hunter v. Pugh* (1839), 4 Jur. 571; *Morrison v. Hoppe* (1851), 4 De G. & Sm. 234; *D'Almaine v. Moseley* (1853), 1 Drew. 629; *Fullerton v. Martin* (1853), 22 L. J. (CH.) 893; *O'Toole v. Browne* (1854), 3 E. & B. 572; *Streatfield v. Cooper* (1859), 27 Beav. 338; *Hamilton v. Buckmaster* (1866), L. R. 3 Eq. 323; *Re Greenwich Hospital Improvement Act* (1855), 20 Beav. 458; *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369, 371; *Lloyd v. Lloyd* (1869), L. R. 7 Eq. 458; *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483); or land with its appurtenances (*Hobson v. Blackburn* (1833), 1 My. & K. 571); or other gifts where the will shows that the testator had other kinds of property present to his mind, and the trusts can be applied to such portion of the blended property as is capable of being so taken (*Saumarez v. Saumarez* (1839), 4 My. & Cr. 331, explained in *Stokes v. Salomons* (1851), 9 Hare, 75, 83). Gifts to trustees took effect subject to resulting trusts as to parts of the property in *Dunnage v. White* (1820), 1 Jac. & W. 583, and *Longley v. Longley* (1871), L. R. 13 Eq. 133.

(*f*) As, for instance, in gifts to trustees, "their executors, administrators, and assigns" (*Doe d. Spearing v. Buckner* (1796), 6 Term Rep. 610, which case, it appears, would now be decided otherwise; *Fullerton v. Martin*, *supra*, at p. 894; *Newland v. Marjoribanks* (1813), 5 Taunt. 268; *Doe d. Hurrell v. Hurrell* (1821), 5 B. & Ald. 18; *Coard v. Holderness* (1855), 20 Beav. 147; *Prescott v. Barker* (1874), 9 Ch. App. 174; and see *Pogson v. Thomas* (1840), 6 Bing. (N. C.) 337, which case, however, it appears, would not now be followed; *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369, 372). Such indications, however, become of less weight where there is a direction for sale and distribution (*O'Toole v. Browne*, *supra*, discussing *Sanderson v. Dobson* (1847), 1 Exch. 141, and S. C. (1849), 7 C. B. 81; *Streatfield v. Cooper*, *supra*; *Dobson v. Bowness* (1868), L. R. 5 Eq. 404, 408).

(*g*) *Porter v. Tournay* (1797), 3 Ves. 311, 313; *Sealy v. Starwell* (1868), 2 L. R. Eq. 326, 348; *Re Moir's Estate*, *Moir v. Warner*, [1882] W. N. 139 (heirlooms).

(*h*) As to cases where a restriction to a locality only applied in the context to part of the gift, see *Norris v. Norris* (1846), 2 Coll. 719; *Domville v. Taylor* (1863), 32 Beav. 604. A gift of "the contents" of a residence ordinarily includes such fixtures as the testator might remove (*Re Oppenheim*, *Oppenheim v. Oppenheim* (1914), 58 Sol. Jo. 723).

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testator (*i*), unless the restriction to that locality is to be rejected as *falsa demonstratio* (*k*). If, however, the property described is movable, the intention is inferred, unless the context is to the contrary (*l*), that the gift includes property which is usually in that situation and has been removed merely temporarily (*m*) or of necessity for its preservation (*n*), or, it seems, tortiously (*o*), but not in general property otherwise permanently removed (*p*). Further, since choses in action are not considered as localised (*q*), a general description of property in a certain locality *primâ facie* (*r*) does not include any choses in action due, payable, or recoverable there, or represented by documents, other than Bank of England notes (*s*), which are kept there (*t*), unless the locality is a place

(*i*) *Shaftsbury (Earl) v. Shaftsbury (Countess)* (1717), 2 Vern. 747; *Green v. Symonds* (1730), 1 Bro. C. C. 129, n.; *Heseltine v. Heseltine* (1818), 3 Madd. 276; *Colleton v. Garth* (1833), 6 Sim. 19; *Houlding v. Cross* (1855), 1 Jur. (N. s.) 250; *Spencer v. Spencer* (1856), 21 Beav. 548; *Blagrove v. Coore* (1859), 27 Beav. 138; *Wilkins v. Jodrell* (1863), 11 W. R. 588. This holds good although the property is acquired, or brought to that locality, after the date of the will; see *Gayre v. Gayre* (1706), 2 Vern. 538; *Sayer v. Sayer* (1714), 2 Vern. 688; for examples as to real estate, see note (*h*), p. 687, *ante*. Goods in transit to the named locality do not pass (*Beaufort (Duke) v. Dundonald (Lord)* (1716), 2 Vern. 739; *Brooke (Lord) v. Warwick (Earl)* (1848), 2 De G. & Sm. 425; *Lane v. Sewell* (1874), 43 L. J. (CH.) 378). See also *Arkell v. Fletcher* (1839), 10 Sim. 299, 309.

(*k*) *Land v. Devaynes* (1794), 4 Bro. C. C. 537; *Norreys v. Franks* (1875), 9 L. R. Eq. 18, 34; and see p. 686, *ante*.

(*l*) *Re Stamford (Earl), Hall v. Lambert* (1906), 22 T. L. R. 632, C. A.

(*m*) *Brooke (Lord) v. Warwick (Earl)* (1848), 2 De G. & Sm. 425; *Spencer v. Spencer*, *supra*, at p. 549; *Bruce v. Curzon-Howe* (1870), 19 W. R. 116; *Rawlinson v. Rawlinson* (1876), 34 L. T. 848; *Re McCalmont, Rooper v. McCalmont* (1903), 19 T. L. R. 490; *Re Lea, Wells v. Holt* (1911), 104 L. T. 253.

(*n*) *Chapman v. Hart* (1749), 1 Ves. Sen. 271, 273 (goods in a ship: original situation was temporary and precarious); *Moore v. Moore* (1781), 1 Bro. C. C. 127, 129; *Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538, 553, 554.

(*o*) *Shaftsbury (Earl) v. Shaftsbury (Countess)*, *supra*, at p. 748; see also *Petre v. Ferrers* (1891), 61 L. J. (CH.) 426, where, however, there were not words of description to pass the articles removed.

(*p*) Except in such cases permanent removal adeems the gift (*Green v. Symonds* (1730), 1 Bro. C. C. 129, n.; and see the other cases cited in note (*i*), *supra*), even if unknown to the testator but made by an authorised agent (*Shaftsbury (Earl) v. Shaftsbury (Countess)*, *supra*).

(*q*) See title CHOSSES IN ACTION, Vol. IV., p. 361.

(*r*) For cases where sufficient intention to the contrary was shown, see *Scorey v. Harrison* (1852), 16 Jur. 1130; *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613; *Guthrie v. Walrond* (1883), 22 Ch. D. 573; *Re Prater, Desing v. Beare* (1888), 37 Ch. D. 481, C. A.; *Re Robson, Robson v. Hamilton*, [1891] 2 Ch. 559; *Re Clark, McKecknie v. Clark*, [1904] 1 Ch. 294, where of two localities, that of the bond debtor and that of the certificate, the latter was preferred; *Re Young, Young v. Bain* (1902), 21 New Zealand Law Reports, 503.

(*s*) *Popham v. Aylesbury (Lady)* (1748), Amb. 68; *Brooke v. Turner* (1836), 7 Sim. 671 (country bank notes excluded); *Mahoney v. Donovan* (1863), 14 L. Ch. R. 262, 388, C. A.; and see *Re Robson, Robson v. Hamilton*, *supra*, at p. 560.

(*t*) *Chapman v. Hart* (1749), 1 Ves. Sen. 271; *Moore v. Moore* (1781), 1 Bro. C. C. 127 (bond); *Jones v. Sefton (Lord)* (1798), 4 Ves. 166; *Nisbett*



where such documents are usually kept (*a*). A description of chattels in a certain receptacle does not ordinarily include articles in the specified place which are mere accessories to any things in another place (*b*), but may include such a sum of money (*c*) as may ordinarily be found there (*d*).

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SUB-SECT. 5.—*Unlimited Gifts of Income.*

**1315.** An unlimited devise of the rents and profits of land is *primâ facie* a gift of the land itself (*e*), and an unlimited bequest of dividends, interest, income or produce of personal estate, or of a mixed fund, is *primâ facie* a gift of the capital or *corpus* of the estate (*f*).

Unlimited  
gifts of rents  
or income.

*v. Murray, Murray v. Nisbett* (1799), 5 Ves. 149; *Fleming v. Brook* (1804), 1 Sch. & Lef. 318, where the rule was adhered to in spite of an exception of a specified chose in action; *Stuart v. Bute (Marquis)* (1806), 11 Ves. 657, 662; *Brooke v. Turner* (1836), 7 Sim. 671 (promissory notes and mortgage); *Hertford (Marquis) v. Lowther (Lord)* (1843), 7 Beav. 1; *Rhodes v. Rhodes* (1874), 22 W. R. 835; *Thorne v. Thorne* (1903), 33 Canada Supreme Court Reports, 309. In *Re O'Brien, O'Brien v. O'Brien*, [1906] 1 I. R. 649, C. A., an intention excluding even a sum of cash was found in the will.

(*a*) As, for instance, a bureau, desk, box, or bank, where documents and money are usually kept (*Roberts v. Kuffin* (1741), 2 Atk. 112; *Re Robson, Robson v. Hamilton*, [1891] 2 Ch. 559).

(*b*) As, for instance, title-deeds or the key to another receptacle (*Brooke v. Turner, supra*, at p. 681; *Re Robson, Robson v. Hamilton, supra*, at p. 565; *Re Craven, Crewdson v. Craven* (1909), 100 L. T. 284, C. A. (gift of a house and its contents: bonds and securities were excluded)). A gift of a "box" or other receptacle does not ordinarily include securities which it contains (*Re Hunter, Northey v. Northey* (1908), 25 T. L. R. 19). As to the general rule as to accessories, see pp. 693, 694, *ante*.

(*c*) *Swinfen v. Swinfen* (No. 4) (1860), 29 Beav. 207.

(*d*) *Chapman v. Hart* (1749), 1 Ves. Sen. 271, *per Lord HARDWICKE*, L.C., at p. 272 ("if not an extraordinary sum and just received").

(*e*) *Rayman v. Gold* (1592), Moore (K.B.), 635; *Johnson v. Arnold* (1748), 1 Ves. Sen. 169, 171; *Murthwaite v. Jenkinson* (1824), 2 B. & C. 357; *Stewart v. Garnett* (1830), 3 Sim. 398, where it was held that the words would pass everything that was necessary to the enjoyment of the estate; *Doe d. Goldin v. Lakeman* (1831), 2 B. & Ad. 30, where the estate was conditional; *Harvey v. Harvey* (1842), 5 Beav. 134; *Signall v. Rose* (1854), 24 L. J. (CH.) 27; *Mannox v. Greener* (1872), L. R. 14 Eq. 456; Co. Litt. 4 b; *Re Martin, Martin v. Martin*, [1892] W. N. 120; and see *Charitable Donations and Bequests Commissioners v. de Clifford (Baroness)* (1841), 1 Dr. & War. 245; *Adshead v. Willetts* (1861), 29 Beav. 358; *Shacklock v. Jarvis* (1872), 26 L. T. 682. In *Mannox v. Greener, supra*, it was held that the rule was not confined to cases of devises of "rents and profits," the rents in that case being described as "income." Where, however, a gift of property (as, for instance, "hereditaments") to trustees is sufficient to include an advowson with other property, a trust of the "rents and annual income" of that property, expressly for life, is not ordinarily sufficient to include the right of next presentation to that advowson (*Martin v. Martin* (1843), 12 Sim. 579), although a trust of the "rents and profits" would be sufficient to include that right (*Sherard v. Harborough (Lord)* (1753), Amb. 165, 167; *Albemarle (Earl) v. Rogers* (1794), 2 Ves. 477; *Cook v. Cholmondeley* (1854), 3 Drew. 1; *Cust v. Middleton* (1864), 34 L. J. (CH.) 185, C. A.).

(*f*) *Elton v. Shepherd* (1781), 1 Bro. C. C. 532; *Phillips v. Chamberlaine* (1798), 4 Ves. 51, 58; *Page v. Leapingwell* (1812), 18 Ves. 463; *Adamson v. Armitage* (1815), 19 Ves. 416, 418; *Stretch v. Watkins* (1816), 1 Madd. 253; *Clough v. Wynne* (1817), 2 Madd. 188; *Haig v. Swiney*

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This rule may, however, be excluded where the will shows that the donee is not to take the land or capital (*g*), as where the donee is to take an interest of the same nature as another donee who expressly takes a life interest only (*h*); and the rule does not apply where the gift of income is not unlimited (*i*), or where the gift is not of all the benefits arising from the property (*k*); but merely of a particular benefit (*l*) or a benefit to be enjoyed by the donee personally (*m*). But it makes no difference whether the income be given to the donee directly or through the intervention of trustees (*n*).

A charge upon such rents, dividends, and income indefinitely may be a charge on the property itself in similar cases (*o*).

Gifts until  
marriage.

**1316.** Where a gift to a donee until marriage is construed to be

(1823), 1 Sim. & St. 487; *Benson v. Whittam*, *Hemming v. Whittam* (1831), 5 Sim. 22; *Phillips v. Eastwood* (1835), L. & G. temp. Sugd. 270, 296; *Mackworth v. Hinxman* (1836), 2 Keen, 658; *Stephenson v. Dowson* (1840), 3 Beav. 342; *Humphrey v. Humphrey* (1851), 1 Sim. (N. s.) 536 ("absolutely" in other gifts); *Southouse v. Bate* (1851), 16 Beav. 132; *Jenings v. Baily* (1853), 17 Beav. 118, where legacies given at the death of the donee did not exclude the rule; *Tyrell v. Clark* (1854), 2 Drew. 86; *Boosey v. Gardner* (1854), 18 Beav. 471 (not appealed from on this point, 5 De G. M. & G. 122); *Dowling v. Dowling* (1866), 1 Ch. App. 612; *Cooney v. Nicholls* (1881), 7 L. R. Ir. 107, 115, C. A.; *Davidson v. Kimpton* (1881), 18 Ch. D. 213, 217; *Re L'Herminier*, *Mounsey v. Buston*, [1894] 1 Ch. 675, 676, where the rule was applied to a power to appoint the income of a fund; *Wiley v. Chanteperdrix*, [1894] 1 I. R. 209, 214; *Tredennick v. Tredennick*, [1900] 1 I. R. 354; *Sheridan v. O'Reilly*, [1900] 1 I. R. 386, 388, 397.

(*g*) See *Re Morgan*, *Morgan v. Morgan*, [1894] 3 Ch. 222, C. A., per LINDLEY, L.J., at p. 227; *Re Rawlins' Trusts* (1890), 45 Ch. D. 299, C. A., affirmed, *sub nom. Scalé v. Rawlins*, [1892] A. C. 342.

(*h*) *Wynne v. Wynne* (1837), 2 Keen, 778, 791; *Blann v. Bell* (1852), 2 De G. M. & G. 775, 781 (sum of bank annuities).

(*i*) *Buchanan v. Harrison* (1861), 1 John. & H. 662, 665 (better reported on this point, 8 Jur. (N. s.) 965, 967, 968); see *Sansbury v. Read* (1805), 12 Ves. 75; *Re Mason*, *Mason v. Mason*, [1910] 1 Ch. 695, 700, C. A. As to the duration of gifts of income generally, see titles RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 483 *et seq.*; TRUSTS AND TRUSTEES, pp. 28, 30, *ante*.

(*k*) *Shep. Touch.* (ed. Preston) 89.

(*l*) Co. Litt. 4 b; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 156. As to devises of a right of use and occupation of land, see p. 773, *post*.

(*m*) The fact that the donee is a married woman, and that the income is given to her for her separate use, is not sufficient to exclude the rule (*South v. Alleine* (1695), 1 Salk. 228; *Elton v. Shepherd* (1781), 1 Bro. C. C. 532; *Adamson v. Armitage* (1815), 19 Ves. 416; *Tawney v. Ward* (1839), 1 Beav. 563; *Humphrey v. Humphrey*, *supra*; *Watkins v. Weston* (1863), 3 De G. J. & Sm. 434, C. A.; *Epple v. Stone* (1906), 3 Commonwealth Law Reports, 412).

(*n*) *Haig v. Swiney* (1823), 1 Sim. & St. 487, 490.

(*o*) *Baines v. Dixon* (1747), 1 Ves. Sen. 41; *Allan v. Backhouse* (1813), 2 Ves. & B. 65, affirmed (1821), Jac. 631; *Phillips v. Gutteridge* (1862), 3 De G. J. & Sm. 332, 336; *Metcalfe v. Hutchinson* (1875), 1 Ch. D. 591, 594; *Re Green*, *Baldock v. Green* (1888), 40 Ch. D. 610, where the rule was excluded; *Re Young*, *Brown v. Hodgson*, [1912] 2 Ch. 479, 482, 486, referring to *Hambro v. Hambro*, [1894] 2 Ch. 564 (terminable annuity); *Ramsay v. Lowther* (1912), 16 Commonwealth Law Reports, 1, 18, 19 (gift of rents, not indefinite).

a gift of the income to the donee indefinitely, requiring the act of marriage to determine the gift, the donee remaining unmarried takes an absolute interest in the fund (*p*).

If a testator, being entitled to land subject to a lease, devises the "rent" or "ground rent" of the land, without expressly disposing of his reversion, the devise *primâ facie* includes not only the rent payable during the lease, but the whole interest of the testator in the land (*q*).

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Gift of rents of property let.

SUB-SECT. 6.—*Particular Descriptions.*

**1317.** Lands do not pass under the word "appurtenances," with reference to other land, in its strict technical sense; but they do pass if it appears that a larger sense was intended to be given to the word, as in the case of a gift of "lands appertaining" to other lands (*r*). Choses in action do not ordinarily pass as appertaining to other property (*s*).

"Appurtenances"; "appertaining" etc.

**1318.** A bequest of a testator's "business" or of his share in a business (*a*) *primâ facie* includes his interest in all the assets (*b*),

"Business."

(*p*) *Rishton v. Cobb* (1839), 5 My. & Cr. 145, 152 (where the gift was to the donee until marriage, with a gift over on alienation), discussed in *Re Boddington, Boddington v. Clariat* (1884), 25 Ch. D. 685, 689, C. A., and *Re Mason, Mason v. Mason*, [1910] 1 Ch. 695, 698, 700, C. A., where the first-named case was distinguished on the ground of a gift over on marriage, but followed in *Re Howard, Taylor v. Howard*, [1901] 1 Ch. 412 ("so long as she remains unmarried"); see p. 774, *post*.

(*q*) *Kerry v. Derrick* (1605), Cro. Jac. 104; *Maundy v. Maundy* (1735), 2 Stra. 1020; *Kaye v. Laxon* (1780), 1 Bro. C. C. 76; *Walker v. Shore* (1815), 19 Ves. 387; *Ashton v. Adamson* (1841), 1 Dr. & War. 198; and see *Cuthbert v. Lempriere* (1814), 3 M. & S. 158.

(*r*) *Buck d. Whalley v. Nurton* (1797), 1 Bos. & P. 53, 57. In the following cases land was held to pass under the term in a gift of a house with its appurtenances, or under a gift of a house simply, with a suitable context: *Boocher v. Samford* (1588), Cro. Eliz. 113; *Ewer v. Heydon* (1594), Moore (K. B.), 359; *Harwood v. Higham* (1586), Godb. 40; *Gennings v. Lake* (1629), Cro. Car. 168, 169 (Crown grant); *Blackborn v. Edgley* (1720), 1 P. Wms. 600, 603; *Doe d. Lempriere v. Martin* (1777), 2 Wm. Bl. 1148 (copyhold land held for a different term); *Ongley v. Chambers* (1824), 8 Moore (C. P.), 665; *Buszard v. Capel* (1828), 8 B. & C. 141, 150; (1829), 6 Bing. 150, 161, Ex. Ch. (deed); *Hobson v. Blackburn* (1833), 1 My. & K. 571; *Leach v. Leach*, [1878] W. N. 79; *Cuthbert v. Robinson* (1882), 51 L. J. (CH.) 238 (charge of legacies and devise to trustees considered material). In the following cases land was held not to pass under the term: *Bettisworth's Case* (1591), 2 Co. Rep. 31 b, 32 a; *Yates v. Clinard* (1599), Cro. Eliz. 704 (devise of copyhold house with the appurtenances, where the land in question was freehold); *Hearn v. Allen* (1625), Cro. Car. 57; *Smith v. Ridgway* (1866), L. R. 1 Exch. 331, Ex. Ch.; and see Plowd. 170; *Doe d. Renow v. Ashley* (1847), 10 Q. B. 663; *Pheysey v. Vicary* (1847), 16 M. & W. 484, 494; *Evans v. Angell* (1858), 26 Beav. 202; *Lister v. Pickford* (1865), 34 Beav. 576; *Hibon v. Hibon* (1863), 9 Jur. (N. S.) 511 ("messuage and premises"). In some of the latter cases it was said that the lands would have passed if the words had been "with the lands appertaining."

(*s*) *Finch v. Finch* (1876), 35 L. T. 235 ("appurtenances" of factory did not include outstanding loans); *Re McCalmont, Rooper v. McCalmont* (1903), 19 T. L. R. 490; as to local descriptions, compare p. 695, *ante*.

(*a*) See *Re Barfield, Goodman v. Child* (1901), 84 L. T. 28 (undrawn profits there included).

(*b*) *Rogers v. Rogers* (1910), 11 State Reports, New South Wales, 38; as to directions to the trustees to carry on the testator's business, see, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 293 *et seq.*



SECT. 4.  
Descrip-  
tions of  
Property.

"Effects."

including such interest in the land on which it is carried on as forms part of those assets(c), but in the context or circumstances may comprise or exclude various items(d), such as book debts(e), the stock in trade(f), or the land on which it is carried on(g); or may be extended to property not part of the assets(h).

**1319.** A gift of the testator's "effects," without a context sufficient to control it, may include the whole of the testator's personal estate where that property is not otherwise disposed of by the will(i), and is *primâ facie* confined to personal estate(k) unless an inference to the contrary arises from the context, in which case even real estate may be comprised in the term(l). It may also by the context(m) be restricted to particular kinds of personal estate(n); thus, in a gift of a house with its furniture and a class of

(c) *Hall v. Fennell* (1875), 9 I. R. Eq. 615, 618; *Devitt v. Kearney* (1883), 13 L. R. Ir. 45, C. A.: see *Re Martin, Martin v. Martin*, [1892] W. N. 120 ("rents and profits" of business).

(d) *Re Beard, Simpson v. Beard* (1888), 57 L. J. (CH.) 887.

(e) *Stuart v. Bute (Marquis)* (1813), 11 Ves. 656, H. L.; *Delany v. Delany* (1885), 15 L. R. Ir. 55, explained in *Re Barfield, Goodman v. Child* (1901), 84 L. T. 28; *Re Haigh* (1907), 51 Sol. Jo. 343 (bank balance); and see *Re Beard, Simpson v. Beard, supra*; *Re Deller's Estate, Warman v. Greenwood*, [1888] W. N. 62; *Re Stevens, Stevens v. Keily*, [1888] W. N. 110, 116.

(f) *Blake v. Shaw* (1860), John. 732 (gift of "plant and goodwill"); *Delany v. Delany, supra*.

(g) *Re Henton, Henton v. Henton* (1882), 30 W. R. 702.

(h) *Blake v. Shaw, supra* (interest in land of no value apart from business), followed in *Re Hawkins, Hawkins v. Argent* (1913), 109 L. T. 969 (house and bank balance included); *Bevan v. A.-G.* (1863), 4 Giff. 361 (debt of partner included); *Re Barfield, Goodman v. Child, supra* (share of capital and undrawn profits included); *Re England, England v. Bayles*, [1906] Victorian Law Reports, 94 ("goodwill" there meant provision in articles for testator's family).

(i) *Hodgson v. Jex* (1876), 2 Ch. D. 122; *Campbell v. Prescott* (1808), 15 Ves. 500, 507; *Michell v. Michell* (1820), 5 Madd. 69, 71; *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290, 303.

(k) *Cave v. Cave* (1762), 2 Eden, 139; *Doe d. Hick v. Dring* (1814), 2 M. & S. 448, dissented from in *Smyth v. Smyth* (1878), 8 Ch. D. 561, *per MALINS, V.-C.*, at pp. 564, 565; *Camsfield v. Gilbert* (1803), 3 East, 510; *Henderson v. Farbridge* (1826), 1 Russ. 479; *Doe d. Haw v. Earles* (1846), 15 M. & W. 450; *Hawkins, Wills*, 1st ed., p. 55, approved in *Hall v. Hall*, [1892] 1 Ch. 361, C. A., *per LINDLEY, L.J.*, at p. 365.

(l) *Hogan v. Jackson* (1775), 1 Cowp. 299 (devise of residue of testator's "effects, both real and personal"), affirmed, *sub nom. Jackson v. Hogan* (1776), 3 Bro. Parl. Cas. 388, followed in *Torrington (Lord) v. Bowman* (1852), 22 L. J. (CH.) 236; *Doe d. Chilcott v. White* (1800), 1 East, 33 (after devise of goods and lands to A. power to give whatever A. thought proper of her "said effects" to B. and C.); *Titchfield (Marquis) v. Horncastle* (1838), 2 Jur. 610 (effects defined by references elsewhere in the will to "real estate" and "property"); *Milsome v. Long* (1854), 3 Jur. (N. S.) 1073 ("stock in trade, money, book debts and effects," carried a reversion in real estate); *Phillips v. Beal* (1858), 25 Beav. 25 (to "use" of S.); *Re Parrott, Parrott v. Parrott* (1885), 53 L. T. 12; *Hall v. Hall*, [1892] 1 Ch. 361, C. A. (intention inferred from the words "devise," "wheresoever situate," "property" etc.); *Re Wass, Re Clark* (1906), 95 L. T. 758 ("personal estate and effects," affected by charge of debts, word "devise," and words of limitation).

(m) *In the Goods of O'Loughlin* (1870), L. R. 2 P. & D. 102.

(n) *Gibbs v. Lawrence* (1860), 7 Jur. (N. S.) 137; *Cross v. Wilkes* (1866), 35 Beav. 562; *Watson v. Arundel* (1876), 10 I. R. Eq. 299; *Re Hammersley, Heasman v. Hammersley* (1899), 81 L. T. 150.

articles which tend to the beneficial occupation and enjoyment of the house, ending with “all other effects,” by the *ejusdem generis* rule (o) it may be restricted to other articles of that nature (a); and the expression is frequently used in a restricted sense, meaning goods and movables (b), a sense especially applicable where other parts of the personal estate are otherwise disposed of (c), or where there is a subsequent residuary gift of personal estate (d).

SECT. 4.  
Descriptions of  
Property.

**1320.** “Estate,” as a general description of property (e), is not a technical word (f), and *primâ facie*, when used in a suitable context, is a very wide term (g), and is sufficient to include the whole real (h) and personal (i) estate of the testator.

“Estate.”

The words “the funds,” standing alone and without a context, have been held to mean the funds established by various Acts of Parliament and forming part of the National Debt of the United Kingdom (k), and where in a will words of description refer to the funds, as in the case of funded property, money in the funds, and like expressions, the *primâ facie* reference is to such public funds (l); but the context and the circumstances may involve a different construction (m).

“Funds.”

**1321.** The expression “goods” or “goods and chattels” as a description of property is *primâ facie* sufficient to include the whole personal estate (n).

“Goods.”

(o) See p. 682, *ante*.

(a) *Gibbs v. Lawrence* (1860), 7 Jur. (N. S.) 137; *Campbell v. McGrain* (1875), 9 I. R. Eq. 397; *Re Miller, Daniel v. Daniel* (1889), 61 L. T. 365 (bank-notes, securities and jewellery excluded); compare *Manton v. Tabois* (1885), 30 Ch. D. 92.

(b) *Michell v. Michell* (1820), 5 Madd. 69, *per* LEACH, V.-C., at p. 72.

(c) *Rawlings v. Jennings* (1806), 13 Ves. 39, 46.

(d) *MacPhail v. Phillips*, [1904] 1 I. R. 155.

(e) As to the effect of the word as describing the testator's interest, compare note (p), p. 775, *post*.

(f) *Basset v. St. Levan* (1895), 13 R. 235, 248, 250.

(g) “Estate is *genus generalissimum*” (*Hamilton Corporation v. Hodsdon* (1847), 6 Moo. P. C. C. 76, 82).

(h) *Bridgwater (Countess) v. Bolton (Duke)* (1703), 1 Salk. 236; *Lumley v. May* (1691), Prec. Ch. 37; *Churchill v. Dibden* (1764) 9 Sim. 447, n.; *Jongsma v. Jongsma* (1787), 1 Cox, Eq. Cas. 362 (copyholds); *Midland Counties Rail. Co. v. Oswin* (1844), 1 Coll. 74; *Patterson v. Huddart* (1853), 17 Beav. 210, 212; *Fullerton v. Martin* (1853), 22 L. J. (CH.) 893, 894; *O'Toole v. Browne* (1854), 3 E. & B. 572; *Meeds v. Wood* (1854), 19 Beav. 215; *Hawksworth v. Hawksworth* (1858), 27 Beav. 1; *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369; and see *Hounsell v. Dunning*, [1902] 1 Ch. 512, 520, 521 (indications that copyholds were not included).

(i) As to the effect of the context in confining the term to personal estate, see *Marchant v. Twisden* (1711), Gilb. 30; *Molyneux v. Rowe* (1856), 25 L. J. (CH.) 570.

(k) *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273, 280, 285; compare *Re Hill, Fettes v. Hill*, [1914] W. N. 132 (“public stocks of the Bank of England”).

(l) *Slingsby v. Grainger*, *supra*; *Ridge v. Newton* (1842), 2 Dr. & War. 239; *Burnie v. Getting* (1845), 2 Coll. 324; *Ellis v. Ellis* (1857), 23 Beav. 543; *Howard v. Kay* (1858), 27 L. J. (CH.) 448; *Brown v. Brown* (1858), 6 W. R. 613; *Wilday v. Sandys* (1869), L. R. 7 Eq. 455.

(m) *Manqin v. Manqin* (1852), 16 Beav. 300; *Ellis v. Eden* (1857), 23 Beav. 543 (foreign funds); and see *Slingsby v. Grainger*, *supra*; *Cadett v. Earle* (1877) 5 Ch. D. 710.

(n) *Stuart v. Bute (Marquis)* (1806), 11 Ves. 656, 666; *Gower (Countess)*

## SECT. 4.

## Descriptions of Property.

"House or building."

"Investments."

"Land," and other general devises.

**1322.** Words which *primâ facie* describe only a house or other building may, in suitable contexts and circumstances, include land necessary for the convenient use and occupation of it (*o*). A gift of a house "and premises" is *primâ facie* sufficient to include such land (*p*) and the appurtenances of the house (*q*). Even other land commonly enjoyed with the house may be included in such descriptions (*r*). A gift of a house *primâ facie* includes chattels affixed to and used for the decoration or convenience of the house (*s*).

**1323.** The ordinary meaning of the word "investments," unaffected by any context, does not include money on deposit at a bank (*t*).

**1324.** By statute (*a*), in a modern will (*b*), a devise of the land of the

*v. Gower (Earl)* (1763), 2 Eden, 201; *Kendall v. Kendall* (1828), 4 Russ. 360, 370; *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290, 303; *Avison v. Simpson* (1859), John. 43; Shep. Touch. (ed. Preston) 447; as to "household goods," see p. 711, *post*. For cases where the word had a restricted meaning under the *eiusdem generis* rule or otherwise, see *Lamphier v. Despard* (1842), 2 Dr. & War. 59 (residuary gift elsewhere in will); *Manton v. Tabois* (1885), 30 Ch. D. 92, 97.

(*o*) Co. Litt. 5 b (garden and curtilage); *Smith v. Martin* (1672), 2 Wms. Saund. (ed. 1871) 802, 808, n.; *Smith v. Ridgway* (1866), L. R. 1 Exch. 331, 333, 334, Ex. Ch. ("land so intimately connected with the use of the building that without it the building would be useless"); see *Steele v. Midland Rail. Co.* (1866), 1 Ch. App. 275; *Lombe v. Stoughton* (1849), 18 L. J. (CH.) 400; *St. Thomas's Hospital (Governors) v. Charing Cross Rail. Co.* (1861), 1 John. & H. 400, 404 (buildings forming part of or appertaining to the messuage), followed in *Re Stokes* (1910), 21 Ontario Law Reports, 464; *Pulling v. London, Chatham and Dover Rail. Co.* (1864), 12 W. R. 969; *Brown v. Brown* (1901), 1 State Reports, New South Wales, Equity, 218; compare the meaning of "house" in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 92 (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 71 *et seq.*); and the meaning of "dwelling house" in the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 17 (4) (see *Inland Revenue Commissioners v. Devonshire (Duke)*, [1914] 2 K. B. 627).

(*p*) *Lethbridge v. Lethbridge* (1862), 4 De G. F. & J. 35; *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563, 569.

(*q*) *Read v. Read* (1867), 15 W. R. 165; *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, 320).

(*r*) *Blackborn v. Edgley* (1720), 1 P. Wms. 600, 603; *Gulliver d. Jefferies v. Poyntz* (1770), 2 Wm. Bl. 726; *Doe d. Clements v. Collins* (1788), 2 Term Rep. 498; *Doe d. Hemming v. Willetts* (1849), 7 C. B. 709; *Ross v. Veal* (1852), 1 Jur. (N. S.) 751; *Hibon v. Hibon* (1863), 9 Jur. (N. S.) 511 (gifts, in the last three cases, of a "house and premises"); *Re Mocatta, Mocatta v. Mocatta* (1884), 49 L. T. 629; *Re Willis, Spencer v. Willis, supra*; and see *Heach v. Prichard*, [1882] W. N. 140.

(*s*) *Re Whaley, Whaley v. Roehrich*, [1908] 1 Ch. 615.

(*t*) *Re Price, Price v. Newton*, [1905] 2 Ch. 55; and see *Archibald v. Hartley* (1852), 21 L. J. (CH.) 399.

(*a*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 26.

(*b*) In wills made before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), a devise of "lands" *primâ facie* did not include leaseholds where there were freehold estates as to which the gift could be operative (*Rose v. Bartlett* (1633), Cro. Car. 292; *Davis v. Gibbs* (1729), 3 P. Wms. 26; *Chapman v. Hart* (1749), 1 Ves. Sen. 271; *Thompson v. Lawley (Lady)* (1800), 2 Bos. & P. 303). Leaseholds, however, might pass under the gift either if there were no freeholds for the gift to operate upon, or if the will showed a contrary intention (*Day v. Trig* (1715), 1 P. Wms. 286; *Knotsford v. Gardiner* (1742), 2 Atk. 450; *Lowther v. Cavendish* (1758), 1 Eden, 99; *Addis v. Clement* (1728), 2 P. Wms. 456, adversely criticised in *Thompson v. Lawley (Lady)*, *supra*, where *Pistol v. Riccardson* (1784), 2 P.



testator, or of the land of the testator in any place (*c*) or in the occupation of any person mentioned in the will, or otherwise described in a general manner, and any other general devise (*d*) which would describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it, is construed to include the customary copyhold and leasehold estates of the testator, or such of those estates or any of them as are within such description, as the case may be, as well as freehold estates, unless a contrary intention appears by the will (*e*).

A devise of "real estate" may be such a general devise as last-mentioned (*f*), but, it appears, is more readily given its technical meaning (*g*).

A gift of land in a named place does not in its technical sense (*h*)

Wms. 459, *n.*, *contra*, was approved; *Turner v. Husler* (1780), 1 Bro. C. C. 78; *Lane v. Stanhope (Earl)* (1795), 6 Term Rep. 345; *Hartley v. Hurle* (1801), 5 Ves. 540; *Goodman v. Edwards* (1833), 2 My. & K. 759; *Gully v. Davis* (1870), L. R. 10 Eq. 562; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 163, note (*p*). Nor did copyholds not surrendered to the uses of the will pass under a gift of lands, except in similar cases (*Watkins v. Lea* (1802), 6 Ves. 633; *Doe d. Belasyse v. Lucan (Earl)* (1808), 9 East, 448; *Church v. Mundy* (1806), 12 Ves. 426; (1808), 15 Ves. 396; *Judd v. Pratt* (1808), 15 Ves. 390; *Sampson v. Sampson* (1813), 2 Ves. & B. 337), until the want of a surrender was rendered immaterial by stat. (1815) 55 Geo. 3, c. 192 (*Doe d. Clarke v. Ludlam* (1831), 7 Bing. 275). The object of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), is to shift the burden of proof and to throw it on the persons who deny that in a will "lands" are meant to include leasehold estates in land (*Prescott v. Barker* (1874), 9 Ch. App. 174, *per* Lord SELBORNE, L.C., at p. 186).

(*c*) *Wilson v. Eden* (1852), 5 Exch. 752; (1852), 18 Q. B. 474; 16 Beav. 153, not following S. C. (1848), 11 Beav. 237 (lands "at or near" W.).

(*d*) As to this phrase, see *Butler v. Butler* (1884), 28 Ch. D. 66, *per* CHITTY, J., at p. 72 (corrected by the report in 52 L. T. 90, 93): . . . "this second branch was intended to cover certain cases that might not be covered by the first branch, and . . . I must find in the will, though it is a will where there is a general devise, some description which points to a particular thing, to a particular estate."

(*e*) See *Wilson v. Eden*, *supra* (no restriction by addition of "all other my real estate in the county of D."; nor by fact that limitations adapted to real estate only); *Prescott v. Barker* (1874), 9 Ch. App. 174 (provisions of will inconsistent with leaseholds being included). A contrary intention may be shown, for example, in a suitable context, by another gift of "all my leasehold estate" (*Re Guyton and Rosenberg's Contract*, [1901] 2 Ch. 591), or of "all my personal estate wheresoever situated" (*Butler v. Butler* (1884), 28 Ch. D. 66), but not by a mere gift of personal estate simply, or by a specific bequest of a specified leasehold (*Re Davison, Greenwell v. Davison* (1888), 58 L. T. 304).

(*f*) *Moase v. White* (1876), 3 Ch. D. 763, observed upon in *Butler v. Butler*, *supra*, at p. 75; *Re Davison, Greenwell v. Davison*, *supra*; *Re Uttermare, Leeson v. Foulis*, [1893] W. N. 158; see also *Hester v. Trustees, Executors and Agency Co., Ltd.* (1892), 18 Victorian Law Reports, 509.

(*g*) See *Butler v. Butler*, *supra*, approving *Wilson v. Eden* (1848), 11 Beav. 237, *per* Lord LANGDALE, M.R., at p. 252; *Prescott v. Barker*, *supra* (applicability of limitations to real estate only); and see *Turner v. Turner* (1852), 21 L. J. (CH.) 843.

(*h*) The result may be otherwise where the testator has no land in the named place, so that the words cannot have effect given to them in their technical sense (*Inchley v. Robinson* (1587), 3 Leon. 165 (land in A. included tithes); *Ritch v. Sanders* (1651), Sty. 261; *Re Hodgson, Taylor v. Hodgson*, [1898] 2 Ch. 545).

SECT. 4.  
Descrip-  
tions of  
Property.

include advowsons in gross (*i*), or other incorporeal hereditaments (*k*) issuing out of land in that locality.

Money held on trust for investment in land as to which no effective election to reconvert the property has been made (*l*) is ordinarily included under a description of "land" or "real estate" generally (*m*), but not under a description of land in a restricted locality, where the restriction does not apply to the trust (*n*). A devise of land *primâ facie* includes whatever estate or interest the testator has in that land (*o*), except mortgage debts charged on the land or on any interest therein (*p*), but the latter may pass if the intention is shown (*q*), or if there is no other estate or interest to which the description can refer (*r*), as in the case where the testator, at the date of his will and of his death (*s*), was a mortgagee in possession (*t*), with no other interest in the land (*a*).

"Legacy."

**1325.** The term "legacy" or "bequest" in its ordinary sense is applied only to a gift of money or some chattel (*b*), but with a proper controlling context it is capable of meaning a devise of land (*c*).

(*i*) *Westfaling v. Westfaling* (1746), 3 Atk. 460, 464; see *Crompton v. Jarratt* (1885), 30 Ch. D. 298.

(*k*) *Ashton v. Ashton* (1735), 3 P. Wms. 384, 386; *West v. Lawday* (1865), 11 H. L. Cas. 375.

(*l*) See title EQUIT, Vol. XIII., p. 112.

(*m*) *Ibid.*, p. 107, note (*g*).

(*n*) *Ibid.*

(*o*) As, for instance, his interest under an existing trust for sale (*Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348, 354, C. A.; *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305), his interest in a term of years, in cases where he has also a freehold reversion (*Mathews v. Mathews* (1867), L. R. 4 Eq. 278; *Re Guyton and Rosenberg's Contract*, [1901] 2 Ch. 591), or in rentcharges kept on foot for his benefit (*Vallance v. Vallance* (1863), 2 New Rep. 229; *Latham v. Travers*, [1912] 1 I. R. 140).

(*p*) *Winn v. Littleton* (1681), 1 Vern. 3; *Strode v. Russell* (1701), 2 Vern. 621, 624; *Casborne v. Scarfe* (1737), 1 Atk. 603; *Bowen v. Barlow* (1872), 8 Ch. App. 171 (mortgage on term of years).

(*q*) *Mackesy v. Mackesy*, [1896] 1 I. R. 511; *Kilkelly v. Powell*, [1897] 1 I. R. 457.

(*r*) *Re Lowman, Devenish v. Pester*, *supra*.

(*s*) *Re Clowes*, [1893] 1 Ch. 214, 218, C. A.

(*t*) *Woodhouse v. Meredith* (1816), 1 Mer. 450; *Burdus v. Dixon* (1858), 6 W. R. 427; *Re Carter, Dodds v. Pearson*, [1900] 1 Ch. 801.

(*a*) *Bowen v. Barlow*, *supra*; *Re Clowes*, *supra*. But where the testator is beneficially entitled at the date of his will, and afterwards sells the land, taking a mortgage to secure part of the purchase-money, then the mortgage money does not in general pass under a gift of the land itself (*Moor v. Raisbeck* (1841), 12 Sim. 123; *Farrar v. Winterton (Lord)* (1842), 5 Beav. 1; *Re Clowes*, *supra*).

(*b*) *Ansley v. Cotton* (1846), 16 L. J. (CH.) 55; *Windus v. Windus* (1853), 6 De G. M. & G. 549; *Ward v. Grey* (1859), 26 Beav. 485, 494 (real estate directed to be sold included, but not real estate not to be sold); *White v. Lake* (1868), L. R. 6 Eq. 188, 192 (not proceeds of real estate); *Re King's Trusts* (1892), 29 L. R. Ir. 401, 410 (interest in realty). A gift of residue, however, is not a "legacy" in the ordinary sense (*Ward v. Grey*, *supra*). Annuities are included in the term "legacies"; see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 470; and compare title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 240, note (*s*).

(*c*) *Brady d. Norris v. Cubitt* (1778), 1 Doug. (K. B.) 31, *per Lord Mansfield*, C.J., at p. 40; *Beckley v. Newland* (1723), 2 P. Wms. 182,

**1326.** A gift of the “living” of a certain church is ambiguous; it is sufficient to pass the advowson, but may be restricted to a single presentation, as where the will shows an intention that the devisee should have a benefit personal to himself and should himself be presented (*d*).

SECT. 4.  
Descrip-  
tions of  
Property.  
“Living.”

**1327.** In the case of a gift of the testator’s “money,” there is no strictly technical meaning of the word (*e*), but the ordinary meaning is *primâ facie* taken to be the meaning in a will if the circumstances of the case admit (*f*). In this ordinary sense the word includes cash and notes in hand (*g*), money immediately payable to the testator at call (*h*), and money at a bank on current account, or on deposit account, at all events where no long notice of withdrawal is required (*i*); but it does not include sums not immediately payable to the testator (*k*), stock or shares (*l*) or other choses in

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*per* Lord MACCLESFIELD, L.C., at p. 186; *Hope d. Brown v. Taylor* (1753), 1 Burr. 268; *Whicker v. Hume* (1851), 14 Beav. 509, 518; *Gyett v. Williams* (1862), 2 John. & H. 429, 436; *Re Shepherd, Michell v. Loram*, [1914] W. N. 65. As to the cases in which the appointment of a “residuary legatee” will give to the appointee the residuary real estate, see p. 712, *post*.

(*d*) *Webb v. Byng* (1856), 2 K. & J. 669, 674, where, however, the decision was *obiter*, as on appeal it was held that the court had no jurisdiction for want of parties (S. C., 8 De G. M. & G. 633, C. A.).

(*e*) *Re Cadogan, Cadogan v. Palagi* (1883), 25 Ch. D. 154, *per* KAY, J., at p. 157.

(*f*) See the general rule, p. 655, *ante*. The burden of proof is on the parties proposing a wider construction (*Re Maclean, Williams v. Nelson* (1894), 11 T. L. R. 82, *per* CHITTY, J., at p. 82).

(*g*) *Downing v. Townsend* (1755), Amb. 280, 281, 282; *Barrett v. White* (1855), 1 Jur. (N. S.) 652, 653; and see *Re Windsor, Public Trustee v. Windsor* (1913), 108 L. T. 947 (money orders passed as “cash”).

(*h*) *Byrom v. Brandreth* (1873), L. R. 16 Eq. 475, 479; *Re Friedman, Friedman v. Friedman* (1908), 8 State Reports, New South Wales, 127. In *Langdate v. Whitfield* (1858), 4 K. & J. 426, 432, however, approved in *Williams v. Williams* (1878), 8 Ch. D. 789, 793, it was said that in the absence of a controlling context the money would be confined to ready money actually in hand; but see note (*i*), *infra*.

(*i*) *Manning v. Purcell* (1855), 7 De G. M. & G. 55, C. A. (balances at bank on both current and deposit accounts; the deposit was there withdrawable at call); *Ogle v. Knipe* (1869), L. R. 8 Eq. 434 (money in hands of trustee awaiting investment); *Byrom v. Brandreth*, *supra*; *Re Hunter, Northey v. Northey* (1908), 25 T. L. R. 19; and see *Re Boorer, Boorer v. Boorer*, [1908] W. N. 189 (“cash at bankers”). With regard to money on deposit at a bank subject to a previous notice of withdrawal being given, it may pass under the term as modified by the context of the will or the circumstances; see *Manning v. Purcell*, *supra*, where the court doubted, but on the terms of the particular will affirmed the view of the court below (S. C. (1854), 2 Sm. & G. 284), that such a deposit balance was included; *Harper’s Trustees v. Bain* (1903), 5 F. (Ct. of Sess.) 716 (money on deposit for four years included in “moneys in any banks”); *Re Reed, Reed v. Reed*, [1911] Victorian Law Reports, 232 (money on fixed deposit did not pass under a gift of “moneys”; moneys at savings bank on short notice did pass); and see notes (*o*), (*p*), p. 708, *post*.

(*k*) *Ogle v. Knipe*, *supra* (mortgage money vested in trustees and subject to a legacy); *Byrom v. Brandreth*, *supra* (apportioned part of annuity to date of death, and of interest on bank balance, did not pass under “money of which I may die possessed”); *Re Beavan, Beavan v. Beavan* (1885), 53 L. T. 245 (apportioned part of dividends).

(*l*) *Re Shelmer’s Will* (1726), Gilb. (CH.) 200, 202 (“stock can be no more comprehended under the word ‘money’ than a term of years or a coach and



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action (*m*), or the testator's general personal estate (*n*). The term, however, is one of flexible meaning (*a*). Words qualifying the gift may, as in the case of a gift of "ready money" (*b*), necessitate a stricter construction (*c*), or may, as in the case of a gift of "money due and owing" (*d*), or of money described by its investment or

horses or any other real or personal chattel"); *Hotham v. Sutton* (1808), 15 Ves. 319, 327; *Gosden v. Dotterill* (1832), 1 My. & K. 56 (the rule that "the term 'money' will not pass stock unless there is in the will some explanatory context" has been sometimes called "the rule in *Gosden v. Dotterill*"), followed in *Lowe v. Thomas* (1854), Kay, 369, where the gift was of a life interest with a gift over; *Hewitt v. Bredin* (1865), 10 Ir. Jur. (N. S.) 85 (Consols); *Ogle v. Knipe* (1869), L. R. 8 Eq. 434 (bank stock); *Collins v. Collins* (1871), L. R. 12 Eq. 455 (building society shares and Consols); *Re Mann, Ford v. Ward*, [1912] 1 Ch. 388 (residue of money in savings bank).

(*m*) *Beales v. Crisford* (1843), 13 Sim. 592 (gift of residue "all but cash or monies so called," promissory notes, bonds, and long annuities held within the exception); *Byrom v. Brandreth* (1873), L. R. 16 Eq. 475 (legacy to testatrix not acknowledged to be at her disposal); *Manning v. Purcell* (1855), 7 De G. M. & G. 55, 65, C. A. (amount deposited with stakeholder for a bet); *Dunally v. Dunally* (1857), 6 I. Ch. R. 540; *Cowling v. Cowling* (1859), 26 Beav. 449 (reversionary interest in stock); *Re Mason's Will* (1865), 34 Beav. 494 (legacy to testatrix in will of parent surviving her); *Dillon v. McDonnell* (1881), 7 L. R. Ir. 335 (fine on intended grant of lease). In *Re Shelmer's Will* (1726), Gilb. 200, a mortgage and arrears of rent were held to be included in the word "money," as used in that case; and compare *Hewitt v. Bredin* (1865), 10 Ir. Jur. (N. S.) 85 (mortgage, arrears of rent and dividends due at death included); *De Robeck v. Cloncurry (Lord)* (1871), 5 I. R. Eq. 588 (money in hands of land agent excluded).

(*n*) *Collet v. Lawrence* (1791), 1 Ves. 268; *Larner v. Larner* (1857), 3 Drew. 704; *In the Goods of Aston* (1881), 30 W. R. 92.

(*a*) *Re Townley, Townley v. Townley* (1884), 50 L. T. 394, per PEARSON, J., at p. 396.

(*b*) See p. 708, *post*.

(*c*) *Ommaney v. Butcher* (1823), Turn. & R. 260 ("money remaining" out of certain proceeds of sale); *Hastings v. Hane* (1833), 6 Sim. 67 ("money to my account"); *Nevinson v. Lennard (Lady)* (1865), 34 Beav. 487 ("money . . . , if any such cash be remaining").

(*d*) The expression "money due" ordinarily includes any claim for money constituting a debt at the death of the testator (*Carr v. Carr* (1811), 1 Mer. 541, n. (bank balance); *Bainbridge v. Bainbridge* (1837), 9 Sim. 16 (residuary estate of another person); *Bide v. Harrison* (1873), L. R. 17 Eq. 76 (damages on claim enforced by executors)); but not moneys received after the testator's death on claims which did not at the testator's death constitute debts (*Stephenson v. Dowson* (1840), 3 Beav. 342 (freight not yet earned); *Collins v. Doyle* (1826), 1 Russ. 135; *Martin v. Hobson* (1873), 8 Ch. App. 401), or the apportioned parts, for the testator's lifetime, of dividends not declared until after his death (*Re Burke, Wood v. Taylor*, [1914] 1 I. R. 81). "Money due and owing" or "money owing" may include, as a rule, any sums payable at a future date or on a future contingency (*Brown v. Brown* (1858), 6 W. R. 613, per WOOD, V.-C., at p. 614 (money raisable on request; money left at bank until called for); *Petty v. Willson* (1869), 4 Ch. App. 574 (money receivable by executors under a policy of assurance); *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135 (money on deposit at bank there included, whether notice of withdrawal was required or not; the presumption against intestacy was applied). See also *Poulett (Earl) v. Hood* (1865), 35 Beav. 234 ("money due on mortgage from any person"; family charges there excluded); *Wiggins v. Wiggins* (1852), 2 Sim. (N. S.) 226 ("money due and owing . . . in the public stocks or funds . . . or other securities whatsoever," there included the residuary estate).

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situation (*e*), allow a wider construction; and generally the context of the will (*f*) and the circumstances of the case (*g*) may show that the description “money” is intended to apply to other property than the items ordinarily comprised in the term (*h*). In a common,

(*e*) *Gallini v. Noble* (1810), 3 Mer. 691 (money in Bank of England, testator having no account there); *Reilly v. Stoney* (1865), 16 I. Ch. R. 295 (“in the Bank of I.”); *Stooke v. Stooke* (1866), 35 Beav. 396 (“in whatever it may be, in bonds or Consols or anything else”); *Wilkes v. Collin* (1869), L. R. 8 Eq. 338 (“in real securities”); *Brennan v. Brennan* (1868), 2 I. R. Eq. 321 (“in the Bank of I.”); *Sealy v. Stawell* (1868), 2 I. R. Eq. 326 (“in my drawer”); *Re Pringle, Walker v. Stuart* (1881), 17 Ch. D. 819 (“however invested”); *Re Harding, Drew v. St. Thomas’ Hospital* (1910), 27 T. L. R. 102 (“moneys invested in any banks or institutions” included Consols); compare *Langdale v. Whitfield* (1858), 4 K. & J. 426 (money, of or to which testatrix might be “possessed or entitled,” included money due); *Vaisey v. Reynolds* (1828), 5 Russ. 12 (“monies in hand,” being contrasted with moneys out at interest on security, included money due); *Howell v. Gayler* (1842), 5 Beav. 157 (“money I may have” in books of the bank did not include stock in names of trustees); *Loring v. Thomas* (1861), 5 L. T. 269; *Re Saxby, Saxby v. Kiddell*, [1890] W. N. 171 (money in savings bank); and see *Re Butler, Le Bas v. Herbert*, [1894] 3 Ch. 250, 251. As to “money in the funds,” see p. 701, *ante*.

(*f*) *Re Townley, Townley v. Townley* (1884), 50 L. T. 394 (personal estate except household furniture and effects); *Lloyd v. Lloyd* (1886), 54 L. T. 841 (rents and bond which would naturally come to executors as money). Where there is an exception from the gift of certain property not falling within the strict meaning of the term, there is ground for extending the meaning (*In the Goods of White* (1882), 7 P. D. 65; *Re Buller, Buller v. Giberne* (1896), 74 L. T. 406). The fact that the “money” was settled did not extend the meaning of the word in *Lowe v. Thomas* (1854), 5 De G. M. & G. 315; but compare *Prichard v. Prichard* (1879), L. R. 11 Eq. 232.

(*g*) *Re Sutton, Stone v. A.-G.* (1885), 28 Ch. D. 464 (where the testatrix mentioned the amount); *Chapman v. Reynolds* (1860), 28 Beav. 221 (where the fact that the state of the property of the testatrix rendered it impossible that after payment of debts the bequest could have anything to operate upon was considered a reason for extending the meaning); see also *Bevan v. Bevan* (1880), 5 L. R. Ir. 57, C. A.; *Masson v. Smellie* (1903), 6 F. (Ct. of Sess.) 148.

(*h*) *Glendening v. Glendening* (1846), 9 Beav. 324, 327; *Moysey v. Stuart* (1870), 23 L. T. 644. Thus, it may include such investments as are readily turned into money; for example, stock was included in the term in the wills considered in *Lynn v. Kerridge* (1737), West temp. Hard. 172; *Buckman v. Ives* (1837), 6 L. J. (CH.) 197; *Waite v. Combes* (1852), 5 De G. & Sm. 676; *Barclay v. Maskelyne* (1858), 5 Jur. (N. S.) 12; *Newman v. Newman* (No. 1) (1858), 26 Beav. 218; *Chapman v. Reynolds* (1860), 28 Beav. 221; *Re Dutton, Herbert v. Harrison* (1869), 20 L. T. 386; *Hart v. Hernandez* (1885), 52 L. T. 217; *Re Smith, Henderson-Roe v. Hitchins* (1889), 42 Ch. D. 302; *Re Adkins, Solomon v. Catchpole* (1908), 98 L. T. 667; *O’Connor v. O’Connor*, [1911] 1 I. R. 263 (mortgages not able to be called in excluded). Where the gift is of money remaining after payment of debts, legacies, or both debts and legacies, either generally out of the estate or out of certain property, the gift is often construed as *ejusdem generis* with that made subject to the payment, and for this reason may pass the residuary personal estate (*Dicks v. Lambert* (1799), 4 Ves. 725; *Kendall v. Kendall* (1828), 4 Russ. 360; *Rogers v. Thomas* (1837), 2 Keen, 8; *Dowson v. Gaskoin* (1837), 2 Keen, 14; *Barrett v. White* (1855), 1 Jur. (N. S.) 652; *Grosvenor v. Durston* (1858), 25 Beav. 97, 99; *Langdale v. Whitfield* (1858), 4 K. & J. 426, 436; *Stocks v. Barré* (1859), John. 54; *Re Egan, Mills v. Penton*, [1899] 1 Ch. 688); but for cases where this inference was rebutted, compare note (*k*), p. 708, *post*.



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inaccurate, popular sense it is sufficient to include the whole (*i*) or the residue (*k*) of the personal (*l*) estate.

**1328.** "Ready money," in its ordinary sense, includes money on current account at a bank (*m*), or in the hands of an agent acting as banker (*n*), and money on deposit account at a bank where no notice of withdrawal is required (*o*); but it does not ordinarily include money on deposit account, where a substantial (*p*) previous notice of withdrawal is required (*q*) according to the usual course of business on deposit (*r*), or other choses in action generally (*s*).

(*i*) *Waite v. Combes* (1852), 5 De G. & Sm. 676, per PARKER, V.-C., at p. 679.

(*k*) *Legge v. Asgill* (1823), Turn. & R. 265, n.; *Dowson v. Gaskoin* (1837), 2 Keen, 14; *Cowling v. Cowling* (1859), 26 Beav. 449, per ROMILLY, M.R., at p. 451; *Montagu v. Sandwich (Earl)* (1863), 33 Beav. 324; *Re Pringle, Walker v. Stewart* (1881), 17 Ch. D. 819; *Re Cadogan, Cadogan v. Palagi* (1883), 25 Ch. D. 154; *Re Maclean, Williams v. Nelson* (1894), 11 T. L. R. 82; *In the Goods of Bramley*, [1902] P. 106; *Re Rowland, Jones v. Rowland* (1902), 86 L. T. 78. So, too, where the court has been influenced by the presumption against intestacy, the word "money" has taken in several cases a wide meaning; see *Lowe v. Thomas* (1854), Kay, 369, per WOOD, V.-C., at p. 377; *Boardman v. Stanley* (1873), 7 I. R. Eq. 342; *Re Cadogan, Cadogan v. Palagi*, *supra*, per KAY, J., at p. 157; *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135; *Re Buller, Buller v. Giberne* (1896), 74 L. T. 406; *Re Adkins, Solomon v. Catchpole* (1908), 98 L. T. 667; *Re Harding, Drew v. St. Thomas' Hospital* (1910), 27 T. L. R. 102. A specific gift coming after the gift in question may in some cases prevent it from being residuary (see *Lowe v. Thomas*, *supra*), but is not conclusive against a residuary gift; see *Re Pringle, Walker v. Stewart*, *supra*, at p. 823; *Re Townley, Townley v. Townley* (1884), 50 L. T. 394; *Re Maclean, Williams v. Nelson* (1894), 11 T. L. R. 82. The fact that there is a residuary gift elsewhere in the will may rebut the inference that the gift of money is of a residuary nature (*Willis v. Plaskett* (1841), 4 Beav. 208, 210; *Williams v. Williams* (1878), 8 Ch. D. 789, C. A.; *Re Mann, Ford v. Ward*, [1912] 1 Ch. 388, 391, distinguishing *Re Adkins, Solomon v. Catchpole*, *supra*).

(*l*) In *Stooke v. Stooke* (1865), 35 Beav. 396, ROMILLY, M.R., at p. 397, gave an instance where he considered that realty would be comprised; and see *Ferman v. Ryan*, [1912] State Reports, Queensland, 145. In *Prichard v. Prichard* (1870), L. R. 11 Eq. 232, MALINS, V.-C., at p. 235, said the words in that case could not be extended to the real estate, because of the favour shown to the heir-at-law; but see note (*c*), p. 667, *ante*.

(*m*) *Taylor v. Taylor* (1837), 1 Jur. 401; *Fryer v. Ranken* (1840), 11 Sim. 55; *Re Powell's Trust* (1858) John. 49; *Parker v. Marchant* (1843), 1 Ph. 356; and see S. C. (1842), 1 Y. & C. Ch. Cas. 290, 305, 306.

(*n*) *Fryer v. Ranken*, *supra*.

(*o*) *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369; *Mayne v. Mayne*, [1897] 1 I. R. 324.

(*p*) Namely, more than twenty-four hours' notice (*Re Price, Price v. Newton*, [1905] 2 Ch. 55, per FARWELL, J., at p. 56).

(*q*) *Mayne v. Mayne*, *supra* (seven or ten days); *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66 (fourteen days).

(*r*) The waiver, by the bank, of the notice required does not make money so deposited "ready money" (*Mayne v. Mayne*, *supra*), unless it is the usual course of business (*Re Rodmell, Safford v. Safford* (1913), 108 L. T. 184), and a mere power to require notice for money, according to practice payable on demand, does not prevent money deposited from being ready money (*Re Cosgrove's Estate, Wills v. Goddard* (1909), *Times*, 3rd April). A common practice of waiver on terms was not considered sufficient in *Re Friedman, Friedman v. Friedman* (1908), 8 State Reports, New South Wales, 127.

(*s*) As, for instance, a sum due on note of hand (*Re Powell's Trust* (1858),



**1329.** A gift of money “invested” in various stocks may, according to the circumstances and the context, be either a gift of the particular investments mentioned (*t*) or of the investments for the time being representing the money which at the date of the will was so invested (*a*).

**1330.** The term “securities” or “securities for money,” according to its literal meaning, includes such moneys as are secured either on property (*b*) or on personal security (*c*) (including even promissory notes (*d*) and bills of exchange (*e*)), and any stock or other investment which by the terms of its creation is a security for the payment of money (*f*), but does not include moneys for which a mere acknowledgment of indebtedness has been given (*g*), or the ordinary

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John. 49); money in the hands of an agent not acting as banker (*Smith v. Butler* (1846), 3 Jo. & Lat. 565; *Cooke v. Wagster* (1854), 2 Sm. & G. 296, 300, where, however, the sum in question passed as “money” generally); the apportioned parts of unreceived rent, dividends, interest, or pension (*Fryer v. Ranken* (1840), 11 Sim. 55; *May v. Grave* (1849), 3 De G. & Sm. 462; *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369); Government or other stock (*Enokhin v. Wylie* (1862), 10 H. L. Cas. 1; *Bevan v. Bevan* (1880), 5 L. R. Ir. 57, C. A.); or a share of another testator’s residue (*In the Will of Andrews, Andrews v. O’Mara* (1899), 25 Victorian Law Reports, 408).

(*t*) *Kermode v. Macdonald* (1866), 3 Ch. App. 584; *Harrison v. Jackson* (1877), 7 Ch. D. 339; *McClellan v. Clark* (1884), 50 L. T. 616; *Re Robe, Slade v. Walpole* (1889), 61 L. T. 497; *Re Slater, Slater v. Slater*, [1906] 2 Ch. 480. In such a case on a subsequent change of investment by the testator into stocks not coming within the description, the gift is adeemed; see p. 602, *ante*.

(*a*) *Le Grice v. Finch* (1817), 3 Mer. 50, not followed in the cases cited in note (*t*), *supra*; and compare *Morgan v. Thomas* (1877), 6 Ch. D. 176, 179. No ademption results from change of investment in such a case.

(*b*) *Callow v. Callow* (1889), 42 Ch. D. 550 (agreement for sale by testator with provision for mortgage securing instalments); *Ex parte Cautley* (1853), 22 L. J. (CH.) 391; *Cust v. Goring* (1854), 18 Beav. 383 (Scottish heritable bond); *Ogle v. Knipe* (1869), L. R. 8 Eq. 434 (mortgage); compare *Robinson v. Robinson* (1851), 1 De G. M. & G. 247, 262 (turnpike bonds). A vendor’s lien was not considered a security in *Goold v. Teague* (1859), 5 Jur. (N. S.) 116; but the case was doubted and distinguished in *Callow v. Callow, supra*, following the observations in Sugden, Vendors and Purchasers, 14th ed., p. 684, and Dart, Vendors and Purchasers, 6th ed., p. 827. As to gifts of mortgages, see title MORTGAGE, Vol. XXI., p. 182, note (*g*).

(*c*) As, for instance, a bond (*Bacchus v. Gilbee* (1863), 3 De G. J. & Sm. 577; *Re Beavan, Beavan v. Beavan* (1885), 53 L. T. 245, *per* KAY, J., at p. 247), judgment debt (*Puxley v. Puxley* (1863), 1 New Rep. 509), or policy of assurance (*Lawrence v. Galsworthy* (1857), 3 Jur. (N. S.) 1049).

(*d*) *Re Beavan, Beavan v. Beavan, supra*; but for the purpose of an investment clause, see *Stiles v. Guy* (1832), 4 Y. & C. (EX.) 571.

(*e*) *Barry v. Harding* (1844), 1 Jo. & Lat. 475, *per* SUGDEN, L.C., at p. 483; but see *Southcot v. Watson* (1745), 3 Atk. 226, 232 (bank-notes).

(*f*) *Bescoby v. Pack* (1823), 1 Sim. & St. 500 (stock in public funds); *Hudleston v. Gouldsbury* (1847), 10 Beav. 547 (shares in canal company); *Turner v. Turner* (1852), 21 L. J. (CH.) 843 (Consols, but not insurance company’s shares); *Re Beavan, Beavan v. Beavan, supra* (Consols and railway debenture stocks); *McDonnell v. Morrow* (1889), 23 L. R. Ir. 591 (debenture stocks).

(*g*) *Vaisey v. Keynolds* (1828), 5 Russ. 12 (money at bank); *Barry v. Harding* (1844), 1 Jo. & Lat. 475 (I.O.U.); *Hopkins v. Abbott* (1875), L. R. 19 Eq. 222 (banker’s deposit notes); *Re Beavan, Beavan v. Beavan*

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description of stock and shares in a public company (*h*). The term “securities,” however, is very commonly used as a synonym for investments, or property dealt with on the Stock Exchange, and this meaning may readily be attributed to the word (*i*), and generally other meanings may be given to it, according to the context of the will and the circumstances of the case (*k*).

**1331.** A bequest of “shares” in a particular company may pass such stock of the testator in that company which is of the same nature as and identical in substance with shares (*l*), but *primâ facie* (*m*) not stock issued as security, such as debentures or debenture stock (*n*). “Stock,” however, does not *primâ facie* include shares (*o*).

**1332.** The meaning in various contexts of the following common terms has been discussed:—“articles of domestic use or ornament” (*p*); “carriages” (*q*); “debentures” (*r*); “fortune” (*s*);

(1885), 53 L. T. 245, *per* KAY, J., at p. 247 (I.O.U.’s); and see *Re Mason’s Will* (1865), 34 Beav. 494 (legacy).

(*h*) *Harris v. Harris* (1861), 29 Beav. 107; *Ogle v. Knipe* (1869), L. R. 8 Eq. 434 (bank stock); *M’Donnell v. Morrow* (1889), 23 L. R. Ir. 591 (shares in companies); *Re Kavanagh, Murphy v. Doyle* (1892), 29 L. R. Ir. 333, C. A. (partly paid bank shares excluded from trustee investment clause); *Re Mailland, Chitty v. Mailland* (1896), 74 L. T. 274.

(*i*) *Dicks v. Lambert* (1799), 4 Ves. 725; *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176, C. A.; *Re Johnson, Greenwood v. Greenwood* (1903), 89 L. T. 520, C. A.; *Re Mort, Perpetual Trustee Co., Ltd. v. Bisdee* (1904), 4 State Reports, New South Wales, 760; *Re J. H.* (1911), 25 Ontario Law Reports, 132.

(*k*) *Dicks v. Lambert, supra* (stock included); *Re Gent and Eason’s Contract*, [1905] 1 Ch. 386 (where power to vary securities included power to sell real estate). As to “securities standing in my name,” see *Re Mayne (K. E.)*, *Stoneham v. Woods*, [1914] 2 Ch. 115.

(*l*) *Morrice v. Aylmer* (1875), L. R. 7 H. L. 717, overruling *Oakes v. Oakes* (1852), 9 Hare, 666; and see *Cleveland (Duchess Dowager) v. Meyrick* (1867), 37 L. J. (CH.) 125.

(*m*) For cases to the contrary, see *Re Weeding, Armstrong v. Wilkin*, [1896] 2 Ch. 364, where testator had no shares.

(*n*) *Dillon v. Arkins* (1885), 17 L. R. Ir. 636, C. A.; *Re Bodman, Bodman v. Bodman*, [1891] 3 Ch. 135; *Re Connolly, Walton v. Connolly* (1914), 110 L. T. 688.

(*o*) *Re Willis, Spencer v. Willis*, [1911] 2 Ch. 563 (shares of like description not included).

(*p*) *Petre v. Ferrers* (1891), 61 L. J. (CH.) 426 (not relics); *Re Owen, Peat v. Owen* (1898), 78 L. T. 643.

(*q*) *Denholm’s Trustees v. Denholm*, [1908] S. C. 43, *per* Lord DUNEDIN, Lord President, at p. 46 (motor car included: the word is “certainly wide enough to cover any form of vehicle in which you are carried. . . . The ordinary sense is a carriage drawn by horses”); *Re Platt, Platt v. Platt* (1907), *Times*, 20th April (horse-carriages only held to be included); *Re Dennis, Dennis v. Dennis* (1908), 24 T. L. R. 499 (motor car included); *Re Hall, Watson v. Hall*, [1912] W. N. 175 (motor car excluded).

(*r*) *Re Herring, Murray v. Herring*, [1908] 2 Ch. 493 (debenture stock included); see also *Phillips v. Eastwood* (1835), L. & G. temp. Sugd. 270, 291, 292 (policies of assurance included under the particular will); *Re Lane, Luard v. Lane* (1880), 14 Ch. D. 856 (debenture stock not included), has sometimes been doubted; see *Dillon v. Arkins* (1885), 17 L. R. Ir. 636, C. A. Similarly, a gift of debenture stock passes debentures if no debenture stock exists to satisfy the gift (*Re Nottage, Jones v. Palmer* (No. 2), [1895] 2 Ch. 657, C. A.).

(*s*) *Baring v. Ashburton* (1886), 54 L. T. 463; *Bacon v. Cosby* (1851), 4 De G. & Sm. 261; *Spearing v. Hawkes* (1857), 6 I. Ch. R. 297.

“furniture” (*t*); “household effects” (*u*); “household furniture” (*a*); “household furniture and effects” (*b*); “household goods” (*c*); and similar expressions (*d*); “personal estate,” or “personal estate and effects,” or “personal property” (*e*); “plate” (*f*); “property” (*g*); “real estate” (*h*).

(*t*) *Re Seton-Smith, Burnand v. Waite*, [1902] 1 Ch. 717 (tenants and trade fixtures there excluded); *Re Londesborough, Bridgeman v. Fitzgerald* (1880), 50 L. J. (CH.) 9 (pictures); *Hele v. Herbert* (1752), 2 Ves. Sen. 430 (china); *Cremorne v. Antrobus* (1829), 5 Russ. 312; *Holden v. Ramsbottom* (1863), 4 Giff. 205 (plated articles); *Petre v. Ferrers* (1891), 61 L. J. (CH.) 426 (not relics). Books as a rule are not included, at any rate in an eighteenth century will (*Bridgman v. Dove* (1744), 3 Atk. 201, 202; *Kelly v. Powlett* (1763), Amb. 605; *Cremorne v. Antrobus*, *supra*, at p. 321; *Porter v. Tournay* (1798), 3 Ves. 311), but it seems that having regard to modern habits of life an intention to include books in the term is now readily inferred (see *Re Holden* (1903), 5 Ontario Law Reports, 156, 162), for example, in a gift of a house and its furniture, as kept up in the testator's lifetime (*Ouseley v. Anstruther* (1847), 10 Beav. 453, 462; *Hutchinson v. Smith* (1863), 1 New Rep. 513).

(*u*) *Re Bourne, Bourne v. Brandreth* (1887), 58 L. T. 537 (wine there included), following *Cole v. Fitzgerald* (1823), 1 Sim. & St. 189, on appeal (1827), 3 Russ. 301; *Re Ashburnham, Gaby v. Ashburnham* (1912), 107 L. T. 601 (motor car included).

(*a*) *Kelly v. Powlett* (1763), Amb. 605 (plate, pictures etc.); *Manning v. Purcell* (1855), 7 De G. M. & G. 55, 68, C. A. (part of tavern furniture for domestic or personal use); *Stone v. Parker* (1860), 29 L. J. (CH.) 874 (cows, horses, farming stock, *primâ facie* excluded); *Finnay v. Grice* (1878), 10 Ch. D. 13 (not fixtures).

(*b*) *Pratt v. Jackson* (1726), 1 Bro. Parl. Cas. 222 (furniture in house let furnished, there excluded); *Northey v. Paxton* (1888), 60 L. T. 30 (not jewellery); *Tempest v. Tempest* (1856), 2 K. & J. 635 (personal ornaments and chattels not for use or ornament in the house, excluded); *Field v. Peckett* (No. 2) (1861), 29 Beav. 573 (ornaments); *Stone v. Parker*, *supra* (not farming stock); *MacPhail v. Phillips*, [1904] 1 I. R. 155; *Re Hammersley, Heasman v. Hammersley* (1899), 81 L. T. 150; *Re Howe, Ferniehough v. Wilkinson*, [1908] W. N. 223 (motor cars included). Choses in action were excluded in *Marshall v. Bentley* (1852), 1 Jur. (N. S.) 786; *Newman v. Newman* (1857), 26 Beav. 218.

(*c*) *Pellew v. Horsford* (1856), 2 Jur. (N. S.) 514; *Nicholls v. Osborn* (1727), 2 P. Wms. 419; *Stapleton v. Conway* (1750), 1 Ves. Sen. 427; see *Re Johnson, Sandy v. Reilly* (1905), 92 L. T. 357 (“household property” there shown to mean residue).

(*d*) In ascertaining what passes under such a bequest in the will of a trader, the court will direct an inquiry, distinguishing articles used for his own domestic or personal use, or in the way of trade or as merchandise; see the decree in *Le Farrant v. Spencer* (1748), 1 Ves. Sen. 97, given in *Manning v. Purcell* (1855), 7 De G. M. & G. 55, 64, n., C. A.

(*e*) Such expressions *primâ facie* are confined to personal estate in the legal sense, as to which see p. 508, *ante* (*Buchanan v. Harrison* (1861), 31 L. J. (CH.) 74; *Belaney v. Belaney* (1867), 2 Ch. App. 138; *Ex parte Yates* (1869), 20 L. T. 940), but may in the context or circumstances include realty (*Doe d. Tofield v. Tofield* (1809), 11 East, 246, 249 (meaning property over which the testator had an absolute personal power of disposition); *Lines v. Lines* (1869), 22 L. T. 400; *Cadman v. Cadman* (1872), L. R. 13 Eq. 470; *Re Smalley, Smalley v. Smalley* (1884), 49 L. T. 662; *Re Wass, Re Clark* (1907), 95 L. T. 758).

(*f*) *Holden v. Ramsbottom* (1863), 4 Giff. 205 (plated articles excluded); and see *Re Lewis, Prothero v. Lewis* (1909), 26 T. L. R. 145 (silver-mounted articles excluded); *Field v. Peckett*, *supra*, at p. 574.

(*g*) In gifts such as a gift of “my property” the word *primâ facie*

(*h*) For note (*h*) see p. 712, *post*.



## SECT. 4.

## Descriptions of Property.

Words sufficient to pass residue. Appointment of residuary legatee.

## SUB-SECT. 7.—Residuary Gifts.

**1333.** Many words are, in a suitable context, capable of denoting the whole or the residue of the real and personal estate of the testator (*i*).

The appointment of any person to be "residuary legatee" *primâ facie* (*k*) only gives him the residue of the personal estate (*l*), but if the context or the circumstances require it may also pass the residue of the real estate (*m*).

includes the testator's real and personal estate and the whole of the testator's interest therein (*Doe d. Wall v. Langlands* (1811), 14 East, 370; *Jones v. Skinner* (1835), 5 L. J. (CH.) 87; *Thomas v. Phelps* (1828), 4 Russ. 348, 351; *Saumarez v. Saumarez*, *De Havilland v. Saumarez* (1839), 4 My. & Cr. 331, 338; *Morrison v. Hoppe* (1851), 4 De G. & Sm. 234; *Re Greenwich Hospital Improvement Act* (1852), 20 Beav. 458; *Lloyd v. Lloyd* (1869), L. R. 7 Eq. 458; *Cameron v. Harper* (1892), 21 Canada Supreme Court Reports, 273).

(*h*) As to the technical meaning of the word, apart from the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 26, or a controlling context, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 163. As to a devise of real estate as affected by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), see pp. 508, 703, *ante*; in cases before the statute, leaseholds were not included, unless either the will showed an intention that they should be included, or there was no real estate for the gift to operate on in its ordinary sense (*Swift v. Swift* (1859), 1 De G. F. & J. 160, 170). For an example of a special meaning given to the word, see *Evans v. Evans* (1849), 17 Sim. 86 (certain tithes excluded).

(*i*) *Blight v. Hartnoll* (1883), 23 Ch. D. 218, 222, C.A. See, for example, *Huxtep v. Brooman* (1785), 1 Bro. C. C. 437 ("all I am worth"); *Doe d. Wall v. Langlands* (1811), 14 East, 370 ("the residue of all my property goods and chattels"); *Wilce v. Wilce* (1831), 7 Bing. 664 ("everything else I die possessed of"); *Green v. Dunn* (1855), 20 Beav. 6 (all my freeholds not hereinbefore devised); *Cogswell v. Armstrong* (1855), 2 K. & J. 227 (all other real and personal estate); and compare *Warner v. Warner* (1851), 15 Jur. 141; *Phillips v. Beal* (1858), 25 Beav. 25; *Re Greenwich Hospital Improvement Act* (1855), 20 Beav. 458 ("all my . . . other property of every description"); *Attree v. Attree* (1871), L. R. 11 Eq. 280 ("all the rest"); *Smyth v. Smyth* (1878), 8 Ch. D. 561 ("all the rest, residue . . . and all other my effects"); compare *Constable v. Bull* (1849), 3 De G. & Sm. 411; *Bibbens v. Potter* (1879), 10 Ch. D. 733; *Re Johnson, Sandy v. Reilly* (1905), 92 L. T. 357 ("the remainder of my household property"); *Re Craven, Crewdson v. Craven* (1908), 100 L. T. 284 (the rest of my investments). Even the phrase "etc." may suffice (*Chapman v. Chapman* (1876), 4 Ch. D. 800; *Re Andrew's Estate, Creasy v. Graves* (1902), 50 W. R. 471). As to "effects," see p. 700, *ante*; as to "estate," p. 701, *ante*.

(*k*) As when used alone or in a will which appears to make a distinction between real property and personal property (*Singleton v. Tomlinson* (1878), 3 App. Cas. 404, 417).

(*l*) *Wills v. Wills* (1841), 1 Dr. & War. 439; *Kellett v. Kellett* (1815), 3 Dow, 248, H. L., explained in *Windus v. Windus* (1856), 6 De G. M. & G. 549, 557, 558; *Lea v. Grundy* (1857), 1 Jur. (N. S.) 951; *Cooney v. Nicholls* (1881), 7 L. R. Ir. 107, C. A.; *Gethin v. Allen* (1888), 23 L. R. Ir. 236; *Re Morris, Morris v. Atherden* (1894), 71 L. T. 179.

(*m*) As, for instance, where the intention to dispose of the whole real and personal estate is shown or inferred (*Pitman v. Stevens* (1812), 15 East, 505; *Day v. Davenport* (1841), 12 Sim. 200; *Davenport v. Colman* (1842), 12 Sim. 588; *Warren v. Newton* (1844), Drury temp. Sug. 464; *Evans v. Crosbie* (1847), 15 Sim. 600; *Wildes v. Davies* (1853), 1 Sm. & G. 475; *Re Gyles* (1863), 14 I. Ch. R. 311; *Singleton v. Tomlinson* (1878), 3 App. Cas. 404; *Re Salter, Farrant v. Carter* (1881), 44 L. T. 603; *Re*

The effect of a gift of general residue, and the property comprised in it, are dealt with elsewhere (*n*); similar rules hold good as to particular residuary gifts by way of general descriptions of particular kinds of property belonging to the testator remaining undisposed of (*a*). A direction that a share of residue shall immediately (as in cases of revocation (*b*) or lapse (*c*) of that share) or on any event (*d*) fall into residue *primâ facie* constitutes a gift of that share by way of addition to the other shares of residue.

SECT. 4.  
Descriptions of Property.

Effect of gift of residue.

SECT. 5.—*Descriptions of Donees.*

SUB-SECT. 1.—*Time of Ascertaining the Donees.*

(i.) *In General.*

**1334.** The ascertainment of the donee is an element in ascertaining the vesting of the gift; accordingly, the presumption in favour of early vesting (*e*) has been invoked, in doubtful cases, to assist in determining which of various persons was intended by a description which was capable of denoting any of them (*f*); but in general this presumption does not assist in finding out whom the testator intended as the objects of his bounty (*g*). An express direction as to vesting (for example, at a specified age) or a gift

General considerations.

*Greally, Travers v. O'Donoghue*, [1910] 1 I. R. 239, 242; *Re Pereira, Worsley v. Society for the Propagation of the Gospel* (1912), 28 T. L. R. 479. The fact that parts of the real estate are specifically devised may be sufficient to give the residuary legatee the residue of the real estate (*Hughes v. Pritchard* (1877), 6 Ch. D. 24, C. A., explained in *Re Methuen and Blore's Contract* (1881), 16 Ch. D. 696, 700); but not where the residuary legatee is one of the specific devisees (*Hillas v. Hillas* (1847), 10 I. Eq. R. 134; *Re Morris, Morris v. Atherden* (1894), 71 L. T. 179; *Re Gibbs, Martin v. Harding*, [1907] 1 Ch. 465, 468). The fact that the testator had no real estate at the date of his will (*Re Methuen and Blore's Contract* (1881), 16 Ch. D. 696), or had no real estate other than that of which the will contains specific and complete dispositions (*Re Gibbs, Martin v. Harding, supra*), is against extending the meaning of "residuary legatee," though not conclusive on the point (*Re Stephen, Stephen v. Stephen*, [1913] W. N. 210, where *Re Gibbs, Martin v. Harding, supra*, is distinguished on the context of that case).

(*n*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 280. As to the effect of two residuary gifts, see p. 678, *ante*.

(*a*) *M'Kay v. M'Kay*, [1900] 1 I. R. 213, 217 (residue of furniture etc.); *Mason v. Ogden*, [1903] A. C. 1 (residue of freeholds). In *Re Brown* (1855), 1 K. & J. 522 (hereditaments comprised in a settlement), and *Springett v. Jennings* (1871), 6 Ch. App. 333 (hereditaments in a named parish), the descriptions were specific and not general.

(*b*) See p. 582, *ante*.

(*c*) See p. 607, *ante*.

(*d*) *Re Wand, Escritt v. Wand*, [1907] 1 Ch. 391; *Re Ballance, Ballance v. Lanphier* (1889), 42 Ch. D. 62.

(*e*) See pp. 797, 798, *post*.

(*f*) *Radford v. Willis* (1871), 7 Ch. App. 7, 10. The "rules of convenience" (see p. 715, *post*) are sometimes said to be directed to make the property vest as early as possible (*Gimblett v. Purton* (1871), L. R. 12 Eq. 427, 430).

(*g*) *Doe d. Smith v. Fleming* (1835), 2 Cr. M. & R. 638, *per Lord ABINGER, C.B.*, at p. 654: "it properly does no more than suggest the most desirable method of carrying that intention into effect when those objects are discovered, assuming that they can be ascertained."

SECT. 5.  
Descrip-  
tions of  
Donees.

Individuals.

over is in general immaterial in ascertaining the class (*h*) unless it alters the description of the class (*i*).

(ii.) *Individuals*.

**1335.** Where the donee is designated by a description which may at different times apply to different individuals, and the context does not point to any future time as the time at which the donee is to be ascertained, then *primâ facie* the only person who is entitled to take is the one who satisfied the description at the date of the will (*k*) if there was any person who to the knowledge of the testator then satisfied it (*l*). Where the context shows that the donee is to be ascertained in the future, but does not show at what specific time, then the first person to satisfy the description is presumed to be intended (*m*). The context may, however, show that the donee in each case is to be ascertained at the death of the testator, or some other definite future time.

(iii.) *Classes*.

Classes, when  
context clear.

**1336.** The words of the will may clearly indicate the point of time at which the class is to be ascertained; thus, in a gift to children "now living" only those in existence at the date of the will can take, and all children born after that date are excluded (*n*); in a gift to children living at the death of the testator or any other person (*a*), or at any particular future time (*b*), or to children now born or to

(*h*) *Williams v. Haythorne, Williams v. Williams* (1871), 6 Ch. App. 782; *Re Payne* (1858), 25 Beav. 556 (to be vested at twenty-one or on leaving issue at death before that age).

(*i*) *Williams v. Russell* (1863), 10 Jur. (N. S.) 168; *Re Knowles, Nottage v. Buxton* (1882), 21 Ch. D. 806.

(*k*) The provisions of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24, do not apply with reference to the objects of the testator's bounty (*Bullock v. Bennett* (1855), 7 De G. M. & G. 283, 285, 286; *Gibson v. Gibson* (1852), 1 Drew. 42, 62 (as to exclusion of widow from dower)).

(*l*) *Lomax v. Holmden* (1749), 1 Ves. Sen. 290 (the first son of the body of C.; the second son, who was then the eldest, took); *Thompson v. Thompson* (1844), 1 Coll. 381, 388, 391 (eldest son at date of codicil took); *Re Whorwood, Ogle v. Sherborne (Lord)* (1887), 34 Ch. D. 446 (to "Lord S."); *Re Laffan and Downes' Contract*, [1897] 11 L. R. 469 (superiress of two convents); *Amyot v. Dwarries*, [1904] A. C. 268, P. C. ("the eldest son of my sister"). *Re Harris's Trust* (1854), 2 W. R. 689, is incorrect. As to gifts to a "wife," see p. 761, *post*; to servants, p. 759, *post*.

(*m*) *Radford v. Willis* (1871), 7 Ch. App. 7 (gift to future "husband" of daughter unmarried at date of will); as to gifts to one of a number of persons, see note (*u*), p. 680, *ante*; as to gifts to an "eldest son" etc., p. 748, *post*.

(*n*) *James v. Richardson* (1677), 1 Eq. Cas. Abr. 213, pl. 11.

(*a*) *Barker v. Lea* (1814), 3 Ves. & B. 115; *Jennings v. Newman* (1839), 10 Sim. 219, where the gift was postponed to a life estate to one of the class, who was held to take; *Turner v. Hudson* (1847), 10 Beav. 222.

(*b*) *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; *Hughes v. Hughes* (1807), 14 Ves. 256; *Dodd v. Wake* (1837), 8 Sim. 615; *Boughton v. Boughton* (1848), 1 H. L. Cas. 406; *Hodson v. Mickelthwaite* (1854), 2 Drew. 294; *Lett v. Randall, Lett v. Dormer* (1855), 3 Sm. & G. 83; *Stuart v. Cockerell* (1870), 5 Ch. App. 713; and see *Re Deighton's Settled Estates* (1876), 2 Ch. D. 783, C. A. Where life interests are given to several persons in succession, and on the death of the last-named person there is a gift to a class of persons "then living," the word "then" is generally to be taken as referring grammatically to the death of that person, even where such



be born during the lifetime of their named parent (*c*), the time of ascertaining the class is fixed by the express words of the will. In all such cases there is no room for the application of any canons of construction.

SECT. 5.  
Descriptions of  
Donees.

**1337.** There is no rule that where there is a gift to a class on a contingent event the time of happening of the contingency determines the individuals composing the class (*d*); the circumstance, however, is to be taken into consideration in combination with other indications of the testator's intention to be found in other parts of his will (*e*), and on the whole context of the will the description of the class may be varied and the contingency applied to the class (*f*).

To class on a  
contingency.

**1338.** Where, however, it cannot be gathered, from the context and circumstances of the case, what time is referred to for ascertaining a class, the court acts upon certain canons of construction, which have been framed for the convenience of the donees and of the administration of the property, and have accordingly been called rules of convenience (*g*).

Rules of  
convenience  
applicable in  
other cases.

**1339.** The first rule of convenience is as follows:—

Class  
ascertained.

A class (*h*) is *primâ facie* composed of those members (if any)

death took place before the death of the testator (*Archer v. Jagon* (1837), 8 Sim. 446; *Re Milne, Grant v. Heysham* (1888), 57 L. T. 828, C. A.; *Palmer v. Orpen*, [1894] 1 I. R. 32). For examples of cases where "then" was referred to the death of the testator or other period of distribution, see *Gaskell v. Holmes* (1844), 3 Hare, 438; *Widdicombe v. Miller* (1853), 1 Drew. 443).

(*c*) *Scott v. Scarborough (Earl)* (1838), 1 Beav. 154.

(*d*) *Boulton v. Beard* (1853), 3 De G. M. & G. 608, C. A., *per* TURNER, L.J., at p. 612; *Hickling v. Fair*, [1899] A. C. 15, *per* Lord DAVEY, at p. 35.

(*e*) *Selby v. Whittaker* (1877), 6 Ch. D. 239, C. A., *per* BAGGALLAY, L.J., at p. 250.

(*f*) *Ibid.* Thus, in a gift, if a named person should leave any child, to all his children, the class is not restricted to children whom he leaves at his death (*Boulton v. Beard*, *supra*; *M'Lachlan v. Tait* (1860), 2 De G. F. & J. 449; as to the application of the rule in *Emperor v. Rolfe* (1749), 1 Ves. Sen. 208, to wills, see p. 671, *ante*). But the context may show the contrary, as, for instance, if the gift is to "such" children (*Sheffield v. Kennett* (1859), 4 De G. & J. 593; *Re Watson's Trusts* (1870), L. R. 10 Eq. 36), or is to "vest" (used in its legal sense) at the death of the parent (*Selby v. Whittaker* (1877), 6 Ch. D. 239, C. A.; see also *Wilson v. Mount* (1854), 19 Beav. 292 (gift over, if no "such" issue)).

(*g*) *Re Emmet's Estate, Emmet v. Emmet* (1880), 13 Ch. D. 484, C. A.; *Re Powell, Grosland v. Holliday*, [1898] 1 Ch. 227, *per* KEKEWICH, J., at p. 230. The rules are admittedly "not founded on any view of the testator's intention" (*Re Emmet's Estate, Emmet v. Emmet*, *supra*, *per* JESSEL, M.R., at p. 490; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520, 527, C. A.), and are "artificial" (*Leake v. Robinson* (1817), 2 Mer. 363, *per* GRANT, M.R., at p. 383). The rules generally for ascertainment of a class, both as to personal property and real property, are said to be founded on the presumption that only persons in being are intended to take (*Ellison v. Airey* (1748), 1 Ves. Sen. 111, 114; *Crone v. Odell* (1811), 1 Ball & B. 449, 459, affirmed, *sub nom. Odell v. Crone* (1815), 3 Dow, 61, H. L.; *Bartleman v. Murchison* (1831), 2 Russ. & M. 136, 140). As to the rules for ascertaining a class taking in default of appointment under a power, see title POWERS, Vol. XXIII., p. 71. As to implied gifts to the objects of an unexercised power of selection, see *ibid.*, p. 70.

(*h*) As to what kinds of classes are subject to this rule, see p. 720, *post*.

SECT. 5.  
Descrip-  
tions of  
Donees.

existing ascertainable and capable of taking (*i*) at the death of the testator (*k*); but where the period of distribution is at a later date, the class opens so as to let in all those members coming into existence before the period of distribution (*l*). Where, however, the gift is immediate, but at the death of the testator no member of the class has yet come into existence, then all the members of the class who are born at any future period *primâ facie* are intended to take under the gift (*a*).

Effect of  
death before  
testator or  
distribution.

As regards members of a class who die before the testator, the class is ascertained independently of them, and there is no question of lapse of their shares (*b*), and they are not included (*c*); nor where they are issue of the testator do they take by leaving issue living at the death of the testator, even where the class consists of but one person (*d*). As regards members of a class taking under a postponed

(*i*) *Fell v. Biddolph* (1875), L. R. 10 C. P. 701, 709 (two had attested will; see p. 556, *ante*); *Re Coleman and Jarrom* (1871), 4 Ch. D. 165, 169 ("those who become incapable of taking—whether by dying in the testator's lifetime or by attesting the will or by some other operation of law—do not take": *ibid.*, per JESSEL, M.R., at p. 173). Similarly, as to the case where future illegitimate children incapable of taking are comprised in the description, see pp. 542, 543, *ante*.

(*k*) *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278, per PARKER, J., at pp. 286, 289; *Singleton v. Gilbert* (1784), 1 Cox, Eq. Cas. 68; *Hill v. Chapman* (1791), 3 Bro. C. C. 391; *Viner v. Francis* (1789), 2 Cox, Eq. Cas. 190; Tudor, L. C. Real Prop., 4th ed., p. 417; *Davidson v. Dallas* (1808), 14 Ves. 576. This rule applies to an immediate gift to a class "or so many of them as shall be living" at a postponed period (*Trelawney v. Molesworth* (1701), Colles, 163). As to a gift to a class of "unmarried" persons, see *Jubter v. Jubber* (1839), 9 Sim. 503; *Blagrove v. Coore* (1859), 27 Beav. 138 (ascertained at death); *Hall v. Robertson* (1853), 4 De G. M. & G. 781, C. A.

(*l*) *Ellison v. Airey* (1748), 1 Ves. Sen. 111; *Bartlett v. Hollister* (1757), Amb. 334; *Congreve v. Congreve* (1781), 1 Bro. C. C. 530; *Devisme v. Mello* (1782), 1 Bro. C. C. 537; *Simmons v. Vallance* (1793), 4 Bro. C. C. 345; *Middleton v. Messenger* (1799), 5 Ves. 136; *Walker v. Shore* (1808), 15 Ves. 122, 125; *Tebbs v. Carpenter* (1816), 1 Madd. 290; *Marshall v. Bousfield* (1817), 2 Madd. 166; *Cooke v. Bowen* (1840), 4 Y. & C. (EX.) 244; *Moffatt v. Burnie* (1853), 18 Beav. 211, 214; *Oppenheim v. Henry* (1853), 10 Hare, 441; *Browne v. Hammond* (1858), John. 210, 212, n.; *Re Wood, Moore v. Bailey* (1880), 43 L. T. 730. This rule is general both in England and Scotland (*Wood v. Wood* (1861), 23 Dunl. (Ct. of Sess.) 342; *Ross v. Ross* (1878), 5 R. (Ct. of Sess.) 833, approved in *Hope Johnstone v. Sinclair's Trustees* (1904), 7 F. (Ct. of Sess.) 25; *Hickling v. Fair*, [1899] A. C. 15, per Lord DAVEY, at p. 35: "applicable, I should suppose, wherever the English language is used." Apart from this letting in of additional members, the postponement of the gift does not postpone the time of ascertainment of the class (*Lee v. Lee* (1860), 1 Drew. & Sm. 85, 87); and other persons who come into existence after the period of distribution are excluded (*Hill v. Chapman* (1791), 3 Bro. C. C. 391; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520, 527). As to what is the period of distribution, see pp. 717 *et seq.*, *post*.

(*a*) *Weld v. Bradbury* (1715), 2 Vern. 705; *Shepherd v. Ingram* (1764), Amb. 448; *Odell v. Crone* (1815), 3 Dow, 61, H. L. ("younger children"); *Leake v. Robinson* (1817), 2 Mer. 363, 383; *Hutcheson v. Jones* (1817), 2 Madd. 124; *Harris v. Lloyd* (1823), Turn. & R. 310, 314; *Armitage v. Williams* (1859), 27 Beav. 346.

(*b*) See p. 614, *ante*.

(*c*) *Fitzroy v. Richmond (Duke)* (1858), 28 L. J. (CH.) 750.

(*d*) *Olney v. Bates* (1855), 3 Drew. 319; *Browne v. Hammond*, *supra* (deciding that the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33 (as to which see p. 610, *ante*), had no application); *Re Harvey's (Sir E.) Estate*,



gift, the death of any of them who has survived the testator but before the period of distribution does not defeat his interest (*e*), provided that the contingency of surviving that period is not part of the description of the class (*f*); thus, the objects among whom the property becomes ultimately divisible are those members of the class who may be living at the period of distribution, and the representatives of such as may have died before that period having survived the testator (*g*).

SECT. 5.  
Descriptions of  
Donees.

**1340.** The period of distribution may be postponed either by some prior gift, or by the nature of the property given, or by the conditions attached to the gift. Period of distribution.

In cases where the gift is postponed to a life estate the period of distribution is usually, but not necessarily, the determination of the life estate (*h*); but the existence of a mere charge on a fund, for example an annuity charged on it, does not necessarily affect the time for ascertaining the period of distribution (*i*). In gifts postponed by life interests.

If there is a prior life interest determinable on bankruptcy and there is no extension of the class of children let in, the class is fixed at the time of bankruptcy (*k*); but where the limitation over to the class after the life interest postpones payment until the death of the life tenant (*l*), or expressly directs the property to be applicable in the same manner as if the life tenant were dead (*m*), In gifts postponed by determinable life interests.

*Harvey v. Gillow*, [1893] 1 Ch. 567; *Re Kinnear*, *Kinnear v. Barnett* (1904), 90 L. T. 537.

(*e*) *Devisme v. Mello* (1782), 1 Bro. C. C. 537; *Stanley v. Wise* (1788), 1 Cox, Eq. Cas. 432; *Cooke v. Bowen* (1840), 4 Y. & C. (EX.) 244; *Watson v. Watson* (1840), 11 Sim. 73; *Swan v. Dowden* (1842), 11 L. J. (CH.) 155; *Locker v. Bradley* (1842), 5 Beav. 593; *Salmon v. Green* (1849), 11 Beav. 453; *Pattison v. Pattison* (1855), 19 Beav. 638. Such persons are said in several cases to take vested interests subject to being divested in quantity by the birth of further members of the class (see, for example, *Stanley v. Wise*, *supra*; *Baldwin v. Rogers* (1853), 3 De G. M. & G. 649); but "vested" is then used in the sense of "transmissible" only, and not in the usual legal sense, and "divested" in the sense of "diminished"; see, further, note (*n*), p. 802, *post*.

(*f*) *Parr v. Parr* (1833), 1 My. & K. 647 (to "devolve" on children of life tenant). There may, however, be a gift over or a substitutionary gift defeating a member's interest (*Pope v. Whitcombe* (1827), 3 Russ. 124; *Re Miles*, *Miles v. Miles* (1889), 61 L. T. 359); and see *Re Shaw*, *Williams v. Pledger* (1912), 56 Sol. Jo. 380.

(*g*) *Re Roberts*, *Percival v. Roberts*, [1903] 2 Ch. 200, *per* JOYCE, J., at p. 202.

(*h*) *Ayton v. Ayton* (1781), 1 Cox, Eq. Cas. 327; *Middleton v. Messenger* (1799), 5 Ves. 136; *Barnaby v. Tassell* (1871), L. R. 11 Eq. 363; compare *Re Knapp's Settlement*, *Knapp v. Vassall*, [1895] 1 Ch. 91, *per* NORTH, J., at p. 96. As to a gift to the "descendants" of two successive life tenants, see *Re Roberts*, *Repington v. Roberts-Gawen* (1882), 19 Ch. D. 520, *per* JESSEL, M.R., at p. 527.

(*i*) *Hill v. Chapman* (1791), 3 Bro. C. C. 391; *Singleton v. Gilbert* (1784), 1 Cox, Eq. Cas. 68; *Watson v. Watson* (1840), 11 Sim. 73; *Coventry v. Coventry* (1865), 2 Drew. & Sm. 470; *Bortoft v. Wadsworth* (1864), 12 W. R. 523; *Re Whiteford*, *Ingdis v. Whiteford*, [1903] 1 Ch. 889; see, however, *Re Hiscoe*, *Hiscoe v. Waite* (1883), 48 L. T. 510; *Gardner v. James* (1843), 6 Beav. 170 (cases where there could be no distribution until the death of the surviving annuitant).

(*k*) *Re Smith* (1862), 2 John. & H. 594, 600, 601; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585.

(*l*) *Brandon v. Aston* (1842), 2 Y. & C. (EX.) 24.

(*m*) *Re Bedson's Trusts* (1885), 28 Ch. D. 523, C. A.



## SECT. 5.

## Description of Donees.

## Remarriage.

this extends the class so as to let in those coming into existence until the death.

In certain cases where a life interest has been determinable on remarriage, and the gift over expressly referred only to the death of the life tenant, but the court construed the gift over as impliedly intended to take effect on the remarriage (*n*), the class of children has been held to be ascertained at the remarriage, although expressly described as to be ascertained at the death (*o*).

In gifts of reversionary property.

**1341.** Where the property is reversionary the period of distribution may be postponed until it falls into possession (*p*); but there is no postponement in case of a gift of a residue which includes a reversionary interest with other property (*q*).

In gifts postponed by the conditions attached.

**1342.** The second rule of convenience deals with the determination of the period of distribution where the gift is of the *corpus* of property (*r*) and is postponed by reason of the conditions attached to it, as where payment is to be made on the attainment of a specified age by the donee (*s*), or on his or her marriage (*t*), or in other cases, it appears, where such conditions are of a nature personal to the donees; this rule is as follows:—

The rule in *Andrews v. Partington*.

Where the postponement of enjoyment is due to conditions attached to the gift, the period of distribution is considered to be as soon as the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share, if the class were then not susceptible of increase (*u*). Thus, where there is an immediate gift to a class, to be paid on their attaining a specified age, the period of distribution is the death of the testator, if any member of the class has then attained that age (*w*), and if not, at the time of the first occasion when a member attains that age (*a*).

(*n*) According to the rule in *Luxford v. Cheeke* (1684), 3 Lev. 125; see p. 805, *post*.

(*o*) *Bainbridge v. Cream* (1852), 16 Beav. 25, followed in *Stanford v. Stanford* (1886), 34 Ch. D. 362, 366; *Re Tucker, Bowchier v. Gordon* (1887), 56 L. T. 118, where, however, STIRLING, J., said, at p. 119, that he did not understand *Bainbridge v. Cream*, *supra*; *Re Dear, Helby v. Dear* (1889), 61 L. T. 432, where KAY, J., said, at p. 434, that he considered *Bainbridge v. Cream*, *supra*, to be a reasonable extension of *Luxford v. Cheeke*, *supra*.

(*p*) *Walker v. Shore* (1808), 15 Ves. 122, 125, followed in *Harvey v. Strachey* (1852), 1 Drew. 73, 123.

(*q*) *Hagger v. Payne* (1857), 23 Beav. 474; *Coventry v. Coventry* (1865), 2 Drew. & Sm. 470.

(*r*) As to gifts of income, see p. 721, *post*.

(*s*) See the text, *infra*. Where, however, a class takes at birth, a gift over on the members failing to attain a specified age does not postpone the period of distribution (*Davidson v. Dallas* (1808), 14 Ves. 576).

(*t*) *Barrington v. Tristram* (1801), 6 Ves. 345; *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 753, 756.

(*u*) *Re Emmet's Estate, Emmet v. Emmet* (1880), 13 Ch. D. 484, 490; *Re Bedson's Trusts* (1885), 28 Ch. D. 523, 526, C. A.; *Re Knapp's Settlement, Knapp v. Vassall*, [1895] 1 Ch. 91, 96; Underhill and Strahan, Interpretation of Wills and Settlements, p. 105.

(*w*) *Picken v. Matthews* (1878), 10 Ch. D. 264; *Gillman v. Daunt* (1856), 3 K. & J. 48.

(*a*) *Andrews v. Partington* (1791), 3 Bro. C. C. 401; *Prescott v. Long* (1795), 2 Ves. 690; *Hoste v. Pratt* (1798), 3 Ves. 730; *Whitbread v. St. John (Lord)* (1804), 10 Ves. 152; *Curtis v. Curtis* (1814), Madd. & G. 14;

**1343.** This rule is adopted to reconcile the inconsistent directions of the will that all the children should take, but that the fund should be divided at a time when the class cannot be ascertained (*b*), and is not applied unless it is necessary (*c*), or unless it will fit in with the other provisions of the will (*d*). Thus, it is not applied where the provisions of the will are inconsistent with any right of the first child, attaining the specified age or satisfying the conditions, to payment of his share (*e*); as in cases where there is an effective direction, extending beyond the time when a child first attains the specified age or satisfies the conditions, to accumulate income (*f*), or to allow maintenance or advancement (*g*).

SECT. 5.

Descrip-  
tions of  
Donees.When  
applicable.

*Titcomb v. Butler* (1830), 3 Sim. 417; *Balm v. Balm* (1830), 3 Sim. 492; *Blease v. Burgh* (1840), 2 Beav. 221; *Robley v. Ridings* (1847), 11 Jur. 813; *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197; *Re Knapp's Settlement, Knapp v. Vassall*, [1895] 1 Ch. 91. The rule is accordingly termed the rule in *Andrews v. Partington* (1791), 3 Bro. C. C. 401, where Lord THURLOW, L.C., treated the rule as already established, though, as pointed out in *Prescott v. Long* (1795), 2 Ves. 690, *per* Lord LOUGHBOROUGH, at p. 692, it does not appear what are the cases he referred to; the rule, however, appears to be applied in *Gilmore v. Severn* (1785), 1 Bro. C. C. 582. A child *en ventre sa mère* when the eldest attains the specified age is included in the class (*Trustees, Executors and Agency Co., Ltd. v. Sleeman* (1899), 25 Victorian Law Reports, 187; see pp. 740 *et seq.* *post*).

(*b*) *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322, *per* BUCKLEY, J., at p. 328; *Defflis v. Goldschmidt* (1816), 1 Mer. 417, *per* GRANT, M.R., at p. 420; *Mainwaring v. Beevor* (1849), 8 Hare, 43, *per* WIGRAM, V.-C., at p. 49; but see *Mann v. Thompson* (1854), Kay, 638, where WOOD, V.-C., at p. 641, appears not to concur in this view. This rule has often been criticised; it is not part of the law of Scotland, which in other respects appears to be similar to the law of England with regard to the ascertainment of the donee: in Scotland all the children are included; see *Hope Johnstone v. Sinclair's Trustees* (1904), 7 F. (Ct. of Sess.) 25, *per* Lord McLAREN, at p. 30. In *Andrews v. Partington*, *supra*, Lord THURLOW, L.C., at p. 404, said that there was no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubted that the same expression meant all the children; and see note (*c*), *infra*.

(*c*) *Re Stephens, Kilby v. Betts*, *supra*, *per* BUCKLEY, J., at p. 328. The rule has been applied to similar gifts to children in a voluntary settlement (*Re Knapp's Settlement, Knapp v. Vassall, supra*); in the case of a marriage settlement there is no necessity for the application of the rule in such a case, as the court may rely on the presumption in favour of all the children of the settlor being included (*Mann v. Thompson, supra*, at p. 642; but see *Re Knapp's Settlement, Knapp v. Vassall, supra, per* NORTH, J., at p. 99).

(*d*) The rule, however, is not excluded by the fact that the class is described as "all" or "all and every" the children of a person; see *Andrews v. Partington, supra*; *Prescott v. Long, supra*.

(*e*) Compare *Re Kipping, Kipping v. Kipping*, [1914] 1 Ch. 62, C. A.; *Macculloch v. Anderson*, [1904] A. C. 55, 61.

(*f*) *Watson v. Young* (1885), 28 Ch. D. 436; *Re Pilkington, Pilkington v. Pilkington* (1892), 29 L. R. Ir. 370; *Re Stephens, Kilby v. Betts, supra*; *Re Stevens, Trustees, Executors and Agency Co., Ltd. v. Teague*, [1912] Victorian Law Reports, 194, 201, 202. This may not be the case where the direction for accumulation is ineffective, owing to the rights of beneficiaries to determine it and take the property free from accumulation (*Curtis v. Curtis* (1814), Madd. & G. 14; *Coventry v. Coventry* (1865), 2 Drew. & Sm. 470; see p. 588, *ante*).

(*g*) *Gardner v. James* (1843), 6 Beav. 170; *Bateman v. Foster* (1844), 1 Coll. 118, 126; *Mainwaring v. Beevor* (1849), 8 Hare, 44; *Iredell v. Iredell* (1858), 25 Beav. 485; *Armitage v. Williams* (1859), 27 Beav. 346; *Bateman v. Gray* (1868), L. R. 6 Eq. 215 (advancement out of "vested or presumptive shares" relied on), followed in *Re Courtenay, Pearce v. Foxwell*

## SECT. 5.

Descrip-  
tions of  
Donees.

Possible  
failure as  
result of rule.  
Effect of  
prior interest  
on rule.

Directions not  
excluding  
rule.

Classes  
subject to the  
rules.

Where the application of the rule would cause the gift to the class, or any other gift in the will connected with it, to fail as being contrary to law (for example, under the rule against perpetuities), and some other construction is possible under the will (*h*) by which all the gifts take effect, it appears that the rule is not applied, but that the alternative construction is adopted (*i*).

The rule may, however, be applied notwithstanding that there is a previous life interest (*k*), unless the testator shows that the expiration of that life interest is intended by him to be the period of distribution (*l*).

The rule applies both where the gift and direction as to payment are distinct, so that the gift is not contingent (*m*), and where the gift is contingent upon attaining the specified age (*n*) or other event, or subject to a gift over in any such event (*o*).

**1344.** These rules of convenience apply to a gift to a class of children, whosoever may be the parent, whether the testator or any other person, alive or dead (*p*), and, it appears, to any other description of a class (*q*) which in the context and circumstances of

(1905), 74 L. J. (CH.) 654; but see *Titcomb v. Butler* (1830), 3 Sim. 417 (power to allow maintenance insufficient); *Mower v. Orr* (1849), 7 Hare, 473, 477; *Hagger v. Payne* (1857), 23 Beav. 474, 479; *Gimblett v. Purton* (1871), L. R. 12 Eq. 427, 430 (power of advancement relating to presumptive shares only).

(*h*) As to this rule in cases of ambiguous construction, see p. 668, *ante*; and title PERPETUITIES, Vol. XXII., p. 307.

(*i*) *Elliott v. Elliott* (1841), 12 Sim. 276 (gift to children of E., as and when attaining twenty-two, with a provision for interest in the meantime; SHADWELL, V.-C., saw no objection to holding the class ascertained at the testator's death), explained, as decided on the ground stated in the text, *supra*, in *Mainwaring v. Beevor* (1849), 8 Hare, 44, 48, and *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266, 270, and followed in *Re Coppard's Estate, Howlett v. Hodson* (1887), 35 Ch. D. 350; and see *Re Hobson's Will and Codicil and Estate, Hobson v. Sharp*, [1907] Victorian Law Reports. 724, 730: compare the cases as to gifts of income, note (*b*), p. 722, *post*. *Elliott v. Elliott, supra*, however, has been much criticised: see *Re Pilkington, Pilkington v. Pilkington* (1892), 29 L. R. Ir. 370, 376; *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197, 202, where *Elliott v. Elliott, supra*, was supported on account of the gift of interest (but this is open to question, since it would only make the gift a vested gift and not a contingent gift, and would not alter the period of distribution); *Re Barker, Capon v. Flick* (1905), 92 L. T. 831. *Re Coppard's Estate, Howlett v. Hodson, supra*, was not intended to go beyond *Elliott v. Elliott, supra* (*Re Mervin, Mervin v. Crossman, supra*), and in so far as it does so ought not to be followed (*Re Stevens, Clerk v. Stevens*, [1896] W. N. 24).

(*k*) *Clarke v. Clarke* (1836), 8 Sim. 59; *Re Emmet's Estate, Emmet v. Emmet* (1880), 13 Ch. D. 484, C. A. (in which cases no children had attained the specified age at the expiration of the previous interest); and see *Robley v. Ridings* (1847), 11 Jur. 813.

(*l*) *Kevern v. Williams* (1832), 5 Sim. 171, followed in *Berkeley v. Swinburne* (1848), 16 Sim. 275, 285, 286, and explained in *Re Emmet's Estate, Emmet v. Emmet, supra*.

(*m*) *Andrews v. Partington* (1791), 3 Bro. C. C. 40, explained in *Re Mervin, Mervin v. Crossman, supra*, per STIRLING, J., at p. 203.

(*n*) *Whitbread v. St. John (Lord)* (1804), 10 Ves. 152 (gift over on death of all under twenty-one etc.); *Balm v. Balm* (1830), 3 Sim. 492; *Locke v. Lamb* (1867), L. R. 4 Eq. 372; *Gimblett v. Purton, supra*.

(*o*) *Barrington v. Tristram* (1801), 6 Ves. 345 (gift over of share of child dying under twenty-one leaving issue).

(*p*) *Viner v. Francis* (1789), 2 Cox, Eq. Cas. 190.

(*q*) *E.g., grandchildren (Mainwaring v. Beevor* (1849), 8 Hare, 44.



the case does not point out some other mode of ascertaining the class (*r*); and are nevertheless applicable although the class may be described as “begotten or to be begotten,” “born or to be born,” or in like words (*s*) where no future period is fixed by the will (*t*); and although the gift is postponed to a life interest given to a named person who by these rules takes as a member of the class (*u*).

**1345.** The rules of convenience apply to gifts of the *corpus* of personal estate (*w*), or of a mixed fund of real and personal estate (*x*). In the case of gifts of income only of such property or of sums payable at intervals (*y*), the class taking any particular payment is as a rule to be ascertained so as to let in all members coming into existence before the time for that payment (*a*); and the class, it appears, is not to be closed finally for all subsequent

SECT. 5.  
Descrip-  
tions of  
Donees.

Gifts subject  
to the rules.

*Wetherell v. Wetherell* (1863), 1 De G. J. & Sm. 134 (“grandchildren and great-grandchildren” of A. and B.); *Coventry v. Coventry* (1865), 2 Drew. & Sm. 470; *Gimblett v. Purton* (1871), L. R. 12 Eq. 427; cousins (*Baldwin v. Rogers* (1853), 3 De G. M. & G. 649), or other descriptions by other grades of relationship (*ibid.*, per TURNER, L.J., at p. 656); and generally, it appears, descriptions of any fluctuating body (*Cocks v. Manners* (1871), L. R. 12 Eq. 574, 586; *Re Delany's Estate* (1881), 9 L. R. Ir. 226, C. A.; *Re Laffan and Downes' Contract*, [1897] 1 I. R. 469, 473; *Re Smith, Johnson v. Bright-Smith*, [1914] Ch. 937; see title CHARITIES, Vol. IV., pp. 119, 120). The rule applies to a class described as living at the death of a person who died in the life of the testator (*Lee v. Pain* (1844), 4 Hare, 201, 250; *Dimond v. Bostock* (1875), 10 Ch. App. 358) or as living at the date of the will (*Leigh v. Leigh* (1854), 17 Beav. 605).

(*r*) As to gifts to “next of kin” of any person, see pp. 755, 756, *post*; and see, generally, p. 714, *ante*.

(*s*) *Sprackling v. Ranier* (1761), 1 Dick. 344; *Whitbread v. St. John (Lord)* (1804), 10 Ves. 152; *Gilbert v. Boorman* (1805), 11 Ves. 238; *Clarke v. Clarke* (1836), 8 Sim. 59; *Butler v. Lowe* (1837), 10 Sim. 317; *Dias v. De Livera* (1879), 5 App. Cas. 123, 134, P. C. The words in question are held to provide for the birth of children between the making of the will and the death of the testator (*Storrs v. Benbow* (1833), 2 My. & K. 46, 48; *Dias v. De Livera*, *supra*, at p. 135); compare p. 723, *post* (real estate).

(*t*) *Scott v. Scarborough (Earl)* (1838), 1 Beav. 154, 168.

(*u*) *Elmsley v. Young* (1835), 2 My. & K. 780; *King v. Tootel* (1858), 25 Beav. 23; *Reay v. Rawlinson* (1860), 29 Beav. 88; *Almack v. Horn* (1863), 1 Hem. & M. 630; and see the cases as to “next of kin” cited in note (*w*), p. 756, *post*.

(*w*) Including real estate, or a mixed fund of real and personal estate, held upon trust for conversion and investment (*Hoste v. Pratt* (1798), 3 Ves. 730; *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197, 202).

(*x*) *Andrews v. Partington* (1791), 3 Bro. C. C. 401 (residue); *Re Emmet's Estate, Emmet v. Emmet* (1880), 13 Ch. D. 484, C. A.; *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 733, 756, C. A.

(*y*) *Re Latham, Seymour v. Bolton*, [1901] W. N. 248 (annuity to children attaining twenty-one; two who had attained twenty-one alone entitled to particular payment in question).

(*a*) *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266, where CHITTY, J., held that the rule in *Andrews v. Partington* (1791), 3 Bro. C. C. 401 (see p. 718, *ante*), did not apply to gifts of income; this decision was criticised and explained in *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322, by BUCKLEY, J.; these criticisms of BUCKLEY, J., however, have been dissented from as unnecessary (*Re Carter, Walker v. Litchfield* (1911), 30 New Zealand Law Reports, 707, C. A.). The rule stated in the text, *supra*, appears to be established in most English-speaking communities; see *Ross v. Dunlop* (1878), 5 R. (Ct. of Sess.) 833; *Re Smisson* (1911), 79 New Jersey (Equity), 233; *Re Carter, Walker v. Litchfield*, *supra*.

## SECT. 5.

## Descriptions of Donees.

Gifts of real estate alone.

Limitations *in futuro*.

payments at the time when the right to receive income first accrues to any member of the class, except in cases where other considerations require it (b).

**1346.** The case of gifts of realty alone remains to be considered. If the gift to the class is construed to be immediate upon the death of the testator, that is the time when the class is ascertained if any members of the class then have come into being (c). A devise not otherwise postponed to "all and every" the children of a person is construed as immediate and the class is ascertained at the testator's death (d).

**1347.** Classes which take under a limitation which can take effect by way of legal remainder must be ascertained in accordance with the rules of law (e) at the time of the death of the testator letting in all who come into existence and take a vested interest on or before the natural determination of the particular estate (f). Other limitations not taking effect at the testator's death must take effect, if at all, as executory devises (g). In the case of an executory devise to a class of children who attain a specified age, the court finds no reason, as there is in the case of personal estate, for cutting down the class of takers by excluding children born after a child has attained that age; and it seems that all the children, whenever born, who attain that age, will be included (h).

(b) *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322. In *Re Powell, Crossland v. Holliday*, [1898] 1 Ch. 227 (gift of real estate), the class was thus closed, but if the ordinary rule had been applied a subsequent gift would have been void under the rule against perpetuities. KEKEWICH, J., thought that in *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266, it was not considered whether it would be right to depart from the rule as to children being ascertained at the testator's death, because they were only interested in income, or for any other reason. In so far as *Re Powell, Crossland v. Holliday*, *supra*, purports to lay down a general rule of construction, it is dissented from in *Re Carter, Walker v. Litchfield* (1911), 30 New Zealand Law Reports, 707, C. A. See also *Mogg v. Mogg* (1815), 1 Mer. 654, referred to as an authority as to the difference between gifts of corpus and of income in *Re Wenmoth's Estate, Wenmoth v. Wenmoth*, *supra*.

(c) *Singleton v. Gilbert* (1784), 1 Cox, Eq. Cas. 68; *Doe d. Thwaites v. Over* (1808), 1 Taunt. 263; *Crone v. Odell* (1811), 1 Ball & B. 449, 458, affirmed, *sub nom. Odell v. Crone* (1815), 3 Dow, 61, H. L.; *Re Johnson, Danily v. Johnson* (1893), 68 L. T. 20 (acceleration of ascertainment by revocation of prior interest); Shep. Touch. (ed. Preston) 436. The rule was applied to gifts of income in *Re Powell, Crossland v. Holliday*, *supra*, at p. 230; see note (b), *supra*. If no members of the class have yet come into being at the death of the testator the gift must take effect as an executory devise, and all members, whenever born, will be let in (*Weld v. Bradbury* (1715), 2 Vern. 705).

(d) *Scott v. Harwood* (1821), 5 Madd. 332.

(e) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 214 *et seq.*

(f) *Ibid.*, p. 225; *Stanley v. Wise* (1788), 1 Cox, Eq. Cas. 432, 433; *Crone v. Odell*, *supra*, at p. 459; *Symes v. Symes*, [1896] 1 Ch. 272; *White v. Odgers*, [1908] 2 Ch. 256. As to a devise to a parent and his children or issue, see pp. 787 *et seq.*, *post*.

(g) As to the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 225, 226.

(h) *Blackman v. Fysh*, [1892] 3 Ch. 209, 224, 225, C. A., explained, however, as depending on the context of the particular will, in *Re Canney's Trust, Mayers v. Stover* (1910), 101 L. T. 905, where it was held, applying



In a gift not otherwise postponed, a description of a class of children as “born and to be born,” or “begotten and to be begotten,” may cause the gift to take effect as an executory devise, and accordingly all the children, whether in existence at the testator’s death or otherwise, may take under the gift (*i*).

In an executory devise to a class on the death of any person or on any other postponed event which does not import contingency in the class, the donees are *primâ facie* ascertained so as to let in all who come into existence and satisfy the description before that event (*k*). In a gift to a class, not postponed otherwise than by the fact that the description may refer to persons yet to come into existence and that no member of the class has come into existence at the testator’s death, all the members of the class coming into existence at any time are let in (*l*).

**1348.** Where a gift carrying intermediate income, such as a gift of residuary personal estate (*m*), is made to a contingent class, if members of the class attain a transmissible interest on coming into existence, whether subject or not to being diminished in any event, the members for the time being in existence share the income (*n*), while if members attain a transmissible interest on attaining a certain age or satisfying some other description or condition, a member of the class attaining a transmissible interest takes only the income of the share to which he would be entitled if the other members of the class for the time being in existence (*o*) had attained transmissible interests (*p*); but if a gift not carrying intermediate income, such as a gift of real estate, is made to such a class, the

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Descriptions of Donees.

Classes “born and to be born.”

Executory devises generally.

Intermediate income.

the rules of convenience to a gift of real estate alone, that the class was closed at the death of a tenant for life; see also *Re Curzon, Martin v. Perry* (1912), 56 Sol. Jo. 362, where the rules of convenience were similarly applied.

(*i*) *Mogg v. Mogg* (1815), 1 Mer. 654, 690 (as to the Mark estate; explained, 3 Preston, Conveyancing, 3rd ed., p. 555); *Gooch v. Gooch* (1853), 3 De G. M. & G. 366, where, however, the devises were devises of rents and profits only. It appears that the rule referring such words to the interval between the date of the will and the testator’s death, which is applicable to personal estate (see note (*s*), p. 721, *ante*), does not apply to gifts of income of real estate; see *Dias v. De Livera* (1879), 5 App. Cas. 123, 130, 132, P. C.; *Cook v. Cook* (1706), 2 Vern. 545, where, it appears, the word “begotten” was construed to include “to be begotten,” as to which construction see p. 744, *post*; *Eddowes v. Eddowes* (1862), 30 Beav. 603; but see *Woodhouse v. Herrick* (1855), 1 K. & J. 352, 358, 360.

(*k*) *Crone v. Odell* (1811), 1 Ball & B. 449, 459; *Browne v. Hammond* (1858), John. 210, 212, n.; *Holland v. Wood* (1870), L. R. 11 Eq. 91, 96; *Re Canney’s Trust, Mayers v. Strover*, *supra*.

(*l*) *Shepherd v. Ingram* (1764), Amb. 448.

(*m*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 274.

(*n*) *Shepherd v. Ingram*, *supra*.

(*o*) On the birth of another child, and the consequent probable enlargement of the class, such child is not entitled to participate in income which has arisen prior to his birth (*Mills v. Norris* (1800), 5 Ves. 335; *Scott v. Scarborough (Earl)* (1838), 1 Beav. 154).

(*p*) *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30, C. A., overruling *Re Jeffery, Burt v. Arnold*, [1891] 1 Ch. 671, and *Re Adams, Adams v. Adams*, [1893] 1 Ch. 329, and explaining *Re Burton’s Will, Banks v. Heaven*, [1892] 2 Ch. 38, *Brandon v. Aston* (1843), 2 Y. & C. Ch. Cas. 30, *Rockford v. Hackman* (1852), 9 Hare, 475, and *Kidman v. Kidman* (1871), 40 L. J. (CH.) 359; *Re Jeffery, Arnold v. Burt*, [1895] 2 Ch. 577.



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Descrip-  
tions of  
Donees.

Gifts to  
groups of  
individuals.

members of the class whose interests are transmissible for the time being take the whole income (*q*).

(iv.) *Groups of Individuals.*

**1349.** If the gift is immediate and is a separate bequest of specific amount to each one of a group of certain children, who are to take as individuals and not as a class, *primâ facie* only those in existence at the testator's death can take, and those coming into existence afterwards are excluded (*r*). The fact that at the date of the will or of the testator's death there are no members of the group in existence does not render future members admissible (*s*). If such a gift is postponed, all those who come into existence before the time of distribution are let in (*t*). The rule is grounded on the inconvenience of postponing distribution until all the children who might be born and the total amount of their bequests could be ascertained (*u*), and accordingly does not apply where by the provisions of the will this inconvenience does not exist (*w*), or is expressly contemplated by the testator (*x*).

(v.) *Survivorship.*

Meanings of  
"survive."

**1350.** The word "survive" and its derivatives ordinarily refer to the longest in duration of lives running concurrently (*y*); they may, however, refer not to concurrent lives, but to the fact of living after a named event or person (*a*). There is no canon of con-

(*q*) *Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523; *Re Walmsley's Settled Estates* (1911), 105 L. T. 332; and see *Stone v. Harrison* (1846), 2 Coll. 715 (sum of Consols).

(*r*) *Garbrand v. Mayot* (1689), 2 Vern. 105 (child born after date of will); *Ringrose v. Bramham* (1794), 2 Cox, Eq. Cas. 384 (a legacy "to every child he hath by his wife E."); *Storrs v. Benbow* (1833), 2 My. & K. 46; S. C., on appeal (1853), 3 De G. M. & G. 390, C. A. (gift to "each child that may be born to" certain persons; a child *en ventre sa mère* was held to be included, but other children born after the death of the testator were excluded); S. C., *sub nom. Townsend v. Early* (1860), 3 De G. F. & J. 1, C. A.; *Butler v. Lowe* (1839), 10 Sim. 317 (under a gift to each of the children of certain persons, begotten or to be begotten, children born after the death of the testator were excluded); *Peyton v. Hughes* (1842), 7 Jur. 311; *Mann v. Thompson* (1854), Kay, 638 ("to all and every the child and children"); *Rogers v. Mutch* (1878), 10 Ch. D. 25 ("to each of the children who shall live to attain" twenty-one); *In the Will of Thompson, Brahe v. Mason*, [1910] Victorian Law Reports, 251.

(*s*) *Mann v. Thompson*, *supra*, at p. 644; *Rogers v. Mutch*, *supra*.

(*t*) *A.-G. v. Crispin* (1784), 1 Bro. C. C. 386.

(*u*) *Mann v. Thompson*, *supra*, at p. 643; *Rogers v. Mutch*, *supra*.

(*w*) In *Evans v. Harris* (1842), 5 Beav. 45, a fund was set apart out of which alone the legacies in question were payable; a child born after the testatrix's death was let in.

(*x*) See *Defflis v. Goldschmidt* (1816), 1 Mer. 417 (postponed gift; all members included).

(*y*) *Re Delany* (1895), 39 Sol. Jo. 468; *Taaffe v. Conmee* (1862), 10 H. L. Cas. 64, 78; *Gee v. Liddell* (1866), L. R. 2 Eq. 341, *per* Lord ROMILLY, M.R., at p. 344 ("the person to survive must be living at the death of the person who is to be survived"); *Re Heath, Jackson v. Norman* (1904), 48 Sol. Jo. 416.

(*a*) *Re Clark's Estate* (1864), 3 De G. J. & Sm. 111; *Mellor v. Daintree* (1888), 33 Ch. D. 198, 210; *Re Sing, Sing v. Mills*, [1914] W. N. 90. For a discussion of the uses of the word "survive" and of these cases, see *Knight v. Knight* (1912), 14 Commonwealth Law Reports, 86. As to the effect of clauses of accruer in general, see pp. 795, 796, *post*.

struction as to the period to which survivorship refers apart from a context (*b*).

**1351.** In cases where there is a gift to a number of persons and the survivors (*c*) and survivor of them, or with benefit of survivorship or in like words (*d*), or where there is a postponed gift to persons "surviving," the survivorship is, in default of any expressed intention of the testator (*e*), *primâ facie* referred to the period of distribution (*f*). Thus, the time in question, where the gift is immediate, is the death of the testator (*g*), and where the gift is postponed to a life estate, is the death of the tenant for life (*h*) or death of the testator, whichever last happens (*i*); and this applies whether the gift is of real or of personal estate (*k*).

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tions of  
Donees.

Ascertain-  
ment of  
survivors at  
period of  
distribution.

(*b*) *Re Benn, Benn v. Benn* (1885), 29 Ch. D. 839, C. A., *per* COTTON, L.J., at p. 844; *Inderwick v. Tatchell*, [1903] A. C. 120, 123.

(*c*) A gift to "survivors" may vest in a sole survivor (*Hearn v. Baker* (1856), 2 K. & J. 383).

(*d*) *Wiley v. Chanteperdrix*, [1894] 1 I. R. 209, 215. It is here assumed that such words are words of gift by way of purchase, and not merely words of limitation (*ibid.*; see p. 781, *post*).

(*e*) *Blackmore v. Snee* (1857), 1 De G. & J. 455, 460. For examples of a context clearly showing such intention, see *Wordsworth v. Wood* (1847), 1 H. L. Cas. 129, 156; *White v. Baker* (1860), 2 De G. F. & J. 55; and for an example of a context excluding the rule in the text, see *Rogers v. Towsey* (1845), 9 Jur. 575.

(*f*) *Cripps v. Wolcott* (1819), 4 Madd. 11, 15; *Vorley v. Richardson* (1856), 8 De G. M. & G. 126, 129 (when youngest child attained twenty-one); *Wiley v. Chanteperdrix*, *supra*, at p. 215. In *Re Benn, Benn v. Benn* (1885), 29 Ch. D. 839, C. A., however, COTTON, L.J., at p. 844, said that there was no canon of construction as to the period to which survivorship is referred except that in an immediate gift it was to be referred to the death of the testator, and if there is a life estate, to the determination of the life estate. In certain early cases survivorship was held, even in a postponed gift, to refer to the testator's death; see *Rose d. Vere v. Hill* (1766), 3 Burr. 1881; *Wilson v. Bayly* (1760), 3 Bro. Parl. Cas. 195; *Doe d. Long v. Prigg* (1823), 8 B. & C. 231; but the rule in *Cripps v. Wolcott*, *supra*, has been constantly followed in England, and in Scotland has been approved by the House of Lords (*Young v. Robertson* (1862), 4 Macq. 314, H. L., where Lord WESTBURY, L.C., stated, at p. 319, that the rule of construction is the same in the jurisprudence of both England and Scotland; *Bowman v. Bowman*, [1899] A. C. 518, 525, 526).

(*g*) *Stringer v. Phillips* (1730), 1 Eq. Cas. Abr. 292; *Bass v. Russell* (1829), Tam. 18; *Ashford v. Haines* (1851), 21 L. J. (CH.) 496; *Neathway v. Reed* (1853), 3 De G. M. & G. 18; *Howard v. Howard* (1856), 21 Beav. 550; and see the explanation of *Bindon (Lord) v. Suffolk (Lord)* (1707), 4 Bro. Parl. Cas. 574, in the headnote of the case.

(*h*) *Cripps v. Wolcott*, *supra*; *Re Poultney, Poultney v. Poultney*, [1912] 2 Ch. 541, 544, stating the rule in *Cripps v. Wolcott*, *supra*, as "where there is a gift to A. for life, with remainder to A., B., C. and to the survivors or survivor, the survivorship is ascertained at the death of the tenant for life"; *Jenour v. Jenour* (1805), 10 Ves. 562; *Blewitt v. Roberts* (1841), Cr. & Ph. 274, 283; *Taylor v. Beverley* (1844), 1 Coll. 108; *Whitton v. Field* (1846), 9 Beav. 368; *Davies v. Thorns* (1849), 3 De G. & Sm. 347; *McDonald v. Bryce* (1853), 16 Beav. 581; *Neathway v. Reed*, *supra*; *Re Pritchard's Trust* (1855), 3 Drew. 163; *Hearn v. Baker* (1856), 2 K. & J. 383; *Re Crawhall's Trust* (1856), 8 De G. M. & G. 480, C. A.; *Hesketh v. Magennis* (1859), 27 Beav. 395; *Young v. Davies* (1863), 2 Drew. & Sm. 167, 170; *Naylor v. Robson* (1865), 34 Beav. 571; *Re Belfast Town Council, Ex parte Sayers* (1884), 13 L. R. Ir. 169, 172.

(*i*) *Spurrell v. Spurrell* (1853), 11 Hare, 54.

(*k*) *Re Gregson's Trust* (1864), 2 De G. J. & Sm. 428; *Buckle v. Fawcett*

## SECT. 5.

## Descriptions of Donees.

Survivorship on contingent event.

Other senses of word "survivors."

Inferences from various gifts over.

**1352.** In cases where there is a gift to several persons, followed by an express contingent gift over on any event to the survivors or survivor, the survivorship may be independent of both the contingent event and the period of distribution (*l*), or, on the other hand, may refer either to the period of distribution (*m*) or to the contingent event (*n*), according to the context in the particular case.

**1353.** The word "survivors," however, and similar words may be used in other than the strict sense; thus, in a set of dispositions in favour of several persons and their children or issue, they may be used in a sense in which the element of survivorship involves not a survivorship between the named persons, but the subsistence of a line of children or issue, or of vested estates and interests (*o*), or they may be used as meaning "others" (*p*). Such words may receive one of these constructions where the context requires it, but not otherwise (*q*). Thus, after a gift to several children in tail, a gift over on the death of any of them without issue indefinitely to the "survivors" in tail is construed as to the "others," creating cross-remainders (*r*). Where the gift is to several persons equally for their respective lives and after the death of any to his children, but if any die without children to the survivors for life (*s*), with remainder

(1845), 4 Hare, 536, 542 (mixed fund); *Howard v. Collins* (1868), L. R. 5 Eq. 349. See the doubts as to the application of the rule to real estate in *Taaffe v. Conmee* (1862), 10 H. L. Cas. 64, 77.

(*l*) Referring only to survivorship between the named persons (*White v. Baker* (1860), 2 De G. F. & J. 55). The court leans against a construction involving a gift of the whole to the last survivor, particularly where there are words indicating a tenancy in common, and attempts to discover a time to which the survivorship is referable (*Cambridge v. Rous* (1858), 25 Beav. 409, 415).

(*m*) *Cambridge v. Rous*, *supra*; *Re Pickworth, Snaith v. Parkinson*, [1899] 1 Ch. 642, C. A.

(*n*) *Crowder v. Stone* (1827), 3 Russ. 217.

(*o*) *Re Friend's Settlement*, *Cole v. Allcot*, [1906] 1 Ch. 47, 54 (case of a deed).

(*p*) *Wilmot v. Wilmot* (1802), 8 Ves. 10; *Leake v. Robinson* (1817), 2 Mer. 363, 394; *Smith v. Osborne* (1857), 6 H. L. Cas. 375, 393; *O'Brien v. O'Brien*, [1896] 2 I. R. 459, C. A.

(*q*) *Davidson v. Dallas* (1808), 14 Ves. 576, 578, where the construction "others" is described as a forced construction; *Winterton v. Crawford* (1830), 1 Russ. & M. 407; and see *Cromek v. Lumb* (1839), 3 Y. & C. (Ex.) 565; *Leeming v. Sherratt* (1842), 2 Hare, 14, 24; *Stead v. Platt* (1853), 18 Beav. 50; *Mann v. Thompson* (1854), Kay, 638, 644; *Greenwood v. Percy* (1859), 26 Beav. 572; *Nevill v. Boddam* (1860), 28 Beav. 554, 559; *De Garagnol v. Liardet* (1863), 32 Beav. 608. As to the "stirpital" construction, see, further, p. 727, *post*.

(*r*) *Doe d. Watts v. Wainwright* (1793), 5 Term Rep. 427; *Smith v. Osborne* (1857), 6 H. L. Cas. 375. Similarly, if the limitations prior to the gift over are to a number of persons for life, with remainder to their sons and daughters in strict settlement (*Cole v. Sewell* (1848), 2 H. L. Cas. 186, 227; *Re Tharp's Estate* (1863), 1 De G. J. & Sm. 453, C. A.).

(*s*) If in such a case the survivors take absolutely, there may be ground for reading survivors, in respect of the last, as "longest liver," as in *Maden v. Taylor* (1876), 45 L. J. (Ch.) 569, followed in *Davidson v. Kimpton* (1881), 18 Ch. D. 213; *Re Roper's Estate*, *Morrell v. Gissing* (1889), 41 Ch. D. 409; but see *King v. Frost* (1890), 15 App. Cas. 548, 553; *Re Mortimer*, *Griffiths v. Mortimer* (1885), 54 L. J. (Ch.) 414; *Askew v. Askew* (1888), 57 L. J. (Ch.) 629.



to their children, without more(*t*), only children of survivors in the ordinary sense can, as a rule, take under the gift over(*u*). If, however, to similar gifts there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life may participate in the share of one who dies without children after their parent(*w*).

In a case where all the shares in the property are settled and there is a general clause of accruer on the death of each tenant for life without children, all the accrued shares being settled in the same way as the original shares, and these dispositions are followed by a gift over in the event of all dying without issue, there is sufficient evidence of an intention not to use the word "survivors" in its proper sense, but to use it in the sense of those who survive either in person or figuratively in issue(*x*).

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tions of  
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survivorship.

(*t*) Such as, for example, a further gift over; see the text, *infra*.

(*u*) *Re Usticke* (1866), 35 Beav. 338; *Re Horner's Estate*, *Pomfret v. Graham* (1881), 19 Ch. D. 186; *Re Dunlevy's Trusts* (1882), 9 L. R. Ir. 349, C. A.; *Re Rubbins, Gill v. Worrall* (1898), 79 L. T. 313, C. A.; *Olphert v. Olphert*, [1903] 1 I. R. 325; *Garland v. Smyth*, [1904] 1 I. R. 35, C. A.; and see *Re Bowman, Re Lay, Whytehead v. Boulton* (1889), 41 Ch. D. 525, 531 (the first rule in this case). A contrary intention in favour of issue may be shown by a substitutional gift, but the word "survivors" may nevertheless have its ordinary meaning (*Willetts v. Willetts* (1848), 7 Hare, 38; *Hodge v. Foot* (1865), 34 Beav. 349; *Blundell v. Chapman* (1864), 33 Beav. 648; *Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626, 633), and without construing "survivors" as "others," the words "their issue" may mean the issue not of surviving children only, but of all the children (*Re Corbett's Trusts* (1860), John. 591, *per* Wood, V.-C., at p. 598; *Re Bowman, Re Lay, Whytehead v. Boulton, supra*, at p. 529).

(*w*) *Re Bowman, Re Lay, Whytehead v. Boulton, supra, per* KAY, J., at p. 531; *Harrison v. Harrison*, [1901] 2 Ch. 136, *per* COZENS-HARDY, J., at p. 142; *O'Brien v. O'Brien*, [1896] 2 I. R. 459, 495, C. A. The inference made from the gift over, in pursuance of the presumption against intestacy (see p. 665, *ante*), is that the objects of the testator's bounty previously named shall between them take the entire estate in every state of circumstances consistent with the gift over not taking effect (*O'Brien v. O'Brien, supra*, at p. 466). Children of predeceased tenants for life do not take merely on account of a direction that accruing shares are to be taken in the same manner as original shares; a rule to the contrary laid down in *Re Bowman, Re Lay, Whytehead v. Boulton, supra*, at p. 532, is disapproved in *Harrison v. Harrison, supra*; *Inderwick v. Tatchell, Tatchell v. Tatchell, Inderwick v. Inderwick*, [1901] 2 Ch. 738, C. A.; S. C., on appeal, *sub nom. Inderwick v. Tatchell*, [1903] A. C. 120; and see *Re Robson, Howden v. Robson*, [1899] W. N. 260.

(*x*) *Re Benn, Benn v. Benn* (1885), 29 Ch. D. 839, C. A., *per* COTTON, L.J., at pp. 844, 845, explaining *Waite v. Littlewood* (1872), 8 Ch. App. 70; *Wake v. Varah* (1876), 2 Ch. D. 348, 358, C. A.; *Re Bilham, Buchanan v. Hill*, [1901] 2 Ch. 169. The fact that some only of the shares are settled (*Lucena v. Lucena* (1877), 7 Ch. D. 255, C. A.), or that the ultimate gift over is on the death without issue of some only of the first takers (*Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626, 633), is not sufficient to give this meaning. In older cases the word was in such cases said to be construed "others" (*Holland v. Allsop* (1861), 29 Beav. 498; *Re Keep's Will* (1863), 32 Beav. 122; *Hurry v. Morgan* (1866), L. R. 3 Eq. 152; *Badger v. Gregory* (1869), L. R. 8 Eq. 78; *Re Row's Estate* (1874), 43 L. J. (CH.) 347; *Askew v. Askew* (1888), 57 L. J. (CH.) 629); but in many of these cases all the other stocks were in fact surviving (*Re Bilham, Buchanan v. Hill, supra, per* JOYCE, J., at p. 175); and as pointed out in *Waite v. Littlewood, supra*, by Lord SELBORNE, L.C., at pp. 73, 74, it is not necessary to adopt the meaning "others" in such cases; it is sufficient to read "survivors"

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tions of  
Donees.

Similarly, a gift over to the "others" (y), or to those "remaining" (a) of a number of persons after a gift to each or one of them, is not read as meaning "survivors," unless it is necessary in the context (b).

(vi.) *Alternative Donees.*

Gifts  
expressed in  
the alter-  
native.

**1354.** Two or more gifts may be made to take effect alternatively, as, for example, in certain mutually exclusive events (c); thus, a gift to A. or B., where A. and B. are donees, described or named, and mutually exclusive (d), is an alternative gift. In the expression of such a gift there is generally a contingency implied, even if not expressed; the court cannot in general give effect to such a gift unless first informed as to who are the alternative donees, and as to what is the relationship between them, and generally as to the circumstances, so as to be able to determine what that implied contingency is (e). If such a contingency could

as meaning "surviving in person or in stirps" (*Wake v. Varah* (1876), 2 Ch. D. 348, C. A., per JAMES, L.J., at p. 358). This construction, however, has been dissented from in Ireland (*O'Brien v. O'Brien*, [1896] 2 I. R. 459, C. A.), and has been described as "forced and fanciful" (*King v. Frost, Underwood v. Frost, Price v. Frost, Plomley v. Frost* (1890), 15 App. Cas. 548, P. C., per LORD MACNAGHTEN, at p. 553); and it is not clear that the word "survivor" can properly be so construed, unless the limitations are expressly framed so as to produce that result (*Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626, per PARKER, J., at pp. 632, 633). For a similar case where on the context of the will the ordinary meaning of the word was adhered to, see *Browne v. Rainsford* (1867), 1 I. R. Eq. 384.

(y) *Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218, 223 (there held to mean "children other than children who die or have died without leaving lawful issue"); *Slade v. Parr* (1843), 7 Jur. 102 (context containing survivors). The "others surviving" of a number of persons may according to the context mean "then surviving" (*Beckwith v. Beckwith* (1876), 36 L. T. 128, C. A.) or "others" (*Re Arnold's Trusts* (1870), L. R. 10 Eq. 252 (but as to this case see now the cases cited in note (u), p. 727, ante)).

(a) *Re Speak, Speak v. Speak* (1912), 56 Sol. Jo. 273, not following *Sheridan v. O'Reilly*, [1900] 1 I. R. 386.

(b) *Re Hagen's Trusts* (1877), 46 L. J. (CH.) 665; *Stanley v. Bond*, [1913] 1 I. R. 170.

(c) It has first to be determined in all cases whether the second gift (as, for example, where it is to take effect on death of the first donee without issue, or leaving issue) takes effect by way of succession to the first gift, or is an alternative to the first gift (*Ware v. Watson* (1855), 7 De G. M. & G. 248, 258; and see *Hatch v. Hatch* (1855), 20 Beav. 105; *Parsons v. Coke* (1858), 4 Drew. 296). An executory limitation to take effect on the donee dying under certain circumstances, as, for example, leaving no issue, may take effect on the death of the donee under those circumstances during the life of the testator, and therefore as a substitutional gift; see pp. 729, 730, post. As to the effect of successive limitations of personality to unborn persons by means of estates tail, see pp. 768, 770, post.

(d) There may be cases, such as gifts to "heirs or next of kin," where the terms are used as applying to one class, and not as alternative (*Lowndes v. Stone* (1799), 4 Ves. 649; *Re Thompson's Trusts* (1878), 9 Ch. D. 607). If B. is the general term for a large class (namely, "descendants") of which A. is an enumeration of members, or a sub-class (namely, "children"), and the gift is to "each of A. or B.," the gift is not void but includes all B.; and "or" need not be altered; see *Solly v. Solly* (1859), 5 Jur. (N. S.) 36; *Clay v. Pennington* (1835), 7 Sim. 370.

(e) See note (c), p. 646, ante.



not be implied, the gift, read as such, without alteration (*f*), where A. and B. are mutually exclusive, would be void for uncertainty (*g*), unless it were either charitable, in which case the court is able to determine the mode in which the gift is to take effect (*h*), or made by way of a power of appointment (*i*).

SECT. 5.  
Descriptions of  
Donees.

**1355.** The contingency which is generally expressed or implied in alternative gifts refers to the death of the first-named donee before some particular period, for example the death of the testator or some other period of distribution; it is inferred that the intention of the testator is that the first donee is to take if then alive, and that the second donee is to take if the first does not survive the particular period (*k*).

Contingency  
to which  
alternative  
gifts refer.

It is not necessary that the gift should be expressed disjunctively; thus, a gift to a class of persons living at some particular time and the issue of such of them as are then dead is also an alternative gift (*l*).

Conjunctive  
alternative  
gifts.

**1356.** In whatever language an alternative gift is expressed, it may, according to its construction, be either original or substitutional (*m*). A gift is alternative and substitutional where the

Original and  
substitutional  
gifts.

(*f*) "Or" may be altered to "and" if necessary, and in accordance with the whole will (*Richardson v. Spragg* (1718), 1 P. Wms. 434; *Eccard v. Brooke* (1790), 2 Cox, Eq. Cas. 213; *Horridge v. Ferguson* (1822), Jac. 583; *Parkin v. Knight* (1846), 15 Sim. 83; *Re Turney, Turney v. Turney*, [1899] 2 Ch. 739, 745, C. A.; see, generally, p. 676, *ante*); but this is not done if the gift can be read as a substitutional gift on some contingency (*Speakman v. Speakman* (1850), 8 Hare, 180); and see note (*k*), *infra*.

(*g*) *Richardson v. Spragg*, *supra*, per JEKYL, M.R., at p. 434; *Longmore v. Broome* (1802), 7 Ves. 124, per GRANT, M.R., at p. 128; *Flint v. Warren* (1847), 15 Sim. 626, 629; as to uncertainty generally, see p. 678, *ante*.

(*h*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163, 167; see title CHARITIES, Vol. IV., pp. 146 *et seq.*

(*i*) *Longmore v. Broome*, *supra*. In such a case, where there is no appointment and no gift over in default of appointment, the gift goes to the donees A. and B. equally (*Penny v. Turner* (1848), 2 Ph. 493; *Re White's Trusts* (1860), John. 656); see, generally, title POWERS, Vol. XXIII., pp. 70, 71.

(*k*) *Salisbury v. Petty* (1843), 3 Hare, 86, 93; *Carey v. Carey* (1857), 6 I. Ch. R. 255; *Walmsley v. Foxhall* (1863), 1 De G. J. & Sm. 605; *Re Pearce, Eastwood v. Pearce* (1912), 56 Sol. Jo. 361; compare *Bowman v. Bowman*, [1899] A. C. 518, 523, where "or" was held to mean "whom failing," and Lord WATSON, at p. 523, said that the point to be determined was at what period of time the testator must be held to have intended that the right of the institute should come to an end if he was not then alive, and that the right of the conditional institute should emerge. Thus, a gift to A., with a substitutional gift to his children or to his issue, takes effect in favour of A. if he is living at the period of distribution (*Montagu v. Nucella* (1826), 1 Russ. 165; *Jones v. Torin* (1833), 6 Sim. 255; *Whitcher v. Penley* (1846), 9 Beav. 477; *Chipchase v. Simpson* (1849), 16 Sim. 485; *Penley v. Penley* (1850), 12 Beav. 547; *Sparks v. Restal* (1857), 24 Beav. 218; *Margitson v. Hall* (1864), 10 Jur. (N. S.) 89; *Holland v. Wood* (1870), L. R. 11 Eq. 91), and in favour of his children or issue if he is not then living (*Davenport v. Hanbury* (1796), 3 Ves. 257; *Girdlestone v. Doe* (1828), 2 Sim. 225 (A. or his heirs); *Salisbury v. Petty*, *supra*; *Re Porter's Trusts* (1857), 4 K. & J. 188).

(*l*) *Re Coulden, Coulden v. Coulden*, [1908] 1 Ch. 320, 325.

(*m*) Thus, a gift preceded by the word "and" is not necessarily original (*Hurry v. Hurry* (1879), L. R. 10 Eq. 346, per JAMES, V.-C., at p. 348, observing on *Re Merricks' Trusts* (1866), L. R. 1 Eq. 551, 558). See *Maynard v. Wright* (1858), 26 Beav. 285.



SECT. 5.  
Descriptions of  
Donees.

Addition  
of words of  
limitation.

Time of death  
contemplated  
in gifts to  
individuals.

interest which the alternative donee is to take is by a prior clause in the will given to the first donee (*n*), so that the second donee merely stands in the place of the first if the latter is not capable of taking on the particular contingency in contemplation. A gift is alternative and original where the interest which the second donee is to take is not by a prior clause given to the first donee (*o*).

In the case of a devise to a person and his heirs (*p*), or to a person and the heirs of his body (*q*), or of a bequest to a person, his executors or administrators (*r*), the gifts are not substitutional, and the death of the named person in the life of the testator does not enable the heirs or the executors or administrators to take as purchasers under the will (*s*).

**1357.** In the case of a gift, whether immediate or postponed, to a person or to a group of individuals (*t*), a substitutional gift applying thereto as a rule takes effect on the death of the prior donee before the death of the testator, or other period of distribution (*a*), even where the prior donee is dead at the date of the will (*b*). An exception arises in the case of postponed gifts (*c*) to a legatee "or his executors or administrators" or to a legatee "or his representatives" where these words have their technical sense (*d*); in such a case the presumption is that the gift is simply another way of giving the legatee a vested interest on the testator's death, and is not a substitutional gift (*e*); and the representatives do not take if the legatee dies in the life of the testator (*f*).

(*n*) *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484, 494.

(*o*) *Ibid.*; *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206, 209; and see *Attwood v. Alford* (1866), L. R. 2 Eq. 479; *Burt v. Hellyar* (1872), L. R. 14 Eq. 160. In *Re Parsons, Blaber v. Parsons* (1894), 8 R. 430, such a gift was called a gift in quasi-substitution.

(*p*) *Brett v. Rigden* (1564), Plowd. 345; *Warner v. White* (1782), 3 Bro. Parl. Cas. 435, overruling the dictum of POPHAM, J., in *Fuller v. Fuller* (1596), Cro. Eliz. 423.

(*q*) *Hartopp's Case* (1591), Cro. Eliz. 243; *Hutton v. Simpson* (1716), 2 Vern. 721; *Denn d. Ratcliffe v. Bagshaw* (1796), 6 Term Rep. 512; *Doe d. Turner v. Kett* (1792), 4 Term Rep. 601.

(*r*) *Elliott v. Davenport* (1705), 1 P. Wms. 83. As to gifts to a person "or" his executors and similar gifts, see the text, *infra*.

(*s*) As to lapse generally, see pp. 607 *et seq.*, *ante*.

(*t*) That is to say, a number of persons taking not as a class but as individuals; see p. 724, *ante*.

(*a*) *Lejeune v. Lejeune* (1837), 2 Keen, 701; *Ive v. King* (1852), 16 Beav. 46, 54; *Ashling v. Knowles* (1856), 3 Drew. 593; *Hodgson v. Smithson* (1856), 8 De G. M. & G. 604; *Re Faulding's Trust* (1858), 26 Beav. 263; *Jones v. Frewin* (1864), 3 New Rep. 415.

(*b*) *Ive v. King*, *supra*; *Hannam v. Sims* (1858), 2 De G. & J. 151, C. A.; *Hobgen v. Neale* (1870), L. R. 11 Eq. 48.

(*c*) The case of immediate gifts in similar language follows the ordinary rule of substitutional gifts (*Gittings v. M'Dermott* (1834), 2 My. & K. 69); see the text, *supra*.

(*d*) See p. 758, *post*; where persons designated by these terms are intended to take beneficially, they take by substitution (*Wingfield v. Wingfield* (1878), 9 Ch. D. 658).

(*e*) *Re Porter's Trusts* (1857), 4 K. & J. 188, *per* WOOD, V.-C., at pp. 193, 198, explaining the cases cited in note (*f*), *infra*; *Thompson v. Whitelock* (1859), 4 De G. & J. 490 (postponement for two years after testator's death).

(*f*) *Corbyn v. French* (1799), 4 Ves. 418; *Bone v. Cook* (1824), M'Cle.

**1358.** In cases where the original gift is to a class the testator is *prima facie* considered to refer to living persons, and not to persons already dead at the date of his will (*g*). Where the gift is immediate and not postponed, a substitutional gift on the death of any of the class to a corresponding substituted donee in general takes effect on the death, before the death of the testator, of any who were living at the date of the will, and who if they had survived would have taken as members of the class (*h*). The substitutional gift, however, fails where the corresponding original member of the class was dead at the date of the will and therefore could not have taken as a member of the class under the will (*i*). Thus, if the original donees are a class of parents, and there is a substitutional gift of each parent's share to the children of that parent and one parent is dead at the date of the will, the children of that parent cannot take (*k*).

SECT. 5.  
Descrip-  
tions of  
Donees.

Gifts to  
classes.

**1359.** The gift to the children, however, may be that they are to take, not simply the share of their parent, but the share of their parent computed on the hypothesis that he would have taken under the original gift; a gift in such a form constitutes an independent original gift to such children and not a gift by way of substitution, and the children may take although their parent is dead at the date of the will (*l*).

Gifts to  
children.

168; and see *Re Turner* (1865), 2 Drew. & Sm. 501. Similarly in case of a postponed gift to "A. or his heirs," where the word "heirs" is used in the sense of "representatives" (*Tidwell v. Ariel* (1818), 3 Madd. 403), but not where the word is used in the sense of persons entitled as on intestacy; in such a case the heirs take as *personæ designatæ* (*Re Porter's Trusts* (1857), 4 K. & J. 188).

(*g*) *Re Hotchkiss' Trusts* (1869), L. R. 8 Eq. 643, 649; *Re Musther, Groves v. Musther* (1890), 43 Ch. D. 569, 572, C. A.

(*h*) *Re Hayward, Creery v. Lingwood* (1882), 19 Ch. D. 470.

(*i*) See the cases cited in note (*k*), *infra*; *Coulthurst v. Carter* (1852), 15 Beav. 421, 427; *Ive v. King* (1852), 16 Beav. 46, 53; *Congreve v. Palmer* (1853), 16 Beav. 435; *Re Wood's (Ann) Will* (1862), 31 Beav. 323.

(*k*) *Christopherson v. Naylor* (1816), 1 Mer. 320; *Butter v. Ommamey* (1828), 4 Russ. 70, 73; *Gray v. Garman* (1843), 2 Hare, 268; *Re Hotchkiss' Trusts, supra*; *Atkinson v. Atkinson* (1872), 6 L. R. Eq. 184, 189; *Kelsey v. Ellis* (1878), 38 L. T. 471; *Re Barker, Asquith v. Saville* (1882), 47 L. T. 38; *Re Webster's Estate, Widgen v. Mello* (1883), 23 Ch. D. 737; *Re Chinery, Chinery v. Hill* (1889), 39 Ch. D. 614; *Re Musther, Groves v. Musther, supra*; *Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381, C. A.; *Re Offiler, Offiler v. Offiler* (1900), 83 L. T. 758; *Gorringe v. Mahlstedt*, [1907] A. C. 225; *Re Cope, Cross v. Cross*, [1908] 2 Ch. 1, C. A.; and see *Re Kirkpatrick, Ferguson v. Kirkpatrick* (1912), 12 State Reports, New South Wales, 282. The decisions of STUART, V.-C., in *Parsons v. Gulliford, Tarry v. Skurry, Ex parte Tarry* (1864), 10 Jur. (N. S.) 231, and *Phillips v. Phillips* (1864), 10 Jur. (N. S.) 1173, and of MALINS, V.-C., in *Re Potter's Trust* (1869), L. R. 8 Eq. 52, *Adams v. Adams* (1872), L. R. 14 Eq. 246, and *Re Lucas's Will* (1880), 17 Ch. D. 788, which are founded on a view that *Christopherson v. Naylor, supra*, should not be followed, are to this extent of no authority; but may perhaps be supported on the particular contexts of the wills in question; see *Re Hotchkiss' Trusts, supra*.

(*l*) *Loring v. Thomas* (1861), 1 Drew. & Sm. 497; *Re Chapman's Will* (1863), 32 Beav. 382; *Re Woolrich, Harris v. Harris* (1879), 11 Ch. D. 663; *Re Chinery, Chinery v. Hill* (1888), 39 Ch. D. 614, *per* CHITTY, J., at p. 618; *Re Parsons, Blaber v. Parsons* (1894), 8 R. 430, 434; *Re Lambert, Corns v. Harrison*, [1908] 1 Ch. 117; *Re Metcalfe, Metcalfe v. Earle*, [1909] 1 Ch.

SECT. 5.  
Descrip-  
tions of  
Donees.

Further, even where the children are expressed to take only their parent's share, the class of children, according to the construction of the whole will, may be ascertained, not by reference to those parents only who could take under the original gift to parents, but by reference to all the parents, whether eventually capable of taking or not; this, again, is an original gift to such children (*m*).

Composite  
class of  
parents and  
issue.

**1360.** In cases where the gift is framed as a gift to a composite class, formed of a class of parents living at a certain period and a class of children of parents then dead, there is *primâ facie* (*n*) an independent and original gift to the latter class of children, and children of parents who were dead before the date of the will may take (*o*) as well as children of parents who died after the date of the will but before the testator.

Postponed  
gifts to a  
class.

**1361.** In the case of a postponed substitutional gift, where the donees under the original gift are a class, and the substitutional gift corresponds to the various members of that class, the testator is considered to be providing for the death of members of the class, between his own death or the time of ascertainment of the class and the period of distribution or the time when the gift is to come into possession (*p*). Accordingly, it is *primâ facie* only in respect of persons who are ascertained as members of the class, and capable of taking under the gift, that substitution is effected (*q*), and as to those who die before the testator or before the time when the

424; *Re Stokes, Barlow v. Bullock* (1907), 52 Sol. Jo. 11; *Re Taylor, Taylor v. White* (1911), 56 Sol. Jo. 175; *Re Williams, Metcalf v. Williams*, [1914] 1 Ch. 219, affirmed, [1914] 2 Ch. 61, C. A. *Loring v. Thomas* (1861), 1 Drew. & Sm. 497, is not affected by *Gorringe v. Mahlstedt*, [1907] A. C. 225, and is recognised as an authority in *Barraclough v. Cooper* (1905), [1908] 2 Ch. 121, n., 125, H. L.; see *Re Lambert, Corns v. Harrison*, [1908] 1 Ch. 117, per EVE, J., at p. 121.

(*m*) *Jarvis v. Pound* (1839), 9 Sim. 549 (alternative gift to the children of "any" sons and daughters; even though "some violence" was done in assigning a share to the parents); *Loring v. Thomas*, *supra* ("any," of parents); *Re Sibley's Trusts* (1877), 5 Ch. D. 494, 501 (where it was said that "all and every" the parents must mean "more than two"). In *Re Metcalfe, Metcalfe v. Earle*, [1909] 1 Ch. 424, JORCE, J., at p. 426, suggested a distinction between a gift to children and a gift to a class of another description (such as nephews and nieces) where the testator might not have means of knowing the state of the family.

(*n*) For cases of contrary intention, see *Waugh v. Waugh* (1833), 2 My. & K. 41, where a direction as to the children's share confined the class of children; *Re Thompson's Trusts* (1854), 5 De G. M. & G. 280.

(*o*) *Tytherleigh v. Harbin* (1835), 6 Sim. 329; *Giles v. Giles* (1837), 8 Sim. 360; *Rust v. Baker* (1837), 8 Sim. 443; *Bebb v. Beckwith* (1839), 2 Beav. 308; *Gaskell v. Holmes* (1843), 3 Hare, 438; *Coulthurst v. Carter* (1852), 15 Beav. 421; *Baldwin v. Rogers* (1853), 3 De G. M. & G. 649, C. A.; *Etches v. Etches* (1856), 3 Drew. 441, 447; *Re Faulding's Trusts* (1858), 26 Beav. 263; *Re Jordan's Trusts* (1863), 2 New Rep. 57; *Heasman v. Pearse* (1871), 7 Ch. App. 275; *Re Morrison*, [1913] Victorian Law Reports, 348.

(*p*) *Re Gilbert, Daniel v. Matthews* (1886), 54 L. T. 752.

(*q*) "To determine whether the substitutional bequest is to take effect on the death of any particular individual, you must first inquire whether he was a member of the class at all" (*Re Porter's Trusts* (1857), 4 K. & J. 188, per WOOD, V.-C., at pp. 191, 192, citing *Ive v. King* (1852), 16 Beav. 46). The substitutional gift took effect in *Hilton v. Hilton* (1866), 15 W. R. 193.



class is to be ascertained, the substitutional gift fails (*r*). If, however, there is no gap between the time of ascertainment of the class and the time of distribution, persons substituted for donees dying in the life of the testator, even before the date of the will, may be let in (*s*).

On the other hand, a postponed alternative gift may be so framed that the donees are to take as original and not substitutional donees, for example, on the hypothesis that the persons for whom they are alternative were ascertained members of the class of first donees; and accordingly these alternative donees may take in such a case, although the members of the class of first donees predeceased the testator (*t*).

**1362.** Conditions attaching to a gift do not *primâ facie* attach to a gift alternative to it, whether original or substitutional (*u*), although in the case of substitutional gifts it may much more easily be inferred that they attach than in the case of alternative original gifts (*w*). Thus, it is not in general necessary, unless the testator so provides, that an alternative donee should survive the period of distribution in order to take, whether the gift is original (*x*) or substitutional (*y*); nor in an alternative and original gift is it in general necessary, unless the testator so provides, that the alternative donee should survive the person for whom he is

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Descrip-  
tions of  
Donees.

Original  
alternative  
gift.

Conditions  
attaching to  
alternative  
gifts.

(*r*) *Thornhill v. Thornhill* (1819), 4 Madd. 377; *Neilson v. Monro* (1879), 27 W. R. 936; *Re Hannam, Haddelsey v. Hannam*, [1897] 2 Ch. 39; *Re Ibbetson, Ibbetson v. Ibbetson* (1903), 88 L. T. 461 (to the child or children of J. and H. "or their heirs"). See the rule also stated in *Ive v. King* (1852), 16 Beav. 46, where, however, the authorities cited refer to another point; *Ashling v. Knowles* (1856), 3 Drew. 593, 595; compare *Smith v. Farr* (1838), 3 Y. & C. (EX.) 328.

(*s*) *King v. Cleaveland* (1857), 26 Beav. 26, affirmed, 4 De G. & J. 477, C. A. (to persons "then living" or their representatives); *Re Philips' Will* (1869), L. R. 7 Eq. 151 (to persons "then living" or their heirs).

(*t*) *Smith v. Smith* (1837), 8 Sim. 353; *Habergham v. Ridehalgh* (1870), L. R. 9 Eq. 395. In *Collins v. Johnson* (1835), 8 Sim. 356, n., the gift was by reference to a prior gift to individuals; see *Re Hannam, Haddelsey v. Hannam*, *supra*, per NORTH, J., at p. 45.

(*u*) *Martin v. Holgate* (1866), L. R. 1 H. L. 175; see *Lyon v. Coward* (1846), 15 Sim. 287; *Barker v. Barker* (1852), 5 De G. & Sm. 753; *Re Bennett's Trusts* (1857), 3 K. & J. 280, 285; *Re Wildman's Trusts* (1860), 1 John. & H. 299; *Re Pell's Trust* (1861), 3 De G. F. & J. 291, C. A.; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484, 496; for cases where the contingency of the first gift applied to the alternative gift, see *Re Kirkman's Trusts* (1859), 3 De G. & J. 558, C. A.; *Bennett v. Merriman* (1843), 6 Beav. 360; *Smith v. Palmer* (1848), 7 Hare, 225; *MacGregor v. MacGregor* (1845), 2 Coll. 192. In so far as these latter cases do not depend on the particular contexts of the wills there in question, they are disapproved in *Martin v. Holgate*, *supra*.

(*w*) *Martin v. Holgate*, *supra*, per Lord CHELMSFORD, at p. 187.

(*x*) *Thompson v. Clive* (1857), 23 Beav. 282; *Martin v. Holgate*, *supra*; *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206; and see note (*k*), p. 729, *ante*, note (*o*), p. 730, *ante*.

(*y*) *Masters v. Scales* (1850), 13 Beav. 60; *Re Battersby's Trusts*, [1896] 1 L. R. 600; *Re Bradbury, Wing v. Bradbury* (1904), 73 L. J. (CH.) 591. The doubt expressed on this point in *Crause v. Cooper* (1859), 1 John. & H. 207, per WOOD, V.-C., at p. 213, was recognised by him as unfounded in *Re Merricks' Trusts* (1866), L. R. 1 Eq. 551, 558. For a case of context to the contrary, see *Re Kirkman's Trust* (1859), 3 De G. & J. 558, C. A.

## SECT. 5.

## Description of Donees.

Ascertainment of class.  
Concurrent interests.

alternative (a) : in a substitutional gift, on the other hand, it is in general necessary that the substituted donee should survive the person for whom he is substituted (b).

**1363.** Subject to the above, the class of substituted donees is ascertained according to the usual rules (c). Whether the members of classes taking under original and substituted gifts may take concurrently depends on the correspondence between the members of those classes respectively. A gift to a class of parents or their children, or parents or their issue, is construed as substituting for each parent his own children or issue, wherever the context allows that construction (d); thus, when there are words denoting an intention to divide the property into shares for the purpose of substitution (e), the parents surviving the period of distribution and the children or issue of parents dying before that period (f) then take concurrently. Otherwise, where the original and substitutional gifts are both to classes, and there is nothing indicative of a substitution for a member of the original class of a corresponding member of the substituted class (g), the gifts are mutually exclusive, and if any member of the original class survives the period of distribution, no member of the substituted class can take (h).

In the absence of a contrary intention being shown (i), the substituted donees as between themselves are joint tenants (k), even where the original donees are tenants in common, and therefore as

(a) *Lyon v. Coward* (1846), 15 Sim. 287; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484, 498; *Heasman v. Pearse* (1871), 7 Ch. App. 275; *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206; but see *Re Jordan's Trusts* (1863), 2 New Rep. 57. For cases of contrary intention, shown by the will, see *Barker v. Barker* (1852), 5 De G. & Sm. 753.

(b) *Thompson v. Clive* (1857), 23 Beav. 282; *Crause v. Cooper* (1859), 1 John. & H. 207; *Lanphier v. Buck*, *supra*; *Re Turner* (1865), 2 Drew. & Sm. 501; *Re Merricks' Trusts* (1866), L. R. 1 Eq. 551, 560, explained in *Re Woolley, Wormald v. Woolley*, *supra*, at p. 209.

(c) See p. 714, *ante*. Thus, the class is ascertained at the testator's death (*Ive v. King* (1852), 16 Beav. 46 (children); *Re Philps' Will* (1869), L. R. 7 Eq. 151, 154 (heirs, in sense of next of kin); *Wingfield v. Wingfield* (1879), 9 Ch. D. 658 (heirs)); subject in the case of a postponed gift to letting in members of the class coming into existence before the period of distribution (*Re Sibley's Trusts* (1877), 5 Ch. D. 494; *Re Jones's Estate*, *Hume v. Lloyd* (1878), 47 L. J. (Ch.) 775, not following *Hobgen v. Neale* (1870), L. R. 11 Eq. 48, on this point).

(d) *Re Coley, Gibson v. Gibson*, [1901] 1 Ch. 40, 44; *Re Alderton, Hughes v. Vanderspar*, [1913] W. N. 129.

(e) *Re Gilbert, Daniel v. Matthews* (1886), 54 L. T. 752, observing upon *Re Daves' Trusts* (1876), 4 Ch. D. 210; *Re Miles, Miles v. Miles* (1889), 61 L. T. 359.

(f) If all of the original class survive that period, the substituted class are excluded (*Re Coley, Gibson v. Gibson*, *supra*, at p. 43).

(g) As, for instance, gifts to children "or their heirs" (*Finlason v. Tatlock* (1870), L. R. 9 Eq. 258).

(h) *Re Coley, Gibson v. Gibson*, *supra*.

(i) See *Lyon v. Coward*, *supra*, at pp. 290, 291; *Hodges v. Grant* (1867), L. R. 4 Eq. 140; *A.-G. v. Fletcher* (1871), L. R. 13 Eq. 128; *Re Horner, Eagleton v. Horner* (1887), 37 Ch. D. 695, 711, where there were double words of severance sufficient to apply to the substituted donees. As to distribution *per capita* or *per stirpes* in such cases, see p. 782, *post*.

(k) *Davenport v. Hanbury* (1796), 3 Ves. 257; *Bridge v. Yates* (1842), 12 Sim. 645; *Salisbury v. Petty* (1843), 3 Hare, 86, 93; *Re Hodgson's*



between original donees and substituted donees taking with them there is a tenancy in common.

**1364.** In cases where the alternative gift fails by reason of the event not having happened on which it is to take effect, then the prior gift to the first donee may take effect although he was not living at the period of distribution (*l*), because the alternative gift operates as a divesting gift only (*m*).

In the case of a gift to a group or class, a substitutionary gift of the shares of such as die leaving issue to their issue does not affect the shares of those who die without leaving issue (*n*).

SUB-SECT. 2.—*Description by Relationship.*

**1365.** A description of a donee by reference to relationship to the testator or other person (as in the case of gifts to children, issue, and the like) is presumed to refer only to legitimate and not illegitimate relatives (*o*). The rule applies to all descriptions of donees, including the children (*p*), nephews (*q*), nieces (*r*), cousins (*s*),

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Failure of  
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gift.

Extent of  
alternative  
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Legitimate  
relations only  
included.

*Trusts* (1854), 1 K. & J. 178; *M'Gregor v. M'Gregor* (1859), 1 De G. F. & J. 63; *Penny v. Clarke* (1860), 1 De G. F. & J. 425, 431; *Coe v. Bigg* (1863), 1 New Rep. 536; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484; *Heasman v. Pearse* (1871), 7 Ch. App. 275, 284, affirming S. C. (1870), L. R. 11 Eq. 522, 535; *Re Yates, Bostock v. D'Eyncourt*, [1891] 3 Ch. 53, disapproving *Shepherdson v. Dale* (1865), 12 Jur. (N. S.) 156; *Re Battersby's Trusts*, [1896] 1 L. R. 600.

(*l*) *Gray v. Garman* (1842), 2 Hare, 268; *Salisbury v. Petty* (1843), 3 Hare, 86, 93.

(*m*) As to divesting generally, see p. 822, *post*.

(*n*) *Baldwin v. Rogers* (1853), 3 De G. M. & G. 649; *Strother v. Dutton* (1857), 1 De G. & J. 675, 676.

(*o*) *Cartwright v. Vawdry* (1800), 5 Ves. 530; *Wilkinson v. Adam* (1812), 1 Ves. & B. 422, 462; *Warner v. Warner* (1850), 15 Jur. 141; *Hill v. Crook* (1873), L. R. 6 H. L. 265, 283; *Dorin v. Dorin* (1875), L. R. 7 H. L. 568; *Re Ayles' Trusts* (1875), 1 Ch. D. 282; *Ellis v. Houstoun* (1878), 10 Ch. D. 236, 241; *Re Eve, Edwards v. Burns*, [1909] 1 Ch. 796, 800; *Re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83, C. A. ("niece," legitimate grand-niece preferred, where she sufficiently answered the description); *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565 (power to appoint to "relations" of donee of power, who was illegitimate; appointments to her natural relatives held good except to a person himself illegitimate, there being nothing to enable the court to draw the inference that the testator included him among the "relations"); *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254, C. A., overruling *Re Du Bochet, Mansell v. Allen*, [1901] 2 Ch. 441. As to the capacity of illegitimate children to take under a will, see p. 542, *ante*.

(*p*) *Swaine v. Kennerley* (1813), 1 Ves. & B. 469; *Re Wells' Estate* (1868), L. R. 6 Eq. 599; *Hill v. Crook* (1873), L. R. 6 H. L. 265; *Dorin v. Dorin* (1875), L. R. 7 H. L. 568, *per* Lord HATHERLEY, at p. 574: "*primâ facie* the word 'children' means legitimate children . . . as much so as if the very word 'legitimate' had been introduced before it," and *per* Lord SELBORNE, at p. 577: "children in a will means legitimate children, unless when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them"; *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, *supra*.

(*q*) *Re Bryon, Drummond v. Leigh* (1885), 30 Ch. D. 110; *Re Hall, Branston v. Weightman* (1887), 35 Ch. D. 551.

(*r*) *Re Fish, Ingham v. Rayner*, *supra*.

(*s*) *Seale-Hayne v. Jodrell*, [1891] A. C. 304.



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or relations generally (*t*) of the person concerned. This meaning is adhered to (*a*), and the illegitimate relatives do not satisfy the description (*b*), unless either from the circumstances (*c*) it is impossible that any legitimate relative could satisfy it (*d*), or an intention to include illegitimate relatives appears in the will (*e*).

(*t*) *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565.

(*a*) No mere conjecture, however probable, based on the testator's knowledge of or intimacy with the illegitimate persons can exclude the rule (*Hill v. Crook* (1873), L. R. 6 H. L. 265, 276; *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254, C. A., overruling *Re Du Bouchet, Mansell v. Allen*, [1901] 2 Ch. 441).

(*b*) The rule applies to descriptions not only in direct gifts, but in a gift over (*Smith v. Jobson* (1888) 59 L. T. 397).

(*c*) The circumstances at the date of the will are considered, and if the intention is shown thereby that illegitimate children are included, the construction is not varied by subsequent events, such as the circumstances existing at the date of a confirmatory codicil (*Wilkinson v. Adam* (1823), 12 Price, 470, H. L.; *Mortimer v. West* (1827), 3 Russ. 370).

(*d*) *Hill v. Crook* (1873), L. R. 6 H. L. 265, 283; as, for instance, where no legitimate children were in existence, and the testator must, in the circumstances, be presumed to have contemplated the illegitimate relatives as satisfying the description and being able to take under an immediate gift (*Beachcroft v. Beachcroft* (1816), 1 Madd. 430; *Woodhouselee (Lord) v. Dalrymple* (1817), 2 Mer. 419 (children of a deceased person); *Wilkinson v. Adam* (1812), 1 Ves. & B. 422, 468; *Dilley v. Matthews* (1865), 11 Jur. (N. S.) 425; *Savage v. Robertson* (1868), L. R. 7 Eq. 176 (description of mother by her maiden name); *Laker v. Hordern* (1875), 1 Ch. D. 644; *Re Haseldine, Grange v. Sturdy* (1886), 31 Ch. D. 511; *In the Estate of Frogley*, [1905] P. 137; *O'Loughlin v. Bellew*, [1906] 1 I. R. 487). There is no such inference where, although no legitimate children were in existence at the date of the will, the testator may have contemplated future children coming into existence who might be legitimate and might satisfy the description in the gift (*Dorin v. Dorin* (1875), 7 H. L. 568; *Durrant v. Friend* (1852), 5 De G. & Sm. 343; *Dover v. Alexander* (1843), 2 Hare, 275; *Re Brown, Penrose v. Manning* (1890), 63 L. T. 159, approved in *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, *supra*). The impossibility of legitimate children coming into existence where a woman is past child-bearing may be sufficient to include the illegitimate children in case of an immediate gift (*Paul v. Children* (1871), L. R. 12 Eq. 16 (future gift to her child or children: existing illegitimate children not entitled); *Re Eve, Edwards v. Burns*, [1909] 1 Ch. 796 (immediate gift: existing illegitimate children held entitled)); and see *Re Brown, Penrose v. Manning*, *supra*, where the woman was fifty years of age, but her illegitimate children were excluded.

(*e*) *Hill v. Crook* (1873), L. R. 6 H. L. 265, 283; *Holt v. Sindrey* (1868), L. R. 7 Eq. 170, as explained in *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1913] 2 Ch. 674, 687 (affirmed, [1914] 1 Ch. 254, C. A.); and see the cases cited in note (*l*), p. 737, *post*. As, for instance, where the testator uses a word in the plural number (such as "children"), when to his knowledge there is only a single legitimate person who could take under the gift, an illegitimate child may be included so as to render the description sensible (*Gill v. Shelley* (1833), 2 Russ. & M. 336; *Leigh v. Byron* (1853), 1 Sm. & G. 486; *Tugwell v. Scott* (1857), 24 Beav. 141; *Re Embury, Bowyer v. Page*, [1914] W. N. 220). But the use of a plural word is not sufficient to include illegitimate persons, if there are legitimate persons sufficient to satisfy the description in its ordinary sense, and there are no other indications of an intention to include illegitimate persons (*Edmunds v. Fessey* (1861), 29 Beav. 233), or if supposing them to be included the words of the will would still remain unsatisfied (*Hart v. Durand* (1816), 3 Anst. 684). The fact that the property is divided by the testator into a number of shares corresponding with the whole number of legitimate

The question of legitimacy (*f*) is in all such cases decided according to the law of the domicile of the person by reference to whom the relationship of the donees is described, whether the gift is a bequest of personalty (*g*), a specific devise of real estate (*h*), or a devise of land upon trust to sell and to apply the proceeds of sale as personalty (*i*).

**1366.** A common indication on the face of a will to include illegitimate relatives in a description is the fact that in other clauses of the will they, or other relatives of theirs, are referred to in terms showing that the testator treated the illegitimate claimants in question (*k*) as legitimate (*l*), particularly where it is shown

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or illegitimate claimants was considered not a sufficient indication in *Cartwright v. Vawdrey* (1800), 5 Ves. 530; *Re Wells' Estate* (1868), L. R. 6 Eq. 599. A gift in a modern will by an unmarried person to his or her own children must take effect, apart from revival after marriage (as to revocation of a will by marriage, see p. 562, *ante*; as to revival, see p. 575, *ante*), in favour of illegitimate children (*Clifton v. Goodbun* (1868), L. R. 6 Eq. 278).

(*f*) There is no rule that illegitimate children cannot in any circumstances participate with legitimate children in the benefit of a gift to children generally (*Owen v. Bryant* (1852), 2 De G. M. & G. 697; *Evans v. Davis* (1849), 18 L. J. (CH.) 180; *Hill v. Crook* (1873), L. R. 6 H. L. 265; *Ebborn v. Fowler*, [1909] 1 Ch. 578, C. A.; *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254, 267, C. A.). A dictum of Lord ELDON, L. C., in *Wilkinson v. Adam* (1812), 1 Ves. & B. 422, at p. 468, and the cases of *Bagley v. Mollard* (1830), 1 Russ. & M. 581, and *Fraser v. Young* (1831), You. 354, so far as they depend on this supposed principle, are overruled.

(*g*) *Re Andros, Andros v. Andros* (1883), 24 Ch. D. 637.

(*h*) *Re Grey's Trusts, Grey v. Stamford*, [1892] 3 Ch. 88.

(*i*) *Skottowe v. Young* (1871), L. R. 11 Eq. 474 (legacy duty), discussed and recognised in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, C. A. In *Boyes v. Bedale* (1863), 1 Hem. & M. 798, it was held that legitimacy was decided by the law of the testator's domicile.

(*k*) Indications treating other illegitimate persons as legitimate are not sufficient (*Mortimer v. West* (1827), 3 Russ. 370; *Re Wells' Estate* (1868), L. R. 6 Eq. 599 (cases of particular children being mentioned and treated as "children"; no inference in favour of illegitimate child not expressly mentioned)), and may be the ground of an inference against the claimant (*Kelly v. Hammond* (1858), 26 Beav. 36).

(*l*) As, for instance, where the parents are spoken of in the will as husband and wife, or the illegitimate person is mentioned as "son," "daughter" or "child" of his or her natural parent, or is otherwise considered as having relatives which strictly in the legal sense could not exist in such a way as impliedly to include the illegitimate persons among the description in question (*Hill v. Crook, supra*, at p. 285; *Meredith v. Farr* (1843), 2 Y. & C. Ch. Cas. 525; *Worts v. Cubitt* (1854), 14 Beav. 421; *Clifton v. Goodbun, supra*; *Savage v. Robertson* (1868), L. R. 7 Eq. 176; *Barlow v. Orde* (1870), L. R. 3 P. C. 164; *Lepine v. Bean* (1870), L. R. 10 Eq. 160; *Re Humphries, Smith v. Millidge* (1883), 24 Ch. D. 691; *Re Bryon, Drummond v. Leigh* (1885), 30 Ch. D. 110; *Re Horner, Eagleton v. Horner* (1887), 37 Ch. D. 695; *Re Hastie's Trusts* (1887), 35 Ch. D. 728; *Seale-Hayne v. Jodrell*, [1891] A. C. 304 (illegitimate persons previously described as "cousins" were entitled to take under a gift to "relatives hereinbefore named"); *Re Harrison, Harrison v. Higson*, [1894] 1 Ch. 561; *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565 (wife's "relations," she being illegitimate); *Re Walker, Walker v. Lutyens*, [1897] 2 Ch. 238; *Re Plant, Griffith v. Hill* (1899), 47 W. R. 183; *Re Wood, Wood v. Wood*, [1902] 2 Ch. 542, C. A.; *Re Smiller, Bedford v. Hughes*, [1903] 1 Ch. 198; *Re Kiddle, Gent v. Kiddle*



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that the testator knew of the illegitimacy, and therefore could not be using his language in its ordinary sense (*m*); but this indication may be rebutted by a special and distinct provision for the illegitimate relatives, or other similar indications that the testator drew a distinction between them and the legitimate relatives (*n*).

Gifts to  
illegitimate  
children  
of a man.

**1367.** Where the gift is to the children of a man (*o*), or children of a man by a certain woman (*p*), and is such that in the circumstances existing illegitimate children are denoted, the gift is construed as referring to those who at the date of the will have acquired the reputation (*q*) of being the named man's children.

Future gifts.

**1368.** The rule of law forbidding gifts to future illegitimate children (*r*) may affect the way in which any such gift takes effect; and in particular, in case of a gift expressly or by implication to all the illegitimate children of a person as a class, the class is restricted to those *in esse* or *en ventre sa mère* at the testator's death (*s*).

(1905), 92 L. T. 724; *Re Corsellis, Freeborn v. Napper*, [1906] 2 Ch. 316; but such indications were not considered conclusive in *Bagley v. Mollard* (1830), 1 Russ. & M. 581; *Megson v. Hindle* (1880), 15 Ch. D. 198, C. A., where, however, there were other indications, as to which see note (*n*), *infra*; *Re Humphries, Smith v. Millidge* (1883), 24 Ch. D. 691, *per* NORTH, J., at p. 696, where, however, a reference to "shares" of daughters was senseless unless the illegitimate child took; *Re Hall, Branston v. Weightman* (1887), 35 Ch. D. 551 (description as "nephew" there not sufficient to include the person in a gift to the testator's sister's children); as to these cases, see *Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208, 213; *Re Walker, Walker v. Lutyens*, [1897] 2 Ch. 238, 252. It appears that there is no hard and fast rule of construction that the mere description of a person as a relative in a previous part of a will makes that person included in a general description of relatives in a later part of the will, but that in all such cases the context of the will and the evidence properly admissible must be considered (*Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138, 142, 143, following *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590, C. A., affirmed, *sub nom. Seale-Hayne v. Jodrell*, [1891] A. C. 304).

(*m*) As to the importance of showing what knowledge the testator had of the facts giving rise to the illegitimacy, see *Re Herbert's Trusts*, (1860) 1 John & H. 121, 124; *Hill v. Crook* (1873), L. R. 6 H. L. 265, 277, 283; *Re Horner, Eagleton v. Horner* (1887), 37 Ch. D. 695, 707, commenting on *Re Ayles' Trusts* (1875), 1 Ch. D. 282. That his knowledge of the illegitimacy is not material where his words are sensible in their ordinary sense, see *Godfrey v. Davis* (1901), 6 Ves. 43, 48; *Warnerv. Warner* (1850), 15 Jur. 141, *per* KNIGHT BRUCE, V.-C., at p. 142. The testator's ignorance of the illegitimacy and his belief that the parents of the illegitimate person were married may negative the inference that that person was intended to take (*Re Pearce, Alliance Assurance Co. Ltd. v. Francis*, [1914] 1 Ch. 254, 263, C. A.).

(*n*) *Megson v. Hindle*, *supra*; *Re Hall, Branston v. Weightman*, *supra*, at p. 557; see *Gill v. Bagshaw* (1866), L. R. 2 Eq. 746.

(*o*) *Laker v. Hordern* (1876), 1 Ch. D. 644, 650.

(*p*) *Wilkinson v. Adam* (1812), 1 Ves. & B. 422, affirmed (1823), 12 Price, 470, H. L.; but this case has been considered to go to the extreme verge of the law; see *Warner v. Warner*, *supra*, at p. 142.

(*q*) As to the meaning of "reputation" for this purpose, see note (*a*), p. 542, *ante*.

(*r*) See p. 542, *ante*.

(*s*) *Holt v. Sindrey* (1868), L. R. 7 Eq. 170; *Hill v. Crook*, *supra*, at pp. 285, 286; *Crook v. Hill* (1876), 3 Ch. D. 773; and see *Ebborn*



**1369.** A description by relationship *primâ facie* refers only to persons related by blood, including the half-blood (*t*), and in the exact relationship, if any, prescribed by the will (*a*), and not to persons related by affinity only (*b*). By the force of the context of the will (*c*) or the circumstances of the case (*d*) the description may be extended to include persons related only by affinity (*e*), or in the same or a different degree of distance in relationship (*f*). The

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by blood.

*v. Fowler*, [1909] 1 Ch. 578, C. A. (case of a settlement), overruling *Re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573.

(*t*) *Grieves v. Rawley* (1852), 10 Hare, 63 ("niece"); *Re Hammersley, Kitchen v. Myers* (1886), 2 T. L. R. 459; *Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138 ("my own nephews and nieces"). For a case of contrary intention, see *Re Dowson, Dowson v. Beadle*, [1909] W. N. 245 ("my own brothers and sisters"); *Re Reed* (1888), 57 L. J. (CH.) 790.

(*a*) Thus, where there are persons to satisfy the descriptions taken in their ordinary sense, and there is nothing in the will or the circumstances to give any other sense to the words, "grandchildren" do not include great-grandchildren (*Orford (Lord) v. Churchill* (1814), 3 Ves. & B. 59); or "first cousins" or "cousins" the descendants of first cousins (*Sanderson v. Bayley* (1838), 4 My. & Cr. 56; *Stoddart v. Nelson, Stanger v. Nelson* (1855), 6 De G. M. & G. 68; *Stevenson v. Abingdon* (1862), 10 W. R. 591; *Burbey v. Burbey* (1862), 9 Jur. (N. S.) 96; *Copland's Executors v. Milnes*, [1908] S. C. 426; the *dictum* giving a wide meaning to the word in *Caldecott v. Harrison* (1840), 9 Sim. 457, 460, is overruled); or "second cousins" first cousins once removed (*Bridgnorth Corporation v. Collins* (1847), 15 Sim. 538, 541; *Re Parker, Bentham v. Wilson* (1881), 17 Ch. D. 262, C. A., where certain cases referred to in note (*f*), *infra*, are examined. So as a rule the description "nephews and nieces" does not include grandchildren (*Campbell v. Bouskell* (1859), 27 Beav. 325; *M'Hugh v. M'Hugh*, [1908] 1 I. R. 155, where the evidence showed that the real nephews and nieces were not the objects of bounty, and there was nothing to show who were those objects), or great nephews or nieces (*Falkner v. Butler* (1765), Amb. 514; *Williamson v. Moore* (1862), 8 Jur. (N. S.) 875; *Re Blower's Trusts* (1871), 6 Ch. App. 351; *Shelley v. Bryer* (1821), Jac. 207); and the description "nieces" does not include great-nieces (*Crook v. Whitley* (1857), 7 De G. M. & G. 490). As to the meanings of "children," see p. 744, *post*.

(*b*) *Hussey v. Berkeley* (1763), 2 Eden, 194, 196 (widow of a grandson, not a grandchild); *Smith v. Lidiard* (1857), 3 K. & J. 252; *Merrill v. Morton* (1881), 17 Ch. D. 382; *Re Cozens, Miles v. Wilson*, *supra*.

(*c*) See the general rule, pp. 651, 652, *ante*.

(*d*) As to the principle relating to *falsa demonstratio*, see p. 685, *ante*.

(*e*) *Frogley v. Phillips* (1861), 3 De G. F. & J. 466; *Re Gue, Smith v. Gue*, [1892] W. N. 132, C. A. (wife of a nephew treated as a niece). Thus, relatives by affinity are held to take rather than the gift should fail, as, for instance, where the testator has no relatives by consanguinity of the described kind, and none can come into existence to satisfy the description (*Hogg v. Cook* (1863), 32 Beav. 641; *Adney v. Greatrex* (1869), 38 L. J. (CH.) 414; *Sherratt v. Mountford* (1873), 8 Ch. App. 928), or where it is shown that the testator treated the claimant as his own relative and did not know of the existence of the relative by consanguinity (*Grant v. Grant* (1870), L. R. 5 C. P. 380, 727, Ex. Ch.; but certain *dicta* in this case as to the meaning of "nephew" were dissented from in *Wells v. Wells* (1874), L. R. 18 Eq. 504, 506, and in *Merrill v. Morton* (1881), 17 Ch. D. 382, 386, and distinguished in *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255, 257, 258, C. A.). "Cousin" may be understood in the circumstances to mean the wife of a cousin (*Re Taylor, Cloak v. Hammond*, *supra*).

(*f*) A gift to the testator's "first and second cousins" has in various contexts been held to include first cousins once or twice removed, and other relations not more remote in degree than second cousins (*Mayolt v.*

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mere fact that in a prior part of the will a person is described as a relative does not alone admit to a share in a subsequent gift to relatives of that degree either the named person, or other persons of like degree with him (*g*), but this fact is an indication in that direction (*h*) to be taken into consideration along with the context of the whole will and the circumstances of the case admissible in evidence (*i*).

SUB-SECT. 3.—*Persons en ventre sa mère Treated as Born or Living.*

Persons en  
ventre sa mère.

**1370.** In certain cases persons *en ventre sa mère* are treated as actually born (*k*). It has been adopted as a rule of construction, for giving effect to a presumed intention (*a*), that in a gift or

*Mayott* (1786), 2 Bro. C. C. 125 (great-niece also included); *Silcox v. Bell* (1823), 1 Sim. & St. 301; *Charge v. Goodyer* (1826), 3 Russ. 140; *Wilks v. Bannister* (1885), 30 Ch. D. 512). The term "second cousins" has been held to include first cousins once and twice removed, where no true second cousins existed (*Re Bonner, Tucker v. Good* (1881), 19 Ch. D. 201; *Slade v. Fooks* (1838), 9 Sim. 386); and see *Bennett v. Marshall* (1856), 2 K. & J. 740; see also *Re Rickitt's Trusts* (1853), 11 Hare, 299 ("niece" held to mean "nephew"); *Stringer v. Gardiner* (1859), 4 De G. & J. 468, C. A. (gift to "my niece E. S.," who was dead, went to a great-great-niece of similar name); *Weeds v. Bristow* (1866), L. R. 2 Eq. 333 ("nephews" included great-nephews). As to the meanings of "children," "issue" etc., see pp. 744 *et seq.*, *post*.

(*g*) Thus, where a husband's niece or wife's niece is described as "my niece A.," she does not necessarily take under a subsequent gift to "my nephews and nieces" (*Smith v. Lidiard* (1857), 3 K. & J. 252; *Wells v. Wells* (1874), L. R. 18 Eq. 504; *Merrill v. Morton* (1881), 17 Ch. D. 382; these cases, though criticised in *Re Gue, Smith v. Gue*, [1892] W. N. 88, 132, C. A., and explained in *Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138, were followed in *Re Green, Bath v. Cannon*, [1914] 1 Ch. 134; or where a grand-nephew is described as "my nephew J.," he does not necessarily take under a gift to "my nephews and nieces" (*Thompson v. Robinson* (1859), 27 Beav. 486; and see *Re Blower's Trusts* (1871), 6 Ch. App. 351).

(*h*) *Re Gue, Smith v. Gue, supra*; *Hussey v. Berkeley* (1763), 2 Eden, 194 (a great granddaughter described as "my granddaughter"); *James v. Smith* (1844), 14 Sim. 214 ("my niece M. daughter of my nephew T.," admitted to share in gift to "my nephews and nieces").

(*i*) *Re Cozens, Miles v. Wilson, supra*, at pp. 142, 143 ("my own nephews and nieces" excluded nephews by affinity previously called "my nephew A." etc.).

(*k*) For many purposes, apart from construction of a will, this is the case; as, for instance, for the purpose of taking under the Statutes of Distribution (*Wallis v. Hodson* (1740), 2 Atk. 114; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 19); or of taking by descent, except that the intermediate rents pending birth descend to the heir (*Basset v. Basset* (1744), 3 Atk. 203); or, under the law before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26) (see p. 562, *ante*), of being in existence so as to cause revocation of a will (*Doe d. Lancashire v. Lancashire* (1792), 5 Term Rep. 49; *Villar v. Gilbey*, [1907] A. C. 139, 148). So, such a person might "be vouched in a recovery though it is for the purpose of making him answer over in value. He may be an executor. . . . He may have an injunction; and he may have a guardian" (*Thellusson v. Woodford* (1799), 4 Ves. 227, *per BULLER, J.*, at p. 322 (affirmed (1805), 11 Ves. 112, H. L.); 1 Bl. Com., 4th ed., pp. 129, 130). As to his capacity to take by devise, see p. 537, *ante*; as to his capacity of being a life in being for the purpose of the rule against perpetuities, see title PERPETUITIES, Vol. XXII., pp. 302, 303.

(*a*) *Clarke v. Blake* (1788), 2 Bro. C. C. 319, *per Lord THURLOW, L.C.*, at



condition referring to persons, of a named relationship to the testator or other *propositus*, who are born at or living at a particular time (*b*), the description includes a person who is then *en ventre sa mère* and is afterwards born alive (*c*), and would have come under the description if he had been then actually born or living, provided that this construction is for the benefit of such unborn person (*d*), and that there is no context in the will indicating a contrary intention (*e*). The rule is commonly stated with respect to gifts to

p. 320; *Trower v. Butts* (1823), 1 Sim. & St. 181, *per* LEACH, V.-C., at p. 184.

(*b*) The qualification "born at" or "living at" the particular time may be expressly made by the words of the will, or impliedly made under the rules for the ascertainment of the class; thus, the rule applies where the gift is to "children" simply, where the class is ascertained during the gestation of the unborn person (*Northey v. Strange* (1716), 1 P. Wms. 340, 342; compare *Storrs v. Benbow* (1833), 2 My. & K. 46, reversed on appeal (1853), 7 De G. M. & G. 390, where the gift was "to each child that may be born" to certain persons; *Mogg v. Mogg* (1815), 1 Mer. 655; *Re Hallett, Hallett v. Hallett*, [1892] W. N. 148).

(*c*) See the discussion on this qualification in *Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 1 Ch. 874, *per* BUCKLEY, J., at pp. 879 *et seq.* In *Doe d. Clarke v. Clarke* (1795), 2 Hy. Bl. 399, EYRE, C.J., said that independently of intention a child *en ventre sa mère* was "living," and this was followed in *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497; this is not, however, the general opinion; see *Trower v. Butts, supra*.

(*d*) *Villar v. Gilbey*, [1907] A. C. 139 (where the rule was not applied to a condition cutting down the interest of a tenant in tail to a life estate), approving the *dicta* and decisions in *Trower v. Butts, supra*; *Blasson v. Blasson* (1864), 2 De G. J. & Sm. 665 (where the words in question were used for the purpose only of ascertaining a period of time); *Pearce v. Carrington* (1873), 8 Ch. App. 969 (where the benefit was that the divesting of the unborn person's interest under another clause was prevented); Digest, lib. 1, tit. 5, s. 7: "*quoties de commodis ipsius partus quaritur*," cited in *Blasson v. Blasson, supra, per* Lord WESTBURY, L.C., who said, *ibid.*, at p. 670, that the rule applied only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to. In *Re Burrows, Cleghorn v. Burrows, supra* (if and in so far as that case is not inconsistent with *Villar v. Gilbey, supra*), the benefit was that the divesting of the mother's interest was prevented; but the words in question were "in case she has no issue then living."

(*e*) *Villar v. Gilbey*, [1906] 1 Ch. 583, C. A., *per* COZENS-HARDY, L.J., at p. 595. The early equity decisions are not easily reconcilable; according to BULLER, J., in *Doe d. Clarke v. Clarke, supra*, at p. 401, there were two classes of cases: the first where the gift was in the nature of a portion or provision for children, and there an after-born child took his share with the rest (see *Millar v. Turner* (1748), 1 Ves. Sen. 85); the second, where the gift arose from some motives of personal affection, and there it was confined to children actually in existence (see *Cooper v. Forbes* (1786), 2 Bro. C. C. 63, where Lord KENYON, M.R., following *Ellison v. Airey* (1748), 1 Ves. Sen. 111, and *Pierson v. Garnet* (1786), 2 Bro. C. C. 38, held that a child *en ventre sa mère* could not take under a bequest to the children of A. living at the testator's death; see also *Freemantle v. Freemantle* (1786), 1 Cox, Eq. Cas. 248, also a decision of Lord KENYON; *Musgrave v. Parry* (1715), 2 Vern. 710). In *Doe d. Clarke v. Clarke, supra*, EYRE, C.J., said, at p. 401, that the cases in equity proceeded on a distinction which appeared to him extremely unsatisfactory and unfit to be the ground of any decision whatever, and the view generally held is that the above decisions of Lord KENYON are now overruled by *Doe d. Clarke v. Clarke, supra*. The distinction drawn, however, may be a real one where the context of the will, as applied to the circumstances, shows that the testator by the description in the will meant to describe persons actually known to him (see *Millar v.*



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Exceptions.

children (*f*), but applies to other descriptions of relatives of the *propositus* (*g*), and to descriptions of persons in conditions as well as in gifts (*h*). In order, however, to be capable of taking under this rule, the person must be capable of having been legitimately begotten before the period of distribution (*i*).

The proviso that the rule is only applied where it is for the benefit of the unborn person admits of an exception in certain cases where there is a question of applying the rule against perpetuities (*k*). Moreover, in the case of a limitation of real estate to a person and his children, where that person has a child *en ventre sa mère* but has had no other child at the death of the testator, that child does not take concurrently with the parent (*l*), and the usual rule of construction in similar cases where children are alive is not applied (*m*).

SUB-SECT. 4.—Enumeration of the Donees.

Enumeration  
different  
from actual  
number.

**1371.** The testator's enumeration of donees is sometimes incon-

*Turner* (1748), 1 Ves. Sen. 85, *per* Lord HARDWICKE, L.C., at p. 86), or that he had no thought of the child *en ventre sa mère* as an immediate recipient of his bounty (see *Roper v. Roper* (1867), L. R. 3 C. P. 32, 35; *Re Emery's Estate*, *Jones v. Emery* (1876), 3 Ch. D. 300; note (*r*), p. 743, *post*).

(*f*) *Hale v. Hale* (1692), Prec. Ch. 50; *Clarke v. Blake* (1788), 2 Bro. C. C. 320; S. C. (1795), 2 Ves. 673; S. C., *sub nom.* *Doe d. Clarke v. Clarke* (1795), 2 Hy. Bl. 399; *Rawlins v. Rawlins* (1796), 2 Cox, Eq. Cas. 425; *Whitlock v. Heddon* (1798), 1 Bos. & P. 243 ("to any son . . . begotten and born" at a certain time); *Trower v. Butts* (1823), 1 Sim. & St. 181; *Re Salaman, De Pass v. Sonnenthal*, [1908] 1 Ch. 4, 6, 8, C. A.

(*g*) *Storrs v. Benbow* (1853), 7 De G. M. & G. 390; *Re Salaman, De Pass v. Sonnenthal*, *supra* (great-nephews and great-nieces); *Re Hallett, Hallett v. Hallett*, [1892] W. N. 148. In *Williams v. Ocean Coal Co., Ltd.*, [1907] 2 K. B. 422, 429, 432, C. A., the court applied the rule to a child as being a "person . . . dependent," in construing the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7 (2); and in *The George and Richard* (1871), L. R. 3 A. & E. 466, 480, it was applied to a child in the construction of "family" in the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93). In *Bennett v. Honywood* (1772), Amb. 708, 712, the court declined to extend the rule to a gift to "relations by consanguinity," but the *ratio decidendi*, that the rule only applied to the case of a devise to children, is contrary to the authorities; see the passages cited from the civil law relating both to lineal and collateral relatives in *Wallis v. Hodson* (1740), 2 Atk. 114, *per* Lord HARDWICKE, L.C., at p. 118.

(*h*) *Gibson v. Gibson* (1698), Freem. (Ch.) 223 (bond for sum to be paid in case obligor should have no son living at his decease); *Burdet v. Hopegood* (1718), 1 P. Wms. 486 (devise in case testator had no son at the time of his death); *Pearce v. Carrington* (1873), 8 Ch. App. 969 (if daughter should be living five years after death of wife and should not then have had any child or children). In *Villar v. Gilbey*, [1907] A. C. 139, also a case of a condition, the rule was excluded on the ground of want of benefit.

(*i*) *Re Corlass* (1875), 1 Ch. D. 460.

(*k*) See title PERPETUITIES, Vol. XXII., pp. 302, 303; *Villar v. Gilbey*, *supra*, at p. 149.

(*l*) *Roper v. Roper*, *supra* (where the parent was held to take an estate of inheritance solely); but see *Mason v. Clarke* (1853), 17 Beav. 125, 130 (bequest). It appears that the court is disinclined to apply the rule where the effect would be to divest the interests of portionists who have obtained payment; see *Palmer v. Cracroft* (1706), 2 Vern. 578.

(*m*) Namely, the rule in *Wild's Case* (1599), 6 Co. Rep. 16 b; see pp. 752, 787, 788, *post*.

sistent with the number of persons satisfying the description (*n*). Where there is a gift to a number of persons designated by a class or group description, with a statement of the number of the donees, which is either greater or less (*o*) than the actual number of persons who fit the description at the death of the testator—as in the case of a gift to the four children of A., who at the death of the testator is shown to have five children—then unless it appears that all the persons so designated were intended to take, independently of their number (*p*), the court considers (*q*) with how many of such persons the testator was acquainted at the date of his will, and if the number corresponds with the number in the will, may thus be able to identify the particular persons described (*r*).

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**1372.** There are cases, however, where the court can arrive at the conclusion that all the persons satisfying a particular description are intended to be benefited, and if there has been an inaccurate enumeration of the persons composing the class, the court rejects the enumeration (*s*). Thus, if it appears that at the date of the will the fact was, and the testator knew, that the number of persons who then answered the description was greater or less than the number shown by the will (*t*), or if the number could not then, in fact and to the knowledge of the testator, be ascertained (*a*), or if (in cases where the gift would otherwise be void for uncertainty) there is no evidence at all of the testator's

Rejection of  
enumeration.

(*n*) See *Selsey (Lord) v. Lake (Lord)* (1839), 1 Beav. 146, 151 ("her five daughters"); there were five sons and one daughter, who alone took); *Lane v. Green* (1851), 4 De G. & Sm. 239 (to the four sons of A.; she had three sons and one daughter, who all took). For cases where the enumeration corrected a mistake in the names, see *Garth v. Meyrick* (1779), 1 Bro. C. C. 30; *Humphreys v. Humphreys* (1789), 2 Cox, Eq. Cas. 184. As to inaccuracy of descriptions generally, see pp. 684 *et seq.*, *ante*.

(*o*) *Re Sharp, Maddison v. Gill*, [1908] 2 Ch. 190, C. A.

(*p*) *Matthews v. Foulshaw* (1864), 12 W. R. 1141; and see the text, *infra*.

(*q*) As to evidence of circumstances, generally, in such cases, see p. 637, *ante*; evidence of intention is properly excluded (*Re Mayo, Chester v. Keirl*, [1901] 1 Ch. 404).

(*r*) *Sherer v. Bishop* (1792), 4 Bro. C. C. 55; *Newman v. Piercey* (1876), 4 Ch. D. 41; *Re Mayo, Chester v. Keirl*, *supra*, at p. 407. 'Another child, *en ventre sa mère*, and not known to the testator, may then be excluded (*Re Emery's Estate, Jones v. Emery* (1876), 3 Ch. D. 300; *Re Smiley* (1908), 28 New Zealand Law Reports, 1; *Re McNeill, Wright v. Johnstone* (1909), 9 State Reports, New South Wales, 220).

(*s*) *Re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, C. A., *per* Lord RUSSELL of KILLOWEN, C.J., at p. 81, and *per* LINDLEY, L.J., at p. 85; *Re Sharp, Maddison v. Gill*, *supra*, at p. 194; *Matthews v. Foulshaw*, *supra*; *Harrison v. Harrison* (1829), 1 Russ. & M. 71, 72; *Hare v. Cartridge* (1842), 13 Sim. 165; *Lee v. Pain* (1844), 4 Hare, 201, 249 (both commented on in *Re Stephenson, Donaldson v. Bamber, supra*); *Yeats v. Yeats* (1852), 16 Beav. 170, 171; *Re Dutton, Plunkett v. Simeon*, [1893] W. N. 65; *Re Groom, Booty v. Groom*, [1897] 2 Ch. 407; see *Selsey (Lord) v. Lake (Lord)*, *supra*.

(*t*) *Scott v. Fenoullhett* (1784), 1 Cox, Eq. Cas. 79; *Hampshire v. Pierce* (1750), 2 Ves. Sen. 216; *Daniell v. Daniell* (1849), 3 De G. & Sm. 337; *Spencer v. Ward* (1870), L. R. 9 Eq. 507; *Lee v. Lee* (1864), 10 Jur. (N. S.) 1041.

(*a*) *Sleech v. Thorington* (1754), 2 Ves. Sen. 560 ("to the two servants living with me at my death").

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knowledge or other admissible evidence to enable the court to determine who were meant by the description (b), the court may reject the enumeration as a mistake.

SUB-SECT. 5.—*Particular Descriptions.*

Persons  
“begotten”  
and “to be  
begotten.”

**1373.** A description of children or issue as “begotten” *primâ facie* includes children or issue to be begotten in the future, and a description of children or issue as “to be begotten” *primâ facie* includes children or issue already begotten (c); but by the context of the will these technical meanings may be displaced and the strictly grammatical meaning substituted in each case (d).

“Children.”

**1374.** The description “children” of a named person (e) in its ordinary sense (f) refers to the first generation only of legitimate (g) descendants, by any marriage (h), and does not include any grandchildren (i) or remoter descendants (k); but it may be extended by the context and the circumstances of the case admissible in evidence (l) to such other generations of descendants (m), to the

(b) *Tomkins v. Tomkins* (1743), 3 Atk. 257; and see 19 Ves. 126, n.; *Stebbing v. Walker* (1786), 2 Bro. C. C. 83, where, however, Lord KENYON said: “I yield to the authority of the cases and not to the reason of them”; *Garvey v. Hibbert* (1812), 19 Ves. 125 (which is the leading case giving its name to the rule); *Harrison v. Harrison* (1829), Tambl. 273; *Lee v. Pain* (1844), 4 Hare, 201, 249; *Morrison v. Martin* (1846), 5 Hare, 507; *Wrightson v. Calvert* (1860), 1 John. & H. 250, *per* WOOD, V.-C., at p. 251, explained in *Newman v. Piercy* (1876), 4 Ch. D. 41, *per* JESSEL, M.R., at p. 47; *McKechnie v. Vaughan* (1873), L. R. 15 Eq. 289; *Re Bassett’s Estate*, *Perkins v. Fladgate* (1872), L. R. 14 Eq. 54; *Re Sharp, Maddison v. Gill*, [1908] 2 Ch. 190, C. A.

(c) Co. Litt. 20 b; *Cook v. Cook* (1706), 2 Vern. 345; *Hebblethwaite v. Cartwright* (1734), Cas. temp. Talb. 31; *Hewet v. Ireland* (1718), 1 P. Wms. 426; *Doe d. James v. Hallett* (1813), 1 M. & S. 124; *Almack v. Horn* (1863), 1 Hem. & M. 630, 633.

(d) *Locke v. Dunlop* (1888), 39 Ch. D. 387, C. A.; and see *Anon.* (1584), 3 Leon. 87.

(e) As to the time of ascertainment of a class of children, see p. 714, *ante*.

(f) See the general rule, p. 655, *ante*.

(g) See the rule as to descriptions by relationship, p. 735, *ante*.

(h) Even though a second marriage is not in the contemplation of the testator (*Brathwaite v. Brathwaite* (1685), 1 Vern. 334; *Champion v. Pickax* (1737), 1 Atk. 472; *Barrington v. Tristram* (1801), 6 Ves. 345; *Ex parte Ilchester (Earl)* (1803), 7 Ves. 348, 380; *Critchett v. Taynton* (1830), 1 Russ. & M. 541; and see *Nash v. Allen* (1889), 42 Ch. D. 54, 59). A reference to a present or future husband did not exclude a deceased husband’s children in *Pasmore v. Huggins* (1855), 21 Beav. 103; *Re Pickup’s Trusts* (1861), 1 John. & H. 389. The contexts in *Stavers v. Barnard* (1843), 2 Y. & C. Ch. Cas. 539 (certain children of a prior marriage specially named); *Stopforth v. Chaworth* (1845), 8 Beav. 331; *Lovejoy v. Crafter* (1865), 35 Beav. 149; *Re Parrott*, *Walter v. Parrott* (1886), 33 Ch. D. 27; *Re Baynham*, *Hart v. Mackenzie* (1891), 7 T. L. R. 587 (“our children” in will in favour of second wife), excluded the children of the prior marriage.

(i) *Reeves v. Brymer* (1799), 4 Ves. 692, 698 (“children may mean grandchildren where there can be no other construction, but not otherwise”); *Radcliffe v. Buckley* (1804), 10 Ves. 195; *Stavers v. Barnard*, *supra*, at p. 540; *Thellusson v. Woodford* (1829), 5 Russ. 100, 106; *Loring v. Thomas* (1861), 1 Drew. & Sm. 497, 508.

(k) *Pride v. Fooks* (1858), 3 De G. & J. 252, 275, C. A.

(l) As to evidence, see, generally, pp. 637 *et seq.*, *ante*.

(m) Thus, “children” may be construed “grandchildren” where the context shows that the testator has used the word in an extended sense



whole line capable of inheriting from the named person (*n*), or to illegitimate children (*o*), stepchildren (*p*), or adopted children (*q*). The meaning of a gift to "the children of A. and B.," where A. and B. are two named persons, depends on the context and circumstances of each case (*r*). It appears that *primâ facie* the children of A. and the children of B. are held to be designated where both classes of children exist (*a*), and that they all take *per capita* (*b*); but,

(*Royle v. Hamilton* (1799), 4 Ves. 437; *Radcliffe v. Buckley* (1804), 10 Ves. 195, 201; *Re Crawhall's Trusts* (1856), 8 De G. M. & G. 480, 487; *Re Blackman* (1852), 16 Beav. 377 (name added)), or where the circumstances admissible in evidence give rise to a similar inference, for example, in a case of a legacy to the children of a deceased person, where at the date of the will there are, to the knowledge of the testator, no children, but only grandchildren alive, on the principle *ut res magis valeat quam pereat* (*Re Smith, Lord v. Hayward* (1887), 35 Ch. D. 558, *per* KAY, J., at p. 559 (there meaning "off-spring")); *Fenn v. Death* (1856), 23 Beav. 73; *Berry v. Berry* (1861), 3 Giff. 134; and see *Crook (or Crooke) v. Brookling* (1689), 2 Vern. 50, 107, 108; *Gale v. Bennet* (1768), Amb. 681, explained in *Pride v. Fooks* (1858), 3 De G. & J. 252, 275—279, C. A.). In *Re Kirk, Nicholson v. Kirk* (1885), 52 L. T. 346, however, the court adhered to the literal construction in a similar case; the meaning "grandchildren" cannot, it appears, be given where the parent of the children is alive (Hawkins, Wills, 1st ed., 85, citing *Moor v. Raisbeck* (1841), 12 Sim. 123, where, however, the context only was relied upon), or where the context of the will draws a distinction between children and grandchildren (*Loring v. Thomas* (1861), 1 Drew. & Sm. 497, 509); and there would be more difficulty in giving the word that meaning in case of a gift to the children of several persons, some of whom had children but others grandchildren only, since the court would be disinclined to give different meanings to the same word (*Radcliffe v. Buckley, supra*; *Re Smith, Lord v. Hayward, supra, per* KAY, J., at p. 599). As to whether, if there are no children, but grandchildren and great-grandchildren, the grandchildren may take to the exclusion of great-grandchildren, see *Fenn v. Death, supra*, where it was so held; *Pride v. Fooks, supra, per* TURNER, L.J., at pp. 275—279: "I can see no ground on which the limitation, if it extends beyond the children, can be confined to the grandchildren, or on which the great-grandchildren can be excluded."

(*n*) As, for instance, in direct gifts (*Bowen v. Lewis* (1884), 9 App. Cas. 890) and in gifts over (*Doe d. Smith v. Webber* (1818), 1 B. & Ald. 713; *Re Synge's Trusts* (1854), 3 I. Ch. R. 379). As to "children" as a word of limitation, see p. 766, *post*; as to limitations to a person and his children, see p. 787, *post*.

(*o*) See pp. 735 *et seq.*, *ante*.

(*p*) As, for instance, where the testator has no children and is accustomed to call his stepchildren by the name "children" (*Re Jeans, Upton v. Jeans* (1895), 72 L. T. 835).

(*q*) *Public Trustee v. Pilkington* (1912), 31 New Zealand Law Reports, 770.

(*r*) *Stummvoll v. Hales* (1864), 34 Beav. 124, *per* ROMILLY, M.R., at p. 126 ("the position in which the parties were placed"); *Re Walbran, Milner v. Walbran*, [1906] 1 Ch. 64, *per* JOYCE, J., at p. 66 ("You must know something about A. and B.").

(*a*) *Mason v. Baker* (1856), 2 K. & J. 567; *Re Davies' Will* (1860), 29 Beav. 93. In *Re Featherstone's Trusts* (1882), 22 Ch. D. 111, however, KAY, J., at pp. 114, 115, following a *dictum* of TURNER, L.J., in *Peacock v. Stockford* (1853), 3 De G. M. & G. 73, 78, C. A., considered that the grammatical construction had been settled by authority (namely *Lugar v. Harman* (1786), 1 Cox, Eq. Cas. 250, and the *dicta* in *Doe d. Hayter v. Joinville* (1802), 3 East, 172) as meaning "B. and the children of A."

(*b*) *Mason v. Barker, supra*; *Re Davies' Will, supra*.

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for example, the fact that either A. or B. had no children (*c*), or that A. was dead and B. alive at the date of the will (*d*) or at the date contemplated by the gift (*e*), or that A. and B. were relatives of the testator of the same degree (*f*), may affect the construction of the gift (*g*).

**1375.** "Descendants" ordinarily refers to children, grandchildren and other issue (*h*), of every degree of remoteness (*i*) in descent; although the word may be confined to mean children on a sufficiently strong context (*k*), the court does not restrict the word to that sense merely because the testator speaks of the descendants taking their parents' share (*l*). The class of descendants taking under a gift are ascertained according to the ordinary rules for ascertaining a class (*m*). The descendants, when ascertained, *primâ facie* take *per capita* and not *per stirpes* (*n*); but in a gift to a group of persons or their descendants, the latter *primâ facie* take by way of substitution only, and not in competition with their parents, if living at the time of distribution (*o*).

(*c*) *Wicker v. Mitford* (1783), 3 Bro. Parl. Cas. 442; *Stummvoll v. Hales* (1864), 34 Beav. 124; *Re Harper, Plowman v. Harper*, [1914] 1 Ch. 70.

(*d*) In such a case B. takes (*Lugar v. Harman* (1786), 1 Cox, Eq. Cas. 250, where it was considered that "of" should have been prefixed to "B." if his children had been intended; but see *Mason v. Baker* (1856), 2 K. & J. 567, *per* WOOD, V.-C., at p. 570; and compare *Hawes v. Hawes* (1880), 14 Ch. D. 614).

(*e*) *Peacock v. Stockford* (1853), 3 De G. M. & G. 73, 78, C. A.

(*f*) *Re Walbran, Milner v. Walbran*, [1906] 1 Ch. 64 (B. entitled to a moiety), distinguished in *Re Harper, Plowman v. Harper*, *supra*.

(*g*) See also *Re Ingle's Trusts* (1871), L. R. 11 Eq. 578 (reference in codicil to the legacy left to B.).

(*h*) "Posterity of all kinds" (*Oddie v. Woodford* (1821), 3 My. & Cr. 584, 617).

(*i*) Such a description, the members being ascertained according to the ordinary rules, is not void for uncertainty (*Pierson v. Garnet* (1787), 2 Bro. C. C. 38, 226).

(*k*) *Smith v. Pepper* (1859), 27 Beav. 86 ("in proportions . . . under the Statute of Distributions"); *Williamson v. Moore* (1862), 8 Jur. (N. s.) 875 ("my nephews and nieces being descendants of my brothers and sisters"); compare *Legard v. Haworth* (1800), 1 East, 120, 130 (restricted to children and grandchildren). It seems that the circumstances of the case and the context may extend the word to include collateral relatives; see *Best v. Stonehewer* (1864), 34 Beav. 66, affirmed (1865), 2 De G. J. & Sm. 537, C. A.; compare *Craik v. Lamb* (1844), 1 Coll. 489 (relations by lineal descent).

(*l*) *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., where the court refused to apply the rule in *Sibley v. Perry* (1802), 7 Ves. 522; see note (*o*), p. 753, *post*.

(*m*) *Tucker v. Billing* (1856), 2 Jur. (N. s.) 483; *Re Roberts, Repington v. Roberts-Gawen* (1882), 19 Ch. D. 520, C. A.; as to gifts to classes, see pp. 614, 714, *ante*.

(*n*) *Crosley v. Clarke* (1761), 3 Swan. 320, n.; *Butler v. Stratton* (1791), 3 Bro. C. C. 367; *Re Flower, Matheson v. Goodwin* (1890), 62 L. T. 217, reversed on another point, 63 L. T. 201, C. A.; see *Rowland v. Gorsuch, Price v. Gorsuch* (1789), 2 Cox, Eq. Cas. 187, where the context required a stirpital distribution; and compare *Re Rawlinson, Hill v. Withall*, [1909] 2 Ch. 36.

(*o*) *Jones v. Torin* (1833), 6 Sim. 255; *Dick v. Lacy* (1845), 8 Beav. 214; *Re Flower, Matheson v. Goodwin*, *supra*; *Re Morgan, Morgan v.*

**1376.** The word “family,” in different circumstances (*p*), may mean a man’s household consisting of himself, his wife, children, and servants (*q*); or his wife and children (*r*); or his children excluding his wife (*s*); or in the absence of wife and children his brothers and sisters (*s*); or his next of kin (*t*); or his genealogical stock (*u*). The word may include any relative whatever, where used to denote the objects of a power of appointment (*a*), or descendants of every degree (*b*).

In a devise of realty to any named “family” or the “family” of any person, the head of the family, or the eldest son and heir presumptive of that person, is *primâ facie* designated, according to the circumstances (*c*).

A gift in the will of a married man to his family, or a gift of personalty alone (*d*) to the family of any person, is *primâ facie* a gift

SECT. 5.  
Description  
of  
Donees.  
“Family.”

Presumption  
in a case of  
a devise.

Meaning in  
general.

*Morgan*, [1893] 3 Ch. 222, 227, 231, C. A. Similarly in case of a gift to a group of individuals and their descendants (*Tucker v. Billing* (1856), 2 Jur. (N. S.) 483).

(*p*) *Blackwell v. Bull* (1836), 1 Keen, 176, per Lord LANGDALE, M.R., at p. 181; *Sinnott v. Walsh* (1880), 5 L. R. Ir. 27, 41, C. A. The word is “a word of most loose and flexible description” (*Green v. Marsden* (1853), 1 Drew. 646, per KINDERSLEY, V.-C., at p. 651; and see *Morton v. Tewart* (1842), 2 Y. & C. Ch. Cas. 67, 81).

(*q*) See *Blackwell v. Bull*, *supra*; *Pigg v. Clarke* (1876), 3 Ch. D. 672, per JESSEL, M.R., at p. 674.

(*r*) *Blackwell v. Bull*, *supra*; *Re Drew*, *Drew v. Drew*, [1899] 1 Ch. 336, 342; see also *James v. Wynford* (Lord) (1854), 2 Sm. & G. 350; *McLeroth v. Bacon* (1799), 5 Ves. 159 (husband there included, although not so as a general rule).

(*s*) *Barnes v. Patch* (1803), 8 Ves. 604; *Gregory v. Smith* (1852), 9 Hare, 708; *Pigg v. Clarke* (1876), 3 Ch. D. 672; *Re Mulqueen’s Trusts* (1881), 7 L. R. Ir. 127. As to the ascertainment of the class, see *Re Parkinson’s Trusts* (1851), 1 Sim. (N. S.) 242.

(*t*) *Cruwys v. Coleman* (1804), 9 Ves. 319; and see note (*g*), p. 748, *post*.

(*u*) *Lucas v. Goldsmid* (1861), 29 Beav. 657, per ROMILLY, M.R., at p. 660; and see *Re Macleay* (1875), L. R. 20 Eq. 186, 187.

(*a*) *Grant v. Lynam* (1828), 4 Russ. 292; *Snow v. Teed* (1870), L. R. 9 Eq. 622 (in power of appointment). A disposition in favour of an illegitimate descendant was held valid in *Lambe v. Eames* (1871), 6 Ch. App. 597. If the donee does not exercise the power, a gift to the family in default of appointment is construed to mean next of kin (*Grant v. Lynam*, *supra*, at p. 297).

(*b*) *Williams v. Williams* (1851), 1 Sim. (N. S.) 358, 371; see *Doe d. King v. Frost* (1820), 3 B. & Ald. 546 (to “younger branches of the family”), and compare *Doe d. Smith v. Fleming* (1835), 2 Cr. M. & R. 638, where a similar gift was in the circumstances void for uncertainty; *Armstrong v. Armstrong* (1888), 21 L. R. Ir. 114, C. A.

(*c*) *Chapman’s Case* (1574), Dyer, 333 b (“to remain to the house,” construed to mean family), recognised as binding in *Counden v. Clerke* (1613), Hob. 29, 33, and in *Crossly v. Clare* (1761), Amb. 397; *Wright v. Atkyns* (1810), 17 Ves. 255, 262; (1815), 19 Ves. 299; *Coop. G.* 111, 122 (reversed, however, on the words of the will (1823), Turn. & R. 143, 145, 155, H. L.); *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Griffith v. Evan* (1842), 5 Beav. 241. As to the use of the word as a word of limitation, see note (*d*), p. 767, *post*.

(*d*) Including the proceeds of sale of real estate held on trust for sale (*Woods v. Woods* (1836), 1 My. & Cr. 401, 408). The same rule may be applicable to a mixed fund of real and personal estate (*Barnes v. Patch*, *supra*) or to real estate devised alone (*Reay v. Rawlinson* (1860), 29 Beav. 88; *Burt v. Hellyar* (1872), L. R. 14 Eq. 160).



SECT. 5.  
Descriptions of  
Donees.

Other  
meanings.

"First son,"  
"eldest son"  
etc.

to his children (*e*), who *primâ facie* take as joint tenants (*f*), or if there are no children, to all such persons as would in the case of intestacy be entitled to take his personal estate under the Statutes of Distribution (*g*).

In a gift of a mixed fund of realty and personalty the word may be used to denote persons entitled by legal succession according to the nature of the property, and to mean the heir as regards the real estate and the next of kin as regards the personal estate (*h*). Where the family is defined merely by a surname, the court may ascertain from the circumstances of the case what family of that surname was best known to the testator, and the persons to take may be determined accordingly (*i*).

Where none of the above meanings can be given consistently with the will, the gift may be void for uncertainty (*k*).

**1377.** The description "first son" or "eldest son" of a certain person in the strict sense means the first-born son (*l*); and similarly for other sons (*m*). The circumstances of the case and the context of the will may, however, show that the testator intended the eldest son of the person at the date of the will (as is *primâ facie* the sense of the words where the strict sense is inapplicable (*n*)), or his eldest son for the time being at the death or other future time (*o*), or the son taking a family estate (*p*), as is *primâ facie* the

(*e*) *Beales v. Crisford* (1843), 13 Sim. 592; *Wood v. Wood* (1843), 3 Hare, 65; *Re Parkinson's Trust* (1851), 1 Sim. (N. S.) 242, 245; *Gregory v. Smith* (1852), 9 Hare, 708; *Re Terry's Will* (1854), 19 Beav. 580; *Pigg v. Clarke* (1876), 3 Ch. D. 672; *Re Hutchinson and Tenant* (1878), 8 Ch. D. 540, *per* JESSEL, M.R., at p. 541; *Re Muffett, Jones v. Mason* (1886), 55 L. T. 671; and see *Harkness v. Harkness* (1905), 9 Ontario Law Reports, 705. Other relatives are *primâ facie* excluded (*Wood v. Wood, supra*; *Burt v. Hellyar* (1872), L. R. 14 Eq. 160; *Re Battersby's Trusts*, [1896] 1 I. R. 600).

(*f*) *Beales v. Crisford, supra*; *Gregory v. Smith, supra*, at p. 712; *contra, Owen v. Penny* (1850), 14 Jur. 359.

(*g*) *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126, *per* Lord ELLENBOROUGH, C.J., at p. 130; *Grant v. Lynam* (1828), 4 Russ. 292, 297; *Re Maxton* (1858), 4 Jur. (N. S.) 407; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*h*) *White v. Briggs* (1848), 2 Ph. 583.

(*i*) *Gregory v. Smith, supra*; *Charitable Donations and Bequests Commissioners v. Deey* (1891), 27 L. R. Ir. 289.

(*k*) *Harland v. Trigg* (1782), 1 Bro. C. C. 142; *Doe d. Hayter v. Joinville* (1802), 3 East, 172; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381, 395; *Re Cullimore's Trust* (1891), 27 L. R. Ir. 18. In *Robinson v. Waddelow* (1836), 8 Sim. 134, a case of a gift to daughters "and their husbands and families," the latter words were rejected; but see *Re Parkinson's Trust, supra*, at pp. 245, 246.

(*l*) *Livesey v. Livesey* (1848), 2 H. L. Cas. 419; *Bathurst v. Errington* (1877), 2 App. Cas. 698, *per* Lord CAIRNS, L.C., at p. 709; *Bennett v. Bennett* (1864), 2 Drew. & Sm. 266; *Meredith v. Treffry* (1879), 12 Ch. D. 170.

(*m*) *Trafford v. Ashton* (1710), 2 Vern. 659 (second son); *Lyddon v. Ellison* (1855), 19 Beav. 565 ("younger children"; meaning children other than the eldest); *Booth-Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167; and see *Crofts v. Beamish*, [1905] 2 I. R. 349, C. A. ("next eldest brother").

(*n*) *Amyot v. Dwarries*, [1904] A. C. 268, P. C., treating *Re Harris's Trust* (1854), 2 W. R. 689, as incorrect; see p. 714, *ante*.

(*o*) *Matthews v. Paul* (1819), 3 Swan. 328; *King v. Bennett* (1849), 4 M. & W. 36; *Stevens v. Pyle* (1861), 30 Beav. 284; *Caldbeck v. Caldbeck*, [1911] 1 I. R. 144.

(*p*) *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43 (settlement);

sense where the provision made by the will is for portions for younger children, and the eldest son is excluded, “younger children” in such a case being *primâ facie* taken to mean children other than a child taking the estate (*q*). It is possible that an eldest son may take under a limitation to “second and other sons (*r*),” but not where by the context of the will he is excluded (*s*).

SECT. 5.  
Descriptions of  
Donees.

**1378.** In a gift to the “heir” or “heirs” of any person, the description in its technical meaning includes the whole line of succession of persons capable of inheriting from him (*t*); it may, however, designate some particular person or persons, satisfying that description at some particular time (*u*), and, in a gift to “the heir of the body” or “heirs of the body” of any person the words have similar meanings (*w*).

“Heir” or  
“heirs.”

In cases of a direct gift to the heir, where the ancestor is living, since no one can be the heir of a living person, the technical meaning may be displaced, and the person who is heir presumptive may be designated (*x*). Otherwise the heir is *primâ facie* ascertained at the death of the ancestor, whether the latter is the testator or any other person, and whether the gift is immediate or future (*a*).

Heir of living  
person.

The word “heir” *primâ facie* refers to descent at common law, and even in a case where copyhold, gavelkind, or borough-English

Common law  
heir.

*Ellison v. Thomas* (1862), 1 De G. J. & Sm. 25. “Eldest” may mean eldest in right of primogeniture (*Thellusson v. Rendlesham* (Lord), *Thellusson v. Thellusson*, *Hare v. Roberts* (1859), 7 H. L. Cas. 429); see, generally, title SETTLEMENTS, Vol. XXV., pp. 587 *et seq.*

(*q*) *Chadwick v. Doleman* (1706), 2 Vern. 527. The eldest daughter is a younger child for this purpose (*Beale v. Beale* (1713), 1 P. Wms. 244; *Pierson v. Garnet* (1786), 2 Bro. C. C. 38).

(*r*) *Clements v. Paske* (1784), 2 Cl. & Fin. 230, n.; *Langston v. Langston* (1834), 2 Cl. & Fin. 196, H. L.; *Re Blake's Estate* (1871), 19 W. R. 765; *Tavernor v. Grindley* (1874), 32 L. T. 424; *Grattan v. Langdale* (1883), 11 L. R. Ir. 473.

(*s*) *Locke v. Dunlop* (1888), 39 Ch. D. 387, C. A. In *Tuite v. Birmingham* (1875), L. R. 7 H. L. 634, the eldest was expressly excluded from the limitation.

(*t*) In such a case the word is a word of limitation; the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b (as to which see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 226 *et seq.*), may be applicable. As to the rule in *Mandeville's Case* (undated), Co. Litt. 26 b, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 246.

(*u*) *Archer's Case* (1597), 1 Co. Rep. 66 b; *Evans v. Evans*, [1892] 2 Ch. 173, C. A.; *Skinner v. Gumbleton*, [1903] 1 I. R. 36; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 226 *et seq.* As to other meanings, see note (*p*), p. 751, *post*.

(*w*) See *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658; *Wesselenyi (Baroness) v. Jamieson*, [1907] A. C. 440 (heir in entail under a settlement, the entail in which had been destroyed).

(*x*) *Doe d. Winter v. Perratt* (1843), 6 Man. & G. 314, H. L., *per* Lord BROUGHAM, L.C., at p. 363; *Dormer v. Phillips* (1855), 4 De G. M. & G. 855; *James v. Richardson* (1678), 2 Lev. 232; 2 T. Jo. 99; *Darbison d. Long v. Beaumont* (1713), 1 P. Wms. 229; *Goodright d. Brooking v. White* (1775), 2 Wm. Bl. 1010.

(*a*) *Danvers v. Clarendon (Earl)* (1681), 1 Vern. 35; *Doe d. Pilkington v. Spratt* (1838), 5 B. & Ad. 731; *Rawlinson v. Wass* (1851), 9 Hare, 673; *Re Frith, Hindson v. Wood* (1901), 85 L. T. 455; *Re Maher. Maher v. Toppin*, [1909] 1 I. R. 70, 75, C. A. In *Doe d. King v. Frost* (1820), 3 B. & Ald. 546, and *Lightfoot v. Maybery*, [1914] W. N. 180, H. L., the heir was on the context held ascertainable at a future time.

SECT. 5.  
Descriptions of  
Donees.

Heirs of  
particular  
character.

Bequest to  
"heir."

lands are given to the heir of the testator, the common law heir, according to the general course of descent, is *primâ facie* entitled (*b*).

**1379.** A devise to heirs of a particular character (*c*), not referring merely to the descent of an estate tail (*d*), takes effect only in favour of the heirs general, conditionally on their possessing that character, unless the intention of the testator is shown to the contrary (*e*). If the devise is to the "heirs male of the body" of any person, and the words are used as words of description and not of limitation (*f*), then the heir male of the body, who need not be heir general (*g*), *primâ facie* takes under the gift; but where, in a devise to "heirs male" or "next heir male" of the testator, it appears that the testator could not have meant the heirs male of his own body, *primâ facie* only the heir general of the testator, being a male, can take under the gift (*h*).

**1380.** Where the gift is of personal estate or of a mixed fund of real and personal estate, the word "heir" *primâ facie* retains its usual meaning, and unless there is something in the will to show a contrary intention, the particular person filling the description of heir-at-law takes the property as a *persona designata* (*i*). By a

(*b*) *Thorpe v. Owen* (1854), 2 Sm. & G. 90; *Davis v. Kirk* (1856), 2 K. & J. 391 (see 2 Jur. (N. s.) 857); *Buchanan v. Harrison* (1861), 1 John. & H. 662; *Polley v. Polley* (No. 2) (1862), 31 Beav. 363; *Sladen v. Sladen* (1862), 2 John. & H. 369; S. C. 8 Jur. (N. s.) 1075; *Garland v. Beverley* (1878), 9 Ch. D. 213; and see Co. Litt. 10 a; and title DESCENT AND DISTRIBUTION, Vol. XI., pp. 7 *et seq.*

(*c*) As, for instance, to the testator's heirs of his name (*Counden v. Clarke* (1613), Hob. 29; *Wrightson v. Macaulay* (1845), 14 M. & W. 214; *Thorpe v. Thorpe* (1862), 1 H. & C. 326).

(*d*) As, for instance, in a devise to "heirs male" construed in the context to mean "heirs male of the body"; see the text, *infra*, and pp. 764, 765, *post*.

(*e*) In Co. Litt. 24 b it is said that under a devise to "heirs female of the body" the person to take by purchase under the gift must be heir general as well as heir female; this is not now considered correct; see *Newcoman v. Bethlehem Hospital* (1741), Amb. 8; *Cholmondeley (Marquis) v. Clinton (Lord)* (1820), 2 Jac. & W. 1, 106, 107; *Doe d. Angell v. Angell* (1846), 9 Q. B. 328, 351; *Goodtitle d. Weston v. Burtenshaw* (1772), Fearn, Contingent Remainders, 9th ed., Appendix I.; *Wrightson v. Macaulay*, *supra*, at p. 231; *Doe d. Winter v. Perratt* (1826), 5 B. & C. 48, 93; S. C. (1843), 9 Cl. & Fin. 607, 617, 625, H. L.; and see Hargrave, notes to Co. Litt. 24 b, note (3), and 164 a, note (2); *Chambers v. Taylor* (1837), 2 My. & Cr. 376, 386.

(*f*) As to the use of such words as words of limitation, see p. 764, *post*.

(*g*) *Wills v. Palmer* (1770), 5 Burr. 2615; *Doe d. Angell v. Angell*, *supra*; and see *Baker v. Wall* (1696), 1 Ld. Raym. 185; *Brown v. Barkham* (1718), 1 Stra. 35, on a bill of review in *Newcoman v. Bethlehem Hospital*, *supra*.

(*h*) *Re Watkins, Maybery v. Lightfoot*, [1912] 2 Ch. 430, 436, reversed, *sub nom. Lightfoot v. Maybery*, [1914] W. N. 180, H. L., on the context of the particular will concerned; and see *Dawes v. Ferrers* (1722), 2 P. Wms. 1.

(*i*) *Gwynne v. Muddock* (1808), 14 Ves. 488; *Mounsey v. Blamire* (1828), 4 Russ. 384; *Tetlow v. Ashton* (1850), 15 Jur. 213; *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524, *per* Lord St. LEONARDS, L.C., at p. 557; *Re Rootes* (1860), 1 Drew. & Sm. 228; *Southgate v. Clinch* (1858), 4 Jur. (N. s.) 428; *Hamilton v. Mills* (1861), 29 Beav. 193; *Smith v. Butcher* (1878), 10 Ch. D. 113; *Keay v. Boulton* (1883), 25 Ch. D. 212, *per* PEARSON, J., at p. 215; *Skinner v. Gumbleton*, [1903] 1 I. R. 36; see also *Boydell v.*



sufficient context, as in cases where the heirs are to take by substitution for the ancestor, the word may be understood to mean such person or persons as would legally succeed to the property according to its nature and quality (*k*); and in the same gift, therefore, it may have two meanings, heir-at-law as to the real estate, and the persons entitled by statute as on intestacy as to the personal estate comprised in the gift (*l*). In a gift of personal estate alone “heirs” has been construed as meaning either next of kin (*m*), the widow taking her share (*n*), or executors and administrators (*o*). The context may, however, give other meanings to the word (*p*).

**1381.** A gift to a named person “or his heirs” is *primâ facie* substitutional, at all events in gifts of personal estate (*q*), so that if the first donee does not take, the bequest takes effect in favour of his next of kin according to the Statutes of Distribution (*r*); but in a direct

SECT. 5.  
Description  
of  
Donees.

To a person  
“or his heirs.”

*Golightly* (1844), 14 Sim. 327, 346, 347, where the heir was also next of kin. As to a gift to “my successors to the titles,” see *Re Cathcart (Earl)* (1912), 56 Sol. Jo. 271.

(*k*) *Vaux v. Henderson* (1806), 1 Jac. & W. 388; *Gittings v. McDermott* (1833), 2 My. & K. 69; *Mounsey v. Blamire* (1828), 4 Russ. 384, *per LEACH*, M.R., at p. 387; compare *Lowndes v. Stone* (1799), 4 Ves. 649 (gift of residue to “next of kin or heir-at-law”); *Re Thompson’s Trusts* (1878), 9 Ch. D. 607 (to “heirs or next of kin”).

(*l*) *Wingfield v. Wingfield* (1878), 9 Ch. D. 658. In *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524, on the other hand, the context showed that the person who was to take the real estate was intended also to take the personal estate.

(*m*) *Low v. Smith* (1856), 2 Jur. (N. S.) 344; *Doody v. Higgins* (1856), 2 K. & J. 729; *Re Gamboa’s Trusts* (1858), 4 K. & J. 756; *Re Philps’ Will* (1869), L. R. 7 Eq. 151; compare *Re Newton’s Trusts* (1867), L. R. 4 Eq. 171 (gift to “heirs and assigns”).

(*n*) *Re Steevens’ Trusts* (1872), L. R. 15 Eq. 110

(*o*) *Lachlan v. Reynolds* (1852), 9 Hare, 796, 798.

(*p*) Such as children (*Loveday v. Hopkins* (1755), Amb. 273; *Wilson v. Vansittart* (1770), Amb. 562; *Symers v. Jobson* (1848), 16 Sim. 267 (“the heirs of her body”); *Bull v. Comberbach* (1858), 25 Beav. 540), or issue (*Speakman v. Speakman* (1850), 8 Hare, 180, 185).

(*q*) *Re Ibbetson, Ibbetson v. Ibbetson* (1903), 88 L. T. 461, *per JOYCE, J.*, at p. 462; *Speakman v. Speakman, supra*; *Wingfield v. Wingfield, supra*. In devises of real estate the word “or” may be changed to “and” if necessary (*Read v. Snell* (1743), 2 Atk. 642, 645; *Wright v. Wright* (1849), 1 Ves. Sen. 409; *Harris v. Davis* (1844), 1 Coll. C. C. 416; *Lachlan v. Reynolds, supra*; *Polley v. Polley* (1861), 29 Beav. 134; *Re Walton’s Estate* (1860), 8 De G. M. & G. 173, where the wills were before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); compare *Adshead v. Willetts* (1861), 29 Beav. 358 (change not made, because there unnecessary); *Re Masterson, Trevanion v. Dumas*, [1902] W. N. 192, C. A. In such cases the first taker takes a fee simple; but the limitation may be substitutional, and may give to the first taker a life interest only; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 165, note (*n*).

(*r*) “If a legacy be given to A. or his heirs, A. if he survives the testator will be entitled to the legacy, but if A. die, the word ‘heirs’ is introduced to prevent a lapse, and therefore the court holds that if the first legatee does not take, the same person will take as would have taken after him, if there had been no lapse, and that the legacy follows the devolution of personal estate” (*Hamilton v. Mills* (1861), 29 Beav. 193, *per ROMILLY, M.R.*, at p. 198; see *Girdlestone v. Doe* (1828), 2 Sim. 225; *Price v. Lockley* (1843), 6 Beav. 180; *Doody v. Higgins* (1852), 9 Hare, Appendix. xxxii.; *Jacobs v. Jacobs* (1853), 16 Beav. 557; *Re Craven* (1857), 23 Beav. 333; *Re Philps’ Will, supra*; *Finlason v. Tatlock* (1870), L. R. 9 Eq. 258); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

## SECT. 5.

## Descriptions of Donees.

gift of personal estate to "the heir" of a named person, the words are *primâ facie* descriptive and not substitutional, and the gift takes effect in favour of the person who is the named person's heir (s).

"Issue."

As a word of limitation.

**1382.** The word "issue," in its usual legal sense, includes descendants of every degree (t). In a devise of real estate to a person "and his issue," especially where at the date of the will he has no issue (u), the word is *primâ facie* a word of limitation (w), and the gift creates an estate tail in the devisee (a). The word is then equivalent to "heirs of the body" (b). Similarly, in a series of limitations by will of real estate, where after a particular estate in any person a remainder is limited to his "issue," the word is *primâ facie* a word of limitation (c), and the rule in *Shelley's Case* applies (d). In both these cases the context of the will may show that the word is one of description and not of limitation. The word is of flexible meaning (e).

As a word of purchase.

In the case of direct gifts to issue (f) as purchasers the word may mean lineal descendants, as is ordinarily its meaning, or children or some particular class of descendants ascertained by reference to some particular time or event (g). The meaning is not

(s) *Hamilton v. Mills* (1861), 29 Beav. 193 (case of a settlement).

(t) *Wythe v. Thurlston* (1748), Amb. 555; S. C., *sub nom. Wythe v. Blackman*, stated in *Davenport v. Hanbury* (1796), 3 Ves. 257, *per ARDEN*, M.R., at p. 258; *Hockley v. Mawbey* (1790), 1 Ves. 143, 150; *Freeman v. Parsley* (1797), 3 Ves. 421; *Leigh v. Norbury* (1807), 13 Ves. 340, 344; *Bernard v. Montague* (1816), 1 Mer. 422, 434; *Head v. Randall* (1843), 2 Y. & C. Ch. Cas. 231, 235; *Hall v. Nalder* (1852), 22 L. J. (CH.) 242; *Ross v. Ross* (1855), 20 Beav. 645, 648; *Rhodes v. Rhodes* (1859), 27 Beav. 413, 416; *Re Corlass* (1875), 1 Ch. D. 460; *Re Brooke, Edyvean v. Archer*, [1903] A. C. 379, 384, P. C. "The word 'issue' is an ambiguous word. In the ordinary parlance of laymen it means children and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children, not grandchildren or great grandchildren. But in the language of lawyers and only in that language it means descendants" (*Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., *per JAMES, L.J.*, at p. 883; compare *Haydon v. Wilshire* (1789), 3 Term Rep. 372, 373: "the word 'issue' is *genus generalissimum*").

(u) The rule in *Wild's Case* (1599), 6 Co. Rep. 16 b; see p. 787, *post*.

(w) *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, 878; see p. 791, *post*. When qualified, however, as in "eldest issue male," the word is *primâ facie* a word of purchase (*Lovelace v. Lovelace* (1685), Cro. Eliz. 40; *Sheridan v. O'Reilly*, [1900] 1 I. R. 386).

(a) *Campbell v. Bouskell* (1859), 27 Beav. 325, 329; *Walsh v. Johnston*, [1899] 1 I. R. 501; *Re Simcoe, Fowler-Simcoe v. Fowler*, [1913] 1 Ch. 552.

(b) *Kavanagh v. Morland* (1853), Kay, 16, 24; *Roddy v. Fitzgerald*, *supra*, at pp. 871, 872; *Re Adams, Adams v. Adams* (1906), 94 L. T. 720, C. A., *per ROMER, L.J.*, at p. 722.

(c) *King v. Mellington* (1672), 1 Vent. 225; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 230, note (a).

(d) As to the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 226 *et seq.*

(e) *M'Gregor v. M'Gregor* (1859), 1 De G. F. & J. 63, *per Lord CAMPBELL, L.C.*, at p. 71; *Re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, C. A.; *per LINDLEY, L.J.*, at p. 418. "Issue" is more flexible than "heirs of the body" (*Kavanagh v. Morland*, *supra*; *Slater v. Dangerfield* (1846), 15 M. & W. 263, 273; *Roddy v. Fitzgerald*, *supra*, at p. 881).

(f) As to gifts over in default of issue, see p. 833, *post*.

(g) *Slater v. Dangerfield* *supra*, at p. 272; *Sandes v. Cooke* (1888), 21



necessarily restricted to children by a context containing a gift to children couched in similar terms (*h*), or by gifts referring to issue as meaning children (*i*).

**1383.** The following are examples of contexts from which the court has inferred that the word "issue" has been used by the testator as meaning "children" (*k*):—

(1) Where the testator in a later part of the will or a codicil speaks of the gift in question as a gift to children (*l*), or otherwise defines the issue taking under the gift as children (*m*);

(2) Where the testator expressly or impliedly limits the word "issue" in other clauses of the same will to mean "children," and the restriction, in the opinion of the court, applies throughout the will (*n*);

(3) Where in an original gift to issue the person whose issue is designated, or in a substitutional gift the first taker, is spoken of as the "parent," "father" or "mother" of the issue (*o*); as, for

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Contexts confining "issue" to children.

The rule in *Sibley v. Perry*.

L. R. Ir. 445, 446. For examples of cases where the usual meaning, namely, all descendants, was adhered to, see *Dodsworth v. Addy* (1842), 11 L. J. (CH.) 382; *Re Jones' Trusts* (1857), 23 Beav. 242.

(*h*) *Waldron v. Boulter* (1856), 22 Beav. 284.

(*i*) For cases where "issue" was used in different passages in different senses, see *Carter v. Bentall* (1839), 2 Beav. 551; *Louis v. Louis* (1863), 9 Jur. (N. S.) 244; *Re Warren's Trusts* (1884), 26 Ch. D. 208; and p. 681, *ante*.

(*k*) See also *Bennett v. Houldsworth*, [1911] W. N. 47. The mere fact that "issue" of a named person is described as "begotten" by him is not sufficient to cut it down to "children" (*Caulfield v. Maguire* (1845), 3 Jo. & Lat. 141, *per* SUGDEN, L.C., at p. 176; *Heydon v. Wilshire* (1789), 3 Term Rep. 372; *Evans v. Jones* (1846), 2 Coll. 516, 523; *Maddock v. Legg* (1858), 25 Beav. 531; but see *Hampson v. Brandwood* (1816), 1 Madd. 381 (male issue, with limitation over to daughters)).

(*l*) *Goldie v. Greaves* (1844), 14 Sim. 348; *Baker v. Bayldon* (1862), 31 Beav. 209; *M'Gregor v. M'Gregor* (1859), 1 De G. F. & J. 63. As to the general rule that the testator makes his will the dictionary showing his meaning, see p. 652, *ante*.

(*m*) *Peel v. Catlow* (1838), 9 Sim. 372 (to issue "in like manner" to previous gift to children); *Farrant v. Nichols* (1846), 9 Beav. 327. So where the gift is to the "issue" in equal shares if more than one, and if only one, the whole "to such one child" (*Bryden v. Willett* (1869), L. R. 7 Eq. 472; *Re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, C. A., *per* LINDLEY, M.R., at p. 419; *Re Hopkins' Trusts* (1878), 9 Ch. D. 131).

(*n*) *Cursham v. Newland* (1838), 4 M. & W. 101; *Ridgeway v. Munkittrick* (1841), 1 Dr. & War. 84; *Edwards v. Edwards* (1849), 12 Beav. 97; *Re Harrison's Estate* (1879), 3 L. R. Ir. 114; *Re Birks, Kenyon v. Birks*, *supra*.

(*o*) This rule is known as the rule in *Sibley v. Perry* (1802), 7 Ves. 522, in which case, however, as explained by JAMES, L.J., in *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., at p. 882, Lord ELDON, L.C., did not intend to lay down any general rule or canon of construction, but was dealing only with the peculiar language of a particular will, and the case is therefore an example of the inference under the second example given in the text, *supra*. The rule is settled, however, by *Pruen v. Osborne* (1840), 11 Sim. 132; *Pope v. Pope* (1851), 14 Beav. 591; *Bradshaw v. Melling* (1853), 19 Beav. 417; *Parsons v. Coke* (1858), 4 Drew. 296; *Smith v. Horsfall* (1858), 25 Beav. 628; *Tatham v. Vernon* (1861), 29 Beav. 604; *Stevenson v. Abingdon* (1862), 31 Beav. 305; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484, 492; *Martin v. Holgate* (1866), L. R. 1 H. L. 175, 184, 186; *Heasman v. Pearse* (1871), 7 Ch. App. 275, 282, 284; *Re Judd's Trusts*, [1884] W. N. 206; *Re Birks, Kenyon v. Birks*, *supra*, where, as LINDLEY, M.R., said, it was not necessary to refer to *Sibley v. Perry*, *supra*, to see that issue there meant



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tions of  
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example, where the gift to the issue is contained in a direction that they shall take the share their parent would have taken if living at the time of distribution, and the reference to the parent is construed as a reference to the first taker. This canon of construction, however, may be controlled by the general effect and scope of the whole will, for example, by the use of the word "issue" in other parts of the will, which may enlarge this construction and restore the word to its original comprehensive meaning (*p*); thus, the court is disinclined to apply this rule where there is a gift over on general failure of the issue (*q*), or where the result of the application of the rule would in certain events be an entire or partial intestacy (*r*).

Reference to  
remoter issue.

(4) Where the testator speaks of the issue of such issue, or uses other phrases showing that he contemplated issue of yet further degrees of remoteness not included in the "issue" in question (*s*).

Reference to  
settlement.

(5) Where the property is directed to be settled on a person and his "issue" (*t*).

Ascertain-  
ment of class.

**1384.** The class of issue is ascertained according to the declared intention of the testator (*u*), and where this is not otherwise shown, according to the ordinary rules, at the testator's death (*w*), letting in issue coming into existence before the period of distribution (*a*), every degree of issue taking concurrently with their descendants. They *primâ facie* take *per capita* (*b*), and as joint tenants (*c*), in the absence of words of severance or other inconsistent context (*d*).

children. The rule applies to settlements *inter vivos* as well as wills (*Barraclough v. Shillito*, [1884] W. N. 158).

(*p*) *Maynard v. Wright* (1858), 26 Beav. 285, *per* ROMILLY, M.R., at p. 289; *Berry v. Fisher*, [1903] 1 I. R. 484, 488; *Re Embury, Page v. Bowyer* (1913), 109 L. T. 511; *Re Johnson, Pitt v. Johnson* (1913), 30 T. L. R. 200, affirmed (1914), 30 T. L. R. 505, C. A.

(*q*) *Ross v. Ross* (1855), 20 Beav. 645, 651; and see *Ralph v. Carrick* (1879), 11 Ch. D. 873, 884, C. A.

(*r*) *Ross v. Ross*, *supra*, at pp. 652, 653; and see *Ralph v. Carrick*, *supra*, *per* JAMES, L.J., at p. 882, instancing a case where a donee's children predeceased him leaving his grandchildren alive. In *Birdsall v. York* (1859), 5 Jur. (N. S.) 1237, where the circumstances were similar, it was not argued that there was an intestacy. In *Smith v. Horsfall* (1858), 25 Beav. 628, ROMILLY, M.R., at p. 630, explained his decision in *Ross v. Ross*, *supra*, that in the latter case issue was confined to the children of the "parent," but that the "parent" might be a grandchild.

(*s*) *Pope v. Pope* (1851), 14 Beav. 591, *per* ROMILLY, M.R., at p. 594; *Fairfield v. Bushell* (1863), 32 Beav. 158.

(*t*) *Thompson v. Simpson* (1841), 1 Dr. & War. 459, 480; *Baker v. Bayldon* (1862), 31 Beav. 209; *Re Dixon's Trusts* (1869), 4 I. R. Eq. 1; *Harris v. Loftus*, [1899] 1 I. R. 491.

(*u*) *Waldron v. Boulter* (1856), 22 Beav. 284 (issue of each grandchild ascertained at his death).

(*w*) See p. 715, *ante*.

(*a*) *Butler v. Ommaney* (1827), 4 Russ. 70; *Clay v. Pennington* (1835), 7 Sim. 370; *Weldon v. Hoyland* (1862), 4 De G. F. & J. 564; *Hobgen v. Neale* (1870), L. R. 11 Eq. 48; *Re Corlass* (1875), 1 Ch. D. 460; *Berry v. Fisher*, [1903] 1 I. R. 484; *Re Taylor's Trusts, Taylor v. Blake*, [1912] 1 I. R. 1.

(*b*) *Davenport v. Hanbury* (1796), 3 Ves. 257; *Re Jones' Trust* (1857), 23 Beav. 242; *Weldon v. Hoyland*, *supra*.

(*c*) *Davenport v. Hanbury*, *supra*.

(*d*) *Weldon v. Hoyland*, *supra*; *Law v. Thorp* (1858), 4 Jur. (N. S.) 447 (with "benefit of survivorship and accruer of surviving shares").

**1385.** Under a gift to “issue male” (*e*) or “male descendants” (*f*) or “male heirs” (*g*) as purchasers, *primâ facie* (*h*) only males claiming as descendants of males, and not of females, can take.

**1386.** “Offspring” similarly extends *primâ facie* to any degree of lineal descendants (*i*), but may be restricted or varied in meaning (*k*).

**1387.** Under a gift to the next of kin (*l*) of any person (*m*), simply and without reference to either intestacy or the Statutes of Distribution (*n*), the donees are considered to be the nearest kindred in blood (*o*), including the half blood (*p*), and not to be the statutory next of kin; and such persons *primâ facie* take as joint tenants. If the will describes the donees by reference to those statutes, either expressly or impliedly (as in the case of a reference to intestacy), the property passes to the statutory next of kin (*q*). In neither

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“Male” issue etc.

“Offspring.”

“Next of kin.”

(*e*) *Lywood v. Kimber* (1860), 29 Beav. 38.

(*f*) *Bernal v. Bernal* (1838), 3 My. & Cr. 559; *Thellusson v. Rendlesham* (Lord), *Thellusson v. Thellusson*, *Hare v. Roberts* (1859), 7 H. L. Cas. 429.

(*g*) *Doe d. Angell v. Angell* (1846), 9 Q. B. 328.

(*h*) For an example where “in the male line” was inconsistent with the donees taking as descendants of males only, see *Sayer v. Bradley* (1856), 5 H. L. Cas. 873 (“nearest of kin in the male line”). In a gift to A. for life and after his death to his issue “in tail male,” daughters may take, the words “in tail male” being a description of the estate taken (*Trevor v. Trevor* (1847), 1 H. L. Cas. 239).

(*i*) *Thompson v. Beasley* (1854), 3 Drew. 7; *Young v. Davies* (1860), 2 Drew. & Sm. 167; *Bradshaw v. Bradshaw*, [1908] 1 I. R. 288.

(*k*) *Lister v. Tidd* (1861), 29 Beav. 618 (restricted to children by a direction to settle; compare p. 754, ante); *Tabuteau v. Nixon* (1899), 15 T. L. R. 485.

(*l*) Compare, generally, the cases as to the construction of settlements, and particularly as to gifts to the next of kin of a married woman as if she had died unmarried, cited in title SETTLEMENTS, Vol. XXV., pp. 581 *et seq.* The same meaning is *primâ facie* attached to descriptions similar to next of kin; see *Harris v. Newton* (1877), 46 L. J. (CH.) 268 (legal or next of kin). In a gift to the next of kin of two persons, the donees are *primâ facie* a class composed of the next of kin of one together with the next of kin of the other (*Re Soper*, *Naylor v. Kettle*, [1912] 2 Ch. 467), but according to the context may be such persons as are common to the two classes of next of kin (*Pycroft v. Gregory* (1829), 4 Russ. 526). As to the effect of the context, see *Williams v. Ashton* (1860), 1 John. & H. 115, 119, 120 (“nearest of kin by heirship”: heir held entitled); *Sayer v. Bradley*, *supra*.

(*m*) See *Robson v. Ibbs* (1837), 6 L. J. (CH.) 213, where the context supplied the want of mention of the *propositus*.

(*n*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*; as to what is sufficient reference to the statutes, see *Harris v. Newton*, *supra*.

(*o*) *Brandon v. Brandon* (1819), 3 Swan. 312 (settlement); *Elmsley v. Young* (1835), 2 My. & K. 780 (settlement); *Withy v. Mangles* (1843), 10 Cl. & Fin. 215, H. L. (settlement), applied to wills in *Avison v. Simpson* (1859), John. 43; *Halton v. Foster* (1868), 3 Ch. App. 505, overruling *Phillips v. Garth* (1790), 3 Bro. C. C. 64, and *Hinckley v. Maclarens* (1832), 1 My. & K. 27. As to next of kin as objects of a power of appointment, however, see *Snow v. Teed* (1870), L. R. 9 Eq. 622.

(*p*) *Cotton v. Searancke* (1815), 1 Madd. 45, explained in *Halton v. Foster*, *supra*; *Brigg v. Brigg* (1885), 33 W. R. 454; *Re Fergusson's Will*, [1902] 1 Ch. 483.

(*q*) *Edwards v. Saloway* (1848), 2 Ph. 625; *Bullock v. Downes* (1860), 9 H. L. Cas. 1; *Nichols v. Haviland* (1855), 1 K. & J. 504; compare title SETTLEMENTS, Vol. XXV., p. 581.

## SECT. 5.

## Description of Donees.

Ascertainment of class.

Ascertainment of class described by reference to Statutes.

case is a wife (*r*) or husband (*s*) *primâ facie* (*t*) included in the term.

**1388.** Whatever may be the time of distribution, where there is a gift to a testator's next of kin, without more, the class *primâ facie* has to be ascertained (*u*) at the testator's death (*w*), and where there is a gift to the next of kin of any other person, the class *primâ facie* has to be ascertained at that person's death if he survived the testator (*x*), and if not at the testator's death (*a*). In a gift to a class of next of kin of the testator, or his nearest relatives, or similar class, living at a future period of distribution, the entire class is ascertained at the testator's death, but those only of the class take who survive the period of distribution (*b*).

Where the gift is to the testator's next of kin entitled by virtue of the Statutes of Distribution, even though they are to be so entitled at some future time (*c*), the class is *primâ facie* ascertained at the testator's death (*d*); the context, however, may require them to be ascertained as if the testator had died at some other period (*e*).

(*r*) *Garrick v. Camden* (Lord), *Patton v. Jones* (1807), 14 Ves. 372, 385; *Lee v. Lee* (1860), 1 Drew. & Sm. 85; *Re Parry, Leak v. Scott*, [1888] W. N. 179; *Re Fitzgerald's Trusts* (1889), 61 L. T. 221 ("next of kin in blood"); *Re Gray's Settlement, Akers v. Sears*, [1896] 2 Ch. 802; and see title SETTLEMENTS, Vol. XXV., p. 581. On the other hand, where the donees are the persons who by virtue of the statute would be entitled to the testator's estate, the widow is included (*Martin v. Glover* (1844), 1 Coll. 269; *Jenkins v. Gower* (1846), 2 Coll. 537).

(*s*) *Milne v. Gilbert, Milne v. Milne, Milne v. Walker* (1852), 2 De G. M. & G. 715, C. A.

(*t*) See *Re Collins' Trust*, [1877] W. N. 87 (widow included, on the context).

(*u*) As to the ascertainment of a class of next of kin on a specified hypothesis, see title SETTLEMENTS, Vol. XXV., p. 582.

(*w*) *Wharton v. Barker* (1858), 4 K. & J. 483, *per* Wood, V.-C., at p. 488; *Seifferth v. Badham* (1846), 9 Beav. 370; *Say v. Creed* (1847), 5 Hare, 580, 587; *Moss v. Dunlop* (1859), 1 De G. & Sm. 490; *Ware v. Rowland* (1848), 2 Ph. 635; *Bird v. Luckie* (1850), 8 Hare, 301, where the sole next of kin took a prior life estate; *Gorbell v. Davison, Gorbell v. Forrest* (1854), 18 Beav. 556 (two of class had prior life interests); *Lee v. Lee, supra* (one had prior interest); *Harrison v. Harrison* (1860), 28 Beav. 21; *Re Ford, Patten v. Sparks* (1895), 72 L. T. 5, C. A.; *Re Maher, Maher v. Toppin*, [1909] 1 L. R. 70, C. A.

(*x*) *Gundry v. Pinniger* (1852), 1 De G. M. & G. 502; *Wharton v. Barker, supra*, at p. 508; and see *Jacobs v. Jacobs* (1853), 16 Beav. 557.

(*a*) *Philps v. Evans* (1850), 4 De G. & Sm. 188; *Wharton v. Barker, supra*, at p. 508; *Re Philps' Will* (1869), L. R. 7 Eq. 151 ("heirs" construed next of kin). For a case of contrary intention, see *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484.

(*b*) *Spink v. Lewis* (1791), 3 Bro. C. C. 355; *Re Nash, Prall v. Bevan* (1894), 71 L. T. 5, C. A., followed in *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278, 288 (next of kin . . . living at the time of the trusts failing).

(*c*) See *Re Winn, Brook v. Whitton, supra*, where PARKER, J., at p. 289, explained that in such cases the ordinary rule which would have ascertained the class at the time referred to is rebutted, because of the necessity for every person who claims under the gift to prove his title by virtue of the statute.

(*d*) *Bullock v. Downes, supra*; *Doe d. Garner v. Lawson* (1803), 3 East, 278; *Markham v. Ivatt* (1855), 20 Beav. 579; *Mortimore v. Mortimore* (1879), 4 App. Cas. 448; *Re Wilson, Wilson v. Batchelor*, [1907] 1 Ch. 450, affirmed, [1907] 2 Ch. 572, C. A.

(*e*) *Wharton v. Barker, supra*; but see S. C., 4 Jur. (N. S.) 553; *Clowes v.*



**1389.** In the case of a gift to next of kin under or according to the Statutes of Distribution, they take as tenants in common in the shares fixed by the statute in cases where either the will in terms refers to the statutory mode of distribution (*f*), or is silent on the subject (*g*); but if, for example, the testator directs that they are to take equally, effect must be given to such direction (*h*).

Where the gift is to next of kin, excluding certain persons, the next of kin are ascertained as if these persons were dead at the time in question, but without any other difference from the above rule (*i*).

**1390.** The mere description of a donee as the holder of an office is not of itself sufficient to raise the inference that the gift is for the benefit of the office and not of the holder personally (*k*), unless the context and circumstances show that the holder for the time being was intended (*l*); but a gift to a person either described as, or known to the testator as, the holder of an office, "or his successors," or a gift to the holder of an office for the time being, is for the benefit of the office or of the association or body in which the office is held (*m*).

**1391.** The primary sense of the word "relations" (*n*) extends to relations of every degree of relationship (*o*), however remote, and where donees are thus described this effect is given to the word wherever it is possible (*p*), as in cases where the gift is a power of selection and appointment among relations (*q*), or is to poor relations by way of perpetual charity (*r*). In general, however, this

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Descriptions of Donees.

Shares in which next of kin take.  
Next of kin excluding certain persons.

Holders of an office.

"Relations."

*Hilliard* (1876), 4 Ch. D. 413; *Re Sturge and Great Western Rail. Co.* (1881), 19 Ch. D. 444; *Re McFee*, *McFee v. Toner* (1910), 103 L. T. 210.

(*f*) *Holloway v. Radcliffe* (1857), 23 Beav. 163 ("as if the same had to be paid under the statute"); *Fielden v. Ashworth* (1875), L. R. 20 Eq. 410, 412 ("as the law directs").

(*g*) A gift to the persons entitled under the statute gives a description not only of the persons, but of their interests (*Martin v. Glover* (1844), 1 Coll. 269, 272).

(*h*) *Re Richards, Davies v. Edwards*, [1910] 2 Ch. 74, *per* SWINFEN EADY, J., at p. 76, following *Mattison v. Tanfield* (1840), 3 Beav. 131, *per* Lord LANGDALE, M.R., at p. 132.

(*i*) *White v. Springett* (1878), 4 Ch. App. 300; *Re Taylor, Taylor v. Ley* (1885), 52 L. T. 839, C. A.; and see *Lee v. Lee* (1860), 1 Drew. & Sm. 85; *Lindsay v. Ellicott* (1876), 46 L. J. (CH.) 878.

(*k*) *Doe d. Phillips v. Aldridge* (1791), 4 Term Rep. 264 *Donnellan v. O'Neill* (1870), 5 L. R. Eq. 523.

(*l*) *Re Corcoran, Corcoran v. O'Cane*, [1913] 1 I. R. 1.

(*m*) *Smart v. Prujean* (1801), 6 Ves. 560, 567; *Thorner v. Wilson* (1855), 3 Drew. 245; S. C. (1858), 4 Drew. 350; *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; *Re Garrard, Gordon v. Craigie*, [1907] 1 Ch. 382; *Re Fowler, Fowler v. Booth* (1914), 30 T. L. R. 632; and see title CHARITIES, Vol. IV., pp. 164, 165.

(*n*) In *Gower v. Mainwaring* (1750), 2 Ves. Sen. 86 ("friends and relations"), and *Re Caplin's Will* (1865), 2 Drew. & Sm. 527 ("relations or friends"), the term "friends" was treated as synonymous with relations, because of the uncertainty on any other construction; see also *Coogan v. Hayden* (1879), 4 L. R. Ir. 585 (heir held entitled), citing *Hensloe's Case* (1600), 9 Co. Rep. 36 b, 39 b.

(*o*) Similarly for the word "kin" (*Re Chapman, Ellick v. Cox* (1883), 49 L. T. 673, 674 ("next male kin" meant next of kin who were males)).

(*p*) *Bennett v. Honeywood* (1772), Amb. 708.

(*q*) *Supple v. Lowson* (1773), Amb. 729.

(*r*) See title CHARITIES, Vol. IV., p. 109.

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Descrip-  
tions of  
Donees.

"Nearest  
relations."

Ascertain-  
ment of class.

"Repre-  
sentatives."

meaning cannot be given to the word in a direct gift to relations, or in a gift to them under a non-exclusive power of distribution, on account of the uncertainty (*s*) in the number of persons designated (*t*); and therefore the court in such a case presumes that the testator intended his next of kin according to the Statutes of Distribution (*u*).

A gift to "nearest relations" is confined to such persons, even where a charitable intention is shown (*w*).

The class of relations is as a rule ascertained as if they were described as next of kin (*a*), and they *primâ facie* take *per capita* (*b*) and as joint tenants (*c*).

**1392.** In a bequest of personal estate to the "representatives" of any person, whether simply or with the added qualification of "legal" or "personal" or "legal personal," the description is taken in its ordinary sense and *primâ facie* designates the executors or administrators of that person (*d*). The term, however, is capable of being interpreted in any sense required by the context (*e*), which

(*s*) As to uncertainty, see p. 678, *ante*.

(*t*) *Brandon v. Brandon* (1819), 3 Swan. 312, 319.

(*u*) *Thomas v. Hole* (1728), Cas. temp. Talb. 251; *Whithorne v. Harris* (1754), 2 Ves. Sen. 527; *Green v. Howard* (1779), 1 Bro. C. C. 31; *Rayner v. Mowbray* (1791), 3 Bro. C. C. 234 (persons "who shall appear to be related to me"); *Devisme v. Mellish* (1800), 5 Ves. 529; *Masters v. Hooper* (1793), 4 Bro. C. C. 207; *Walter v. Maunde* (1815), 19 Ves. 424 (real estate); *Cracklow v. Norie* (1838), 7 L. J. (CH.) 278; *Baker v. Gibson* (1849), 12 Beav. 101; *Re Aspinall's Settlement* (1861), 30 L. J. (CH.) 321; *Re Greenwood's Will* (1861), 31 L. J. (CH.) 119; *Hibbert v. Hibbert* (1873), L. R. 15 Eq. 372 (where an illegitimate relative, described in another gift as if legitimate, was not included); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.* As to gifts by way of a non-exclusive power of distribution, see *Pope v. Whitcombe* (1810), 3 Mer. 689; *Lawlor v. Henderson* (1877), 10 I. R. Eq. 150, 151; as to a gift to the relatives of an illegitimate person, see *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565, 574. Similarly, in a gift implied from a power of selection not exercised (*Harding v. Glyn* (1739), 1 Atk. 469, as to which see *Brown v. Higgs* (1804), 5 Ves. 495, *per ARDEN*, M.R., at pp. 501, 502; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Re Swan, Reid v. Swan*, [1911] 1 I. R. 405, C. A.).

(*w*) *Edge v. Salisbury* (1741), Amb. 70; *Goodinge v. Goodinge* (1749), 1 Ves. Sen. 230; *Smith v. Campbell* (1815), 19 Ves. 400.

(*a*) See p. 756, *ante*; *Pearce v. Vincent* (1836), 2 Keen, 230; *Bishop v. Cappel* (1847), 1 De G. & Sm. 411; *Eagles v. Le Breton* (1873), L. R. 15 Eq. 148; see, however, *Tiffin v. Longman* (1852), 18 Beav. 275.

(*b*) *Thomas v. Hole*, *supra*; *Tiffin v. Longman*, *supra*; for a case of a context to the contrary, see *Fielden v. Ashworth* (1875), L. R. 20 Eq. 410.

(*c*) *Eagles v. Le Breton*, *supra*.

(*d*) *Corbyn v. French* (1799), 4 Ves. 418, 434, 435; *Price v. Strange* (1820), Madd. & G. 159; *Saberton v. Skeets* (1830), 1 Russ. & M. 587; *Hinchcliffe v. Westwood* (1849), 2 De G. & Sm. 216; *Re Crawford's Trusts* (1854), 2 Drew. 230 ("to my cousins german now existing, or their representatives"); *Wyndham's Trusts* (1865), L. R. 1 Eq. 290 (husband, as general administrator, preferred to executor of will); *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269; compare *Re Best's Settlement Trusts* (1874), L. R. 18 Eq. 686 (a case of settlement). The mere appointment of executors, or references to executors and administrators may, but will not necessarily, give a different sense to the words (*Re Ware, Cumberlege v. Cumberlege-Ware*, *supra*, at p. 278; *Walter v. Makin* (1833), 6 Sim. 148; *Walker v. Camden (Marquis)* (1848), 16 Sim. 329; *Alger v. Parrott* (1866), L. R. 3 Eq. 328; *Re Thompson, Machell v. Newman* (1886), 55 L. T. 85; and see *Briggs v. Upton* (1872), 7 Ch. App. 376 (settlement)).

(*e*) *Re Crawford's Trusts*, *supra*, *per* KINDERSLEY, V.-C., at p. 233.

may show that the description means descendants (*f*), or next of kin, according to the Statutes of Distribution (*g*), as in cases where directions are added showing that a division among them is intended (*h*), or where the gift is to the person or his representatives immediately on the death of the testator (*i*), and not after a life estate (*k*), or otherwise where it is shown that the donees were to take beneficially and not in any fiduciary capacity (*l*).

SECT. 5.

Descriptions of Donees.

**1393.** Gifts to the “servants” of the testator or other donees described by their employment (*m*) and not by name, to take as individuals, *primâ facie* refer to persons filling the character at the date of the will, and do not import that the employment and character must continue to the death of the testator (*n*). It may appear, however, that the donees are regarded as a class to be ascertained in accordance with the ordinary rules (*o*), and generally the context of the will may show that persons filling the character at the date of the will (*p*), or at the death of the testator (*q*), or at any other time (*r*), are designated.

“Servants.”

The character of servants admitted to benefit must depend on the

(*f*) *Horsepool v. Watson* (1797), 3 Ves. 383, 384 (“children and their representatives, being issue”); *Styth v. Monro* (1834), 6 Sim. 49 (construed “descendants”); *Atherton v. Crowther*, *Deudon v. De Massals* (1854), 19 Beav. 448; *Re Horner*, *Eagleton v. Horner* (1887), 37 Ch. D. 695, 710, 712; *Re Knowles*, *Rainford v. Knowles* (1888), 59 L. T. 359; *Re Bromley*, *Wilson v. Bromley* (1900), 83 L. T. 315 (“natural representatives”).

(*g*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*; *Holloway v. Radcliffe* (1857), 23 Beav. 163.

(*h*) *Long v. Blackall* (1797), 3 Ves. 486; *Robinson v. Smith* (1833), 6 Sim. 47; *Walker v. Camden (Marquis)* (1848), 16 Sim. 329, doubted in *Re Crawford's Trusts* (1854), 2 Drew. 230, 241.

(*i*) *Booth v. Vicars* (1844), 1 Coll. 6; *Smith v. Palmer* (1849), 7 Hare, 225; *Atherton v. Crowther*, *Deudon v. De Massals*, *supra*, at p. 451.

(*k*) See *Re Crawford's Trusts*, *supra*, per KINDERSLEY, V.-C., at p. 242, explaining *Bridge v. Abbott* (1791), 3 Bro. C. C. 224, and *Cotton v. Cotton* (1839), 2 Beav. 67, and giving the reason for the distinction drawn between the immediate and postponed gifts; *Hinchliffe v. Westwood* (1848), 2 De G. & Sm. 216; *Chapman v. Chapman* (1864), 33 Beav. 556; *Re Turner* (1865), 2 Drew. & Sm. 501; *Re Thompson*, *Machell v. Newman* (1886), 55 L. T. 85.

(*l*) *King v. Cleaveland* (1859), 4 De G. & J. 477, 481.

(*m*) For a gift to “clerks,” see *Re Jones*, *Williams v. A.-G.* (1912), 106 L. T. 941, C. A.

(*n*) *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290, per KNIGHT BRUCE, V.-C., at p. 299; *Re Miller*, *Galloway v. Miller* (1913), 135 L. T. Jo. 10. In such a case the fact that the servant has left the testator's service before his death does not affect the gift (*ibid.*). For the similar rule with regard to descriptions generally, see p. 714, *ante*. The presumption is that legacies to servants are in satisfaction of wages due, if any (*Richardson v. Greese* (1744), 3 Atk. 65; *Ellard v. Phelan*, [1914] 1 I. R. 76).

(*o*) *Re Marcus*, *Marcus v. Marcus* (1887), 57 L. T. 399, 400.

(*p*) *Parker v. Marchant*, *supra*, distinguished in *Re Marcus*, *Marcus v. Marcus*, *supra*, on the ground of a preceding gift to three named persons who were servants at the date of the codicil; *Jones v. Henley* (1685), 2 Rep. Ch. 162 [361] (where the gift was construed to be to servants at the date of the will who continued as such until the death of the testator).

(*q*) *Re Marcus*, *Marcus v. Marcus*, *supra*; *Re Bell*, *Wright v. Scrivener*, [1914] W. N. 89.

(*r*) *Re Sharland*, *Kemp v. Rozey*, [1896] 1 Ch. 517 a, C. A.; *Re Miller*, *Galloway v. Miller*, *supra*.



SECT. 5.  
Descriptions of  
Donees.

Particular  
descriptions  
of servants.

Gift of a  
year's wages  
to servants.

context and the circumstances (s). Thus, "servants living with me at the time of my death" or "servants in my service at the time of my death" are not confined to persons actually living in the same house with the testator, but, in the ordinary sense of the words, include persons who are wholly in his service and not free to serve others (t). In the case of such a gift a servant who before the testator's death leaves his service, either voluntarily (u) or even on a wrongful dismissal (a), is not entitled to share, though a temporary absence while the relationship of service continues is immaterial (b).

"Domestic" or "household" servants are as a rule restricted to indoor servants (c).

**1394.** Where a testator gives to his servants, generally, one or more years' wages, he *prima facie* is understood to mean that the gift is intended for servants whom he has hired at yearly wages; the nature of the gift explains the persons for whom it is intended (d). The mere fact of splitting up a year's remuneration into weekly payments does not, however, exclude a servant from such a legacy (e); and this presumption has no operation where the context of the will

(s) In *Sleech v. Thorington* (1754), 2 Ves. Sen. 560, 564, a gift to "the two servants that shall live with me at the time of my death" was held to include a third taken into service afterwards, the enumeration being rejected (see pp. 742, 743, *ante*). An annuity to a servant so long as she continues in the service of a person, who, in fact, predeceases the testator, may take effect as a life annuity (*Burchett v. Woodward* (1823), Turn. & R. 442).

(t) *Blackwell v. Pennant* (1852), 9 Hare, 551, *per* TURNER, V.-C., at p. 553, following *Townshend v. Windham and Robinson* (1706), 2 Vern. 546, and *Howard v. Wilson* (1832), 4 Hag. Ecc. 107; see also *Chilcott v. Bromley* (1806), 12 Ves. 114 (coachman provided by jobmaster excluded); *Bulling v. Ellice* (1845), 9 Jur. 936 (salaried farm bailiff included); *Thrupp v. Collett* (No. 2) (1858), 26 Beav. 147 (servants living off the premises included; but a boy not continuously employed and (*ibid.*, *per* ROMILLY, M.R., at p. 151) a charwoman excluded); *Armstrong v. Clavering* (1859), 27 Beav. 226 (land agent and house steward devoting unemployed time to agency for other landowners included); *Re Lawson, Wardley v. Bringlee*, [1914] 1 Ch. 682 (male nurse).

(u) *Re Serres's Estate, Venes v. Marriott* (1862), 8 Jur. (N. S.) 882; *Re Benyon, Benyon v. Grieve* (1884), 51 L. T. 116.

(a) *Darlow v. Edwards* (1862), 1 H. & C. 547, Ex. Ch.; *Re Hartley's Trusts* (1878), 47 L. J. (CH.) 610 (dismissal by order in lunacy breaking up the establishment of the testatrix).

(b) *Herbert v. Reid* (1810), 16 Ves. 481, where Lord ELDON, L.C., discussing evidence of the servant leaving service, said, at p. 489, that the master must explain whether he sent her from the house as putting an end to the relation entirely, or only suspending her services; *Re Lawson, Wardley v. Bringlee*, *supra*.

(c) *Ogle v. Morgan* (1852), 1 De G. M. & G. 359 (indoor servants not receiving board wages), followed in *Vaughan v. Booth* (1852), 16 Jur. 808, and *Re Drax, Savile v. Yeatman* (1887), 57 L. T. 475; *Re Ogilby, Cochrane v. Ogilby*, [1903] 1 I. R. 525; *Re Lawson, Wardley v. Bringlee*, *supra*.

(d) *Blackwell v. Pennant*, *supra*, *per* TURNER, V.-C., at p. 554, followed in *Breslin v. Waldron* (1855), 4 I. Ch. R. 333 ("the amount of a year's wages"), and approved in *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1, C. A. In *Booth v. Dean* (1833), 1 My. & K. 560, the gift was construed to mean family servants usually hired by the year. As to workmen, compare *Re Macneil, Ex parte Grellier* (1831), Mont. 264; *Re Streather, Ex parte Crawford* (1831), Mont. 270 (both cases under the Bankruptcy Acts).

(e) *Ogle v. Morgan*, *supra*, *per* Lord TRURO, L.C., at p. 360.

shows that the reference to the year is introduced merely to fix the amount of the legacy (*f*).

**1395.** Where the donee is described as the wife of a person, and that person is married at the date of the will, then, in the absence of a context to the contrary, the wife existing at the date of the will is *primâ facie* intended to take, and not any subsequent wife (*g*); the fact that the interest conferred is only during widowhood, after a life estate to the husband (*h*), or that it is expressed to be given for the support of the wife and her husband and his children (*i*), does not of itself show any contrary intention. If the context shows that intention, or according to the circumstances, the description of "wife" may include a subsequent wife (*k*), a person not married to the testator or other person whose wife she is said to be (*l*), or an affianced wife (*m*).

Similar rules apply to the description "husband" (*n*).

**1396.** If the gift is to the wife, who is accurately so described, expressly "during widowhood," the latter words form a condition as to the beginning and ending of her interest, so that the effect of a subsequent divorce before the gift takes effect is that she is

SECT. 5.  
Descriptions of Donees.

"Wife."

"Husband."

To wife during "widowhood."

(*f*) *Re Sheffield (Earl)*, *Ryde v. Bristow*, [1911] 2 Ch. 267, C. A.

(*g*) *Garratt v. Niblock* (1830), 1 Russ. & M. 629; *Re Drew, Drew v. Drew*, [1899] 1 Ch. 336, per STIRLING, J., at p. 339, followed in *Re Coley, Hollinshead v. Coley*, [1903] 2 Ch. 102, 104, 109, C. A.; compare *Re Hancock, Malcolm v. Burford-Hancock*, [1896] 2 Ch. 173, C. A. (settlement). As to a gift to the "widow" of any person, see, on the other hand, *Re Lory* (1891), 7 T. L. R. 419.

(*h*) *Re Coley, Hollinshead v. Coley*, *supra*, per KEKEWICH, J., at p. 104; and see the cases cited in note (*i*), *infra*.

(*i*) *Boreham v. Bignall* (1850), 8 Hare, 131, followed in *Re Burrow's Trusts* (1864), 10 L. T. 184, and *Firth v. Fielden* (1874), 22 W. R. 622, but not followed in *Re Lyne's Trusts* (1869), L. R. 8 Eq. 65, which case, though followed in *Re Lory*, *supra*, has been disapproved in *Re Griffiths' Policy*, [1903] 1 Ch. 739; *Re Coley, Hollinshead v. Coley*, *supra*.

(*k*) *Longworth v. Bellamy* (1871), 40 L. J. (CH.) 513; *Re Drew, Drew v. Drew*, *supra* (in both cases a discretionary trust, after a determinable life interest, for the benefit of the donee, his wife and children, was relied upon as excluding the rule); *Peppin v. Bickford* (1797), 3 Ves. 570 (person not married until after death of testator). In such a case, *primâ facie* no one can take who is not at the death of the named person in the position of his legal wife, and a divorce disentitles her (*Re Morrieson, Hitchins v. Morrieson* (1888), 40 Ch. D. 30, dissenting from *Bullmore v. Winter* (1883), 22 Ch. D. 619, which, however, was decided on the particular context, but the former case has been criticised; see *Lavender v. Rosenheim* (1909), 110 Maryland Reports, 150, 158, 159).

(*l*) In the following cases the circumstances showed that a mistress or partner in an invalid marriage was denoted by the term "wife": *Re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685, C. A.; *Giles v. Giles, Penfold v. Penfold* (1836), 1 Keen, 685; *Doe d. Gains v. Rouse* (1848), 5 C. B. 422 (in which cases the name of the so-called wife was added); *Pratt v. Mathew* (1856), 22 Beav. 328, 337; *Re Petts* (1859), 27 Beav. 576; *Turner v. Brittain* (1863), 3 New Rep. 21; *Anderson v. Berkley*, [1902] 1 Ch. 936; *Re Wagstaff, Wagstaff v. Jalland*, [1908] 1 Ch. 162, C. A.; *Re Hammond, Burniston v. White*, [1911] 2 Ch. 342.

(*m*) *Schloss v. Stiebel* (1833), 6 Sim. 1; *Re Brown, Golding v. Brady* (1910), 26 T. L. R. 257.

(*n*) *Franks v. Brooker* (1860), 27 Beav. 637; *Radford v. Willis* (1872), 7 Ch. App. 7. In *Re Bryan's Trust* (1851), 2 Sim. (N. S.) 103, the context referred to a named husband. In *Nash v. Allen* (1889), 42 Ch. D. 54, by the context the description meant "husband surviving her."

SECT. 5.  
Descriptions of  
Donees.

disentitled to the gift, as she does not then become a widow (*o*); if she is not accurately so described, the words may be read "until death or remarriage" (*p*).

SECT. 6.—Quantity of Interest Given.

SUB-SECT. 1.—In General.

No presumption as to quantity of interest.

**1397.** A testator gives arbitrarily such estate as he thinks fit, consistently with law, and, apart from the construction of the words of the whole will, there is no presumption that he means one quantity of interest rather than another; the subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given, construed according to the ordinary general rules (*q*).

Absolute interest cut down.

Thus, an interest apparently an estate of inheritance in real estate (*r*) or an absolute interest in personal estate may on the context of the whole will be cut down to a life interest (*s*), or made subject to defeasance (*t*); or a life interest may be extended to an absolute interest (*u*), or may be reduced by the context to an estate until remarriage or other event (*v*).

Clear gift not cut down.

It is a settled rule of construction that if there is a clear gift it is not to be cut down by anything subsequent in the will which does not with reasonable certainty indicate the intention of the testator to cut it down (*a*). This rule does not mean, however, that the court

(*o*) *Re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685, C. A.; *Re Kettlewell, Jones v. Kettlewell* (1908), 98 L. T. 23.

(*p*) *Re Wagstaff, Wagstaff v. Jalland*, [1908] 1 Ch. 162, C. A.; *Re Hammond, Burniston v. White*, [1911] 2 Ch. 342.

(*q*) *Blackburn v. Stables* (1814), 2 Ves. & B. 367, per GRANT, M.R., at p. 370; *Doe d. Brodbelt v. Thomson* (1858), 12 Moo. P. C. C. 116, 127; *Coward v. Larkman* (1888), 60 L. T. 1, 2, H. L.

(*r*) *Goodtitle d. Cross v. Wodhull* (1745), Willes, 592.

(*s*) *Sherratt v. Bentley* (1834), 2 My. & K. 149; *Joslin v. Hammond* (1834), 3 My. & K. 110; *Hayes v. Hayes* (1836), 1 Keen, 97; *Morrall v. Sutton* (1842), 5 Beav. 100; *Lonsdale (Earl) v. Berchtoldt (Countess)* (1854), Kay, 646; *Johnston v. Antrobus* (1856), 21 Beav. 556; *Re Brooks' Will* (1865), 2 Drew. & Sm. 362; *Re Bagshawe's Trusts* (1877), 25 W. R. 659; *Re Houghton, Houghton v. Brown* (1884), 50 L. T. 529; *Re Russell* (1885), 52 L. T. 559; *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, 942; *In the Estate of Lupton*, [1905] P. 321; *Shields v. Shields*, [1910] 1 I. R. 116. A mere gift over on the death of the donee in any contingent circumstances is not as a rule such a context (*Watkins v. Weston* (1863), 3 De G. J. & Sm. 434; *Re Bourke's Trusts* (1891), 27 L. R. Ir. 573; *Parnell v. Boyd*, [1896] 2 I. R. 571; and see *Re Monck (Lady), Monck v. Croker*, [1900] 1 I. R. 56).

(*t*) *Bird v. Webster* (1853), 1 Drew. 338.

(*u*) As to gifts of personal estate to a person for life and after his death to his executors, see title PERSONAL PROPERTY, Vol. XXII., pp. 414, 415; as to such gifts with an intervening general power of appointment, see title POWERS, Vol. XXIII., p. 8; as to unlimited gifts of income being gifts of capital, see p. 697, ante.

(*v*) *Meeds v. Wood* (1854), 19 Beav. 215, 222; and see *Lancaster v. Varly* (1826), 5 L. J. (o. s.) 41. Vice versa an estate expressly until remarriage may be for life or other larger period (*Doe d. Westminster (Dean and Chapter) v. Freeman* (1786), 2 Chit. 498; *Re Cabburn, Gage v. Rutland* (1882), 46 L. T. 848).

(*a*) *Thornhill v. Hall* (1834), 2 Cl. & Fin. 22, 36, H. L.; *Featherston v. Featherston* (1835), 3 Cl. & Fin. 67, 73, 75, H. L.; *Home v. Pillans* (1833), 2 My. & K. 15, 25, approved in *Abbott v. Middleton, Ricketts v. Carpenter*



is to institute a comparison between the two clauses in question as to lucidity (*b*). Thus, where personal estate is given in terms which confer an absolute estate to a named donee, and then further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail (*c*).

SECT. 6.  
Quantity of  
Interest  
Given.

SUB-SECT. 2.—*Presumption in Favour of the Donee.*

**1398.** If an intention of bounty towards a particular donee is apparent on the face of the will, but the will is ambiguous as to the manner in which the gift is to take effect with regard to the property given or the interest created therein, the court leans to that construction of the gift which is most favourable to the donee (*d*)

Presumption  
in favour of  
donee.

(1858), 7 H. L. Cas. 68, 84; *Randfield v. Randfield* (1860), 8 H. L. Cas. 225, 235, 238; *Ley v. Ley* (1841), 2 Man. & G. 780; *Peppercorn v. Peacock* (1841), 3 Man. & G. 356; *Kerr v. Clinton (Baroness)* (1869), L. R. 8 Eq. 462, 465; *Crozier v. Crozier* (1873), L. R. 15 Eq. 282; *Re Jones, Richards v. Jones*, [1898] 1 Ch. 438, 441; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200, 204; *Re Freeman, Hope v. Freeman*, [1910] 1 Ch. 681, 691, C. A. The principle applies not only where the question is one of the revocation of the legacy, but as between one donee and another person claiming to be donee under the same will (*Re Freeman, Hope v. Freeman, supra*, at p. 687). As to the cases of failure of a direction to settle, where there is an absolute gift in the first instance, see p. 674, *ante*.

(*b*) *Randfield v. Randfield, supra*, per Lord CAMPBELL, at p. 235. The rule, however, has frequently been stated as requiring the subsequent clause to be "equally" clear with the first; for example, as meaning that words which cut down a gift clearly given should be as clear as the words which confer it; see *Doe d. Hearle v. Hicks* (1831), 8 Bing. 475, H. L.; *Kiver v. Oldfield* (1859), 4 De G. & J. 30, 37; *Leslie v. Rother (Earl)*, [1894] 2 Ch. 499, 516, C. A.

(*c*) *Hoare v. Byng* (1844), 10 Cl. & Fin. 508, H. L. (to B. "and afterwards" to others); *Re Percy, Percy v. Percy* (1883), 24 Ch. D. 616 ("afterwards"), followed in *Hyndman v. Hyndman*, [1895] 1 I. R. 179 ("at their death"). It is otherwise where the interests are such that the interests other than the last can be treated as successive life interests (*Lonsdale (Earl) v. Bercholdt (Countess)* (1854), Kay, 646 ("remainder to B., remainder to C.")). As to gifts with power of disposal, see p. 770, *post*.

(*d*) Bac. Abr., tit. Wills and Testaments (G) (7th ed., p. 483). "Being a grant, a devise must be taken most strongly against the grantor" (*Cooper v. Woolfitt* (1857), 2 H. & N. 122, per POLLOCK, C.B., at p. 125). As to the similar rule in case of deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 440, 441. As to rights of selection given to the donee, see p. 531, *ante*. As to a devise of an option of purchase of the testator's land at a fixed price, see p. 529, *ante*. "When any specific thing is given it must be in general understood that the devisee is meant to take it in its integrity," and without derogation (*Conron v. Conron* (1858), 7 H. L. Cas. 168, 180, 190); the presumption is "against an intention to charge land specifically devised, and a contrary intention is not shown by a mere charge on all the testator's land (*Spong v. Spong* (1829), 1 Dow & Cl. 365, H. L.), but may be shown by a sufficient context (*Bank of Ireland v. McCarthy*, [1898] A. C. 181, 185). Similarly, in the case of a devise of specific real estate forming part of the assets of the testator's partnership, the devisee *primâ facie* takes free from the liability to contribute to the partnership debts as between the beneficiaries claiming under the will in a case where the other partnership property is more than enough to clear the partnership debts (*Re Holland, Brettell v. Holland*, [1907] 2 Ch. 88); but this does not affect the adjustment of rights as between the partners themselves, even where the surviving partner is the devisee (*Farquhar v. Hadden* (1871), 7 Ch. App. 1). Again, where a doubt arises upon what property a charge of debts is to operate, the court inclines to a construction which gives the

SECT. 6. in the absence of all other means of ascertaining the intention (e).  
**Quantity of Interest Given.**

What are words of limitation.

SUB-SECT. 3.—*Gifts with Words of Limitation.*

**1399.** The question whether words are words of limitation or not is equivalent to the question whether they were used by the testator for the purpose of describing the quantity of interest which the testator intended the donee to take (*f*). The technical words of limitation, which are necessary in some instruments (*g*), are not necessary in a will (*h*) for creating either legal estates of inheritance in real estate or equitable interests therein (*i*).

Devise to a person "and his heirs."

**1400.** Although a devise to a person and his heirs usually gives a fee simple, the context may show that by "heirs" was meant "heirs of the body" (*k*), so that an estate tail only is created. For example, a devise over on the donee's death without heirs of his body (*l*) or without issue indefinitely (*m*) has the effect of cutting down the fee simple to an estate tail. A devise over on default of "heirs" has this effect if the devisee over is the right heir of the

creditors a charge on the larger amount of property (*Noel v. Weston* (1813), 2 Ves. & B. 269, 274 ; and compare *Re Fitzgerald's Settlement, Fitzgerald v. White* (1887), 37 Ch. D. 18 (trust in a settlement for paying mortgagees out of accumulations of rents)). As to cases where a particular motive, or mode of benefit to the donee, is expressed, see p. 777, *post*. It has been suggested that the rule of construction in favour of the donee may be especially applicable in cases of wills made for valuable consideration (*Underhill and Strahan, Interpretation of Wills and Settlements*, 2nd ed., pp. 50, 51).

(e) There is thus no room for the application of the rule where the ordinary principles of construction as to giving effect to every word (*Patching v. Dubbins* (1853), Kay, 1, *per* WOOD, V.-C., at pp. 13, 14), and as to giving their ordinary meaning to the words (*Taylor v. St. Helen's Corporation* (1877), 6 Ch. D. 264, *per* JESSEL, M.R., at p. 270), sufficiently indicate the intention ; see pp. 655 *et seq.*, *ante*.

(f) *Harvey v. Towell* (1847), 7 Hare, 231, 234. Such words are descriptions of the interest taken by the donee, made by reference to the rights of transmission of the estate on death. For descriptions of the interest taken by reference to other rights, see the text, pp. 770 *et seq.*, *post*.

(g) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 165, 244 ; Co. Litt. 9 b.

(h) In a will "executor" is as good as "heir" as a word of limitation to pass the fee simple in real estate (*Rose d. Vere v. Hill* (1766), 3 Burr. 1881, 1885 (to survivors "and their representatives") ; *Stein v. Ritherdon* (1868), 37 L. J. (CH.) 369, 371).

(i) See titles REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 166 ; EQUIT, Vol. XIII., pp. 94, 95 ; and p. 526, *ante*.

(k) Co. Litt. 21 b ; *Cowper v. Scott* (1731), 3 P. Wms. 119, *per* JEKYLL, M.R., at p. 122 ; *James v. Hay* (1792), 4 Term Rep. 605 ; *Doe d. Jearrad v. Bannister* (1840), 10 L. J. (EX.) 33 ; *Biddulph v. Lees* (1859), 28 L. J. (Q. B.) 211, 213, Ex. Ch. (clause showing that there is some ulterior estate to be taken under the will by way of remainder) ; *Re Thompson, Ex parte Thompson* (1864), 16 I. Ch. R. 228, C. A. ("always to go in the male line") ; *O'Hanlon v. Unthank* (1872), 7 I. R. Eq. 68 ("heirs being issue"). As to the construction in certain cases of successive gifts to each of a number of persons "and his heirs" so as to create successive estates tail, see p. 673, *ante*.

(l) *Wallop v. Darby* (1612), Yelv. 209 ; *Jenkins v. Herries* (1819), 4 Madd. 67 ; S. C., *sub nom. Jenkins v. Hughes* (1860), 8 H. L. Cas. 571 ; and see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 245.

(m) See p. 850, *post*.



testator and the first devisee is the testator's child (*n*), or if the devisee over is a person who is capable of being a collateral heir of the first devisee (*o*), or if the event on which the gift over is made necessarily depends on the existence of a collateral heir to the first devisee on such first devisee's death (*p*), but not in other cases (*q*). A direction that the donee is made the testator's heir (*r*), or other expressions (*s*) indicating an intention that the donee shall be recognised as filling the character which would entitle him by law to the whole of the testator's real estate (*t*) in a suitable context (*u*), may give the donee an estate in fee simple or other inheritable estate.

A devise by an owner in fee simple to the devisee and his "heirs male," or to him and his "heirs female" (*v*) or to him and his "heirs

SECT. 6.  
Quantity of  
Interest  
Given.

Devise to a  
person "and  
his heirs  
male."

(*n*) *Nottingham v. Jennings* (1700), 1 P. Wms. 23 (see S. C., 1 Ld. Raym. 568, but compare S. C., Willes, 166, n.); *Fearne, Contingent Remainders*, 10th ed., p. 467.

(*o*) *Allen v. Spendlove* (1673), 2 Eq. Cas. Abr. 306; *Parker v. Thacker* (1682), 3 Lev. 70; *Tyte v. Willis* (1733), Cas. temp. Talb. 1; *Pickering v. Towers* (1758), Amb. 363; *Morgan v. Griffiths* (1775), 1 Cowp. 234; *Doe d. Bean v. Halley* (1798), 8 Term Rep. 5, 10; *Doe d. Hatch v. Bluck* (1816), 6 Taunt. 485; *Simpson v. Ashworth* (1843), 6 Beav. 412; *Hancock v. Clavey* (1871), 25 L. T. 323; *Fearne, Contingent Remainders* (ed. Butler), p. 466; *Ernst v. Zwicker* (1897), 27 Canada Supreme Court Reports, 594; *Re McDonald* (1903), 6 Ontario Law Reports, 478. The reason is that it is impossible for the first devisee to die without an heir while the remainderman or his issue continue (*Tyte v. Willis, supra*). In *Harris v. Davis* (1844), 1 Coll. 416, 423, the rule was extended to a case where the devisees over were the "survivors" (construed "others") of a number of persons, some of whom were, but all were not, capable of being collateral heirs. The rule applies to a settlement *inter vivos* (*Re Smith's Estate* (1891), 27 L. R. Ir. 121, 126, following *Doe d. Littledale v. Smeddle* (1818), 2 B. & Ald. 126).

(*p*) *Re Waugh, Waugh v. Cripps*, [1903] 1 Ch. 744, 747.

(*q*) *Webb v. Hearing* (1616), Cro. Jac. 415, 416; *Crumble v. Jones* (1709), Willes, 167, n. (the right heirs of donee's father, who was alive); *A.-G. v. Gill* (1726), 2 P. Wms. 369 (devise over to a charity); *Preston d. Eagle v. Funnell* (1739), Willes, 164 (testator's nearest of kindred, who were not necessarily capable of inheriting from the donee, his son); *Tilburgh v. Barbut* (1748), 1 Ves. Sen. 89 (first devisee's half-brother; see now Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), and title DESCENT AND DISTRIBUTION, Vol. XI., p. 11).

(*r*) *Spark v. Purnell* (1614), Hob. 75; *Tayler v. Web (or Webb)* (1651), Sty. 301, 307, 319; compare *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, where the context showed that the "heir" took an estate tail; *Beauclerk v. Dormer* (1748), 2 Atk. 308.

(*s*) As, for instance, where the donee is made the testator's "executor" as to a freehold (*Doe d. Gillard v. Gillard* (1822), 5 B. & Ald. 785; *Doe d. Hickman v. Haslewood* (1837), 6 Ad. & El. 167; *Doe d. Pratt v. Pratt* (1837), 6 Ad. & El. 180; *Murphy v. Donnelly* (1870), 4 I. R. Eq. 111, 115; see also *Clements v. Cassye* (1601), Noy, 48; *Shaw v. Bull* (1701), 2 Eq. Cas. Abr. 320; *Piggot v. Penrice* (1717), Prec. Ch. 471 (cases where the gift was held restricted to lands taken as executor)). As to gifts of real estate to a person and his "executors" etc., see note (*h*), p. 764, *ante*. As to the appointment of a residuary legatee, see p. 712, *ante*.

(*t*) *Parker v. Nickson* (1863), 1 De G. J. & Sm. 177, 183.

(*u*) For examples of cases where the context was to the contrary, see *Shelton v. Watson* (1849), 13 Jur. 203 (direction for settlement); *Stratford v. Powell* (1807), 1 Ball & B. 1 ("sole heiress for life"). The word "inherit" may be used in the sense of "take in succession" to the last taker (*Stratford v. Powell, supra*).

(*v*) Co. Litt. 27 a; *Anon.* (1534), Y. B. 27 Hen. 8, 27, pl. 11; *Baker v.*



SECT. 6.  
Quantity of  
Interest  
Given.

Other words  
capable of  
being words  
of limitation.

lawfully begotten" (*w*), creates an estate in fee tail special (male or female) or general, respectively, in the devisee.

**1401.** Many words descriptive of descendants are capable in a will of being words of limitation in respect of both real and personal estate. The words "first and every other son" or "children" may be taken as words of limitation where it is necessary to give them that construction in order to effectuate the intention of the testator (*x*), though ordinarily speaking they are words of purchase (*a*); and similarly in the case of the words "son," "eldest

*Wall* (1697), 1 Ld. Raym. 185; *Blaxton v. Stone* (1687), 3 Mod. Rep. 123; *Ossulston's (Lord) Case* (1709), 3 Salk. 336; *Doe d. Lindsay (Earl) v. Colyear* (1809), 11 East, 548; *Doe d. Tremewen v. Permewen* (1840), 11 Ad. & El. 431, 436 (to A. and his heir male living to attain twenty-one); *Doe d. Angell v. Angell* (1846), 9 Q. B. 358; *Good v. Good* (1857), 7 E. & B. 295, *per* Lord CAMPBELL, C.J., at p. 300; and compare *Tufnell v. Borrell* (1875), L. R. 20 Eq. 194; *Crumpe v. Crumpe*, [1900] A. C. 127, where it was so assumed. It is otherwise in a non-testamentary instrument (Littleton's Tenures, s. 31; *Anon.* (1534), Y. B. 27 Hen. 8, 27, pl. 11).

(*w*) *Co. Litt* 20 b; *Nanfan v. Legh* (1816), 7 Taunt. 85; *Good v. Good*, *supra*, *per* Lord CAMPBELL, C.J., at p. 300; and see *Beresford's Case* (1608), 7 Co. Rep. 41 a. It is otherwise in a non-testamentary instrument (*Dormer's Case* (*Abraham v. Twigg*) (1596), Moore (K. B.), 424, cited in *Beresford's Case*, *supra*, at p. 41 b). In a devise to A. and his "lawful heirs," the word "lawful," *primâ facie*, does not restrict the sense of the words (*Mathews v. Gardiner* (1853), 17 Beav. 254, 257; and see *Simpson v. Ashworth* (1843), 6 Beav. 412, 416).

(*x*) Thus, such a gift may be explained by a subsequent gift over on default of issue generally (*Wight v. Leigh* (1809), 15 Ves. 564; *Herbert v. Blunden* (1837), 1 Dr. & Wal. 78; *Re Childe*, [1883] W. N. 48, explained in *Re Pennefather*, *Savile v. Savile*, [1896] 1 I. R. 249, 262), or even by a gift over on default of some particular kind of issue, or of issue restricted in some manner (*Foord v. Foord* (1730), 3 Bro. Parl. Cas. 124 (without sons); *Wylde v. Lewis* (1738), 1 Atk. 432, 434; *Robinson v. Hicks* (1758), 3 Bro. Parl. Cas. 180 (without such issue); *Doe d. Jones v. Davies* (1832), 4 B. & Ad. 43; *Lewis v. Puxley* (1847), 16 M. & W. 733). Accordingly, a limitation to a father for life, and after his death to his "children," where on the construction of the will in question this word is a collective name for all the line of descent, creates an estate tail in the father (*Anon.* (1563), 1 And. 43; *Hodges v. Middleton* (1780), 2 Doug. (K. B.) 431, which case, however, is said (*Broadhurst v. Morris* (1831), 2 B. & Ad. 1, *per* PRESTON, *arguendo*, at p. 10) to have been overruled by an unreported case of *Monck v. Commissioners of Woods and Forests*; *Voller v. Carter* (1854), 4 E. & B. 173, followed in *Coles v. Witt* (1856), 2 Jur. (N. S.) 1226; *Bowen v. Lewis* (1884), 9 App. Cas. 890; *Re Pennefather*, *Savile v. Savile*, *supra*, at p. 255; compare the rule in *Wild's Case* (1599), 6 Co. Rep. 16 b; p. 787, *post*; as to the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 226 *et seq.*). It appears, however, that, except in certain cases (see pp. 787 *et seq.*, *post*), the authorities do not lay down any canon of construction to guide the court as to when such words are words of limitation (*East v. Twyford* (1851), 9 Hare, 713, *per* TURNER, V.-C., at p. 730, affirmed (1853), 4 H. L. Cas. 517); in all these cases the intention of the testator as gathered from the whole will must fix the meaning (*Mandeville v. Carrick* (1795), 3 Ridg. Parl. Cas. 352, 365).

(*a*) *Doe d. Phipps v. Mulgrave (Lord)* (1793), 5 Term Rep. 320, *per* Lord KENYON, C.J., at p. 323, adopted in *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613, *per* Lord CAMPBELL, C.J., at p. 624. See, accordingly, *Doe d. Burrin v. Charlton* (1840), 1 Man. & G. 429; *Malcolm v. Malcolm* (1856), 21 Beav. 223; *Bennett v. Bennett* (1864), 2 Drew. & Sm. 266; *Re Bishop and Richardson's Contract*, [1899] 1 I. R. 71.

son" (*b*), "eldest male issue" (*c*), or "family" (*d*). The words "issue" (*e*), "descendants" (*f*), and "posterity" (*g*) are more easily susceptible of such a meaning. In the case of such words, where they include not only persons who are heirs by lineal descent, but persons who can only be collateral heirs, the estate is a fee simple; where they only comprise persons who are heirs by lineal descent, the estate is an estate tail (*h*), the stock of descent being chosen so as to include all the members of the family intended to take (*i*).

**1402.** A word (such as the words "issue" or "heirs of the body") capable of describing at once a donee and persons taking an estate tail by way of inheritance, if the context requires it (*j*), may be at one and the same time a word of description, pointing out who is to be the first taker, and a word of limitation, prescribing what estate such first taker is to have; the gift is construed in such cases as creating such an estate in the first taker as will descend if allowed to do so to the whole series of persons who successively answer the description (*k*).

SECT. 6.  
Quantity of  
Interest  
Given.

Words at  
same time  
descriptive  
and of  
limitation.

(*b*) *Bifield's Case*, cited in *King v. Melling* (1690), 1 Vent. 225, *per* Lord HALE, at p. 231; *Sonday's Case* (1611), 9 Co. Rep. 127 b; *Robinson v. Robinson* (1756), 1 Burr. 38, affirmed, *sub nom. Robinson v. Hicks* (1758), 3 Bro. Parl. Cas. 180; *Lewis v. Puxley* (1847), 16 M. & W. 733; *Mellish v. Mellish* (1824), 2 B. & C. 520 (property "to go to daughter C. as follows: if she had a son, to that son"; C. took estate in tail male); *Forsbrook v. Forsbrook* (1867), 3 Ch. App. 93; compare note (*f*), p. 839, *post*, as to gifts over on death without "children."

(*c*) *Re Finlay's Estate*, [1913] 1 I. R. 143, distinguishing the cases cited in note (*w*), p. 752, *ante*.

(*d*) *Lucas v. Goldsmid* (1861), 29 Beav. 657; and see *Wright v. Atkyns* (1815), Coop. G. 111, 122, 123.

(*e*) *Harvey v. Towell* (1847), 7 Hare, 231 (personal estate); *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 211, 225, C. A.; and see p. 752, *ante*.

(*f*) *Bird v. Webster* (1853), 1 Drew. 338, 340.

(*g*) *A.-G. v. Bamfield* (1703), Freem. (CH.) 268; *Young v. Davies* (1863), 2 Drew. & Sm. 167, 172 (to "my surviving daughters and their lawful offspring"); compare *Shannon (Earl) v. Good* (1884), 15 L. R. Ir. 284, 298, C. A.; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 230, note (*a*).

(*h*) Co. Litt. 9 b: "if a man devise land to a man *et sanguini suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile."

(*i*) *Doe d. Gallini v. Gallini* (1835), 3 Ad. & El. 340, 353, Ex. Ch.; *Doe d. Gallini v. Gallini* (1833), 5 B. & Ad. 621, 642, approved in *Forsbrook v. Forsbrook*, *supra*, at p. 96.

(*j*) The rule is subject to the paramount rule (see p. 651, *ante*) as to giving effect to the intention collected from the whole will (*Wright v. Vernon* (1854), 2 Drew. 439, 460, referring to *Roe d. Nightingale v. Quartley* (1787), 1 Term Rep. 630).

(*k*) *Wright v. Vernon* (1858), 7 H. L. Cas. 35 (to the "right heirs of A. . . by B. his second wife for ever" created an estate tail in the person satisfying the description at the death of the testator), affirming *S. C.* (1854), 2 Drew. 439, where KINDERSLEY, V.-C., at p. 452, stated the effect of *Mandeville's Case* (1328), Y. B. 2 Edw. 3, 1, cited in Co. Litt. 26 b (as to which compare title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 246); see *Wills v. Palmer* (1770), 5 Burr. 2615 (to the heirs male of the body of P.); *Southcot v. Stowell* (1673), 1 Mod. Rep. 226, 237; 2 Mod. Rep. 207; *Allgood v. Blake* (1872), L. R. 7 Exch. 339; (1873), L. R. 8 Exch. 160, 169, Ex. Ch. (to "all and every other the issue of my body," with gift over in default of such issue); compare *Matheson v. Atkinson* (1906),



## SECT. 6.

Quantity of  
Interest  
Given.

Quasi-  
inheritable  
gifts of per-  
sonal estate.

**1403.** A disposition by will of personal estate by words which in the opinion of the court show an intention to give an inheritable estate in it to a donee gives him an absolute interest (*l*). Thus, where the words are used in their usual sense (*m*), a donee takes an absolute interest under a bequest of personal estate to him and his heirs (*n*), or to him and the heirs of his body (*o*), or to him and the heirs male of his body (*p*), or under other expressions showing an intention that his issue throughout the whole of their line should take after him by descent (*q*). The intention may be inferred by implication from a gift over on failure of his heirs of the body or

26 New Zealand Law Reports, 145; *Moore v. Simkin* (1885), 31 Ch. D. 95 (limitation to "heirs" general, so as to create fee simple: rule in *Mandeville's Case* (1328), Y. B. 2 Edw. 3, 1, held inapplicable).

(*l*) The rule is often stated in the form "words which create an estate tail in realty will give an absolute interest in personalty"; see *Tothill v. Pitt* (1766), 1 Madd. 488, per SEWELL, M.R., at p. 509; *Elton v. Eason* (1812), 19 Ves. 73, per GRANT, M.R., at p. 78; *Heron v. Stokes* (1842), 2 Dr. & War. 89, 106; *Audsley v. Horn* (1859), 1 De G. F. & J. 226, 236; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013, per Lord COTTENHAM, L.C., at p. 1020; *Re Lowman, Devenish v. Pender*, [1895] 2 Ch. 348, 361, C. A. It is pointed out in *Underhill and Strahan, Interpretation of Wills and Settlements*, p. 220, that this statement is not correct; and in *Re Jeafferson's Trusts* (1866), L. R. 2 Eq. 276, WOOD, V.-C., at p. 280, said that that proposition could not be taken absolutely in its full integrity; it would contradict the rule established in *Forth v. Chapman* (1719), 1 P. Wms. 663; see pp. 770, 838, *post*.

(*m*) The preliminary question in such cases is always whether, regard being had to the whole will, and considering that the property is personal and not real estate, the words are thus used in their usual sense (*Re Jeafferson's Trusts*, *supra*, per WOOD, V.-C., at p. 280). Upon a consideration of the whole will it may appear that the words "heirs of the body," and the like, describe particular persons (see, for instance, *Dakin v. Nicholson* (1837), 6 L. J. (CH.) 329; and p. 749, *ante*). The question of contrary intention is, therefore, in the first place, a question not whether the testator intended the donee to have an absolute interest or not (*Garth v. Baldwin* (1755), 2 Ves. Sen. 646, per Lord HARDWICKE, L.C., at p. 661: "a limitation of personal estate to one for life and the heirs of his body; which vests absolutely, whether so intended by the testator or not"), but whether the words of limitation are used in a sense different from their usual sense.

(*n*) *Anstruther v. Chalmer* (1825), 2 Sim. 1; *Re Banks, Ex parte Hovile* (1855), 2 K. & J. 387; and see *Bigge v. Bensley* (1783), 1 Bro. C. C. 187.

(*o*) *Whitmore v. Weld* (1685), 1 Vern. 326, 347; *Garth v. Baldwin*, *supra*; *Crooke v. De Vandes* (1803), 9 Ves. 197; *Crawford v. Trotter* (1819), 4 Madd. 361; *Widdison v. Hodgkin* (1823), 2 L. J. (O. S.) (CH.) 9 ("heirs," meaning in the context "heirs of the body"); and see *A.-G. v. Hird* (1782), 1 Bro. C. C. 170; *Wilkinson v. South* (1798), 7 Term Rep. 555, 557.

(*p*) *Leventhorpe v. Ashbie* (1635), 1 Roll. Abr. 831, pl. 1; *Tudor, L. C. Real Prop.*, 4th ed., p. 382; *Seale v. Seale* (1715), 1 P. Wms. 291; and see *Bennet v. Lewknor* (1616), 1 Roll. Rep. 356 (to A. and his heirs males).

(*q*) *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 206, C. A.; *Re Barker's Trusts* (1882), 48 L. T. 573; see, accordingly, *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613 ("to my brother Lord J. B., and to his children in succession"); *Britton v. Twining* (1817), 3 Mer. 176 (to A. during his life, and "after his decease to the heir male of his body, and so on in succession to the heir-at-law, male or female"); *Re Commercial Railway Act, Ex parte Harrison* (1838), 3 Y. & C. (EX.) 275; *Beaver v. Nowell* (1858), 25 Beav. 551; *Young v. Davies* (1863), 2 Drew. & Sm. 167 ("to my surviving daughters and their lawful offspring"); *Atkinson v. L'Estrange* (1885), 15 L. R. Ir. 340 (to A. for life and to her heirs after her). As to gifts to a person and his children, see, further, p. 787, *post*.



SECT. 6.  
Quantity of  
Interest  
Given.

failure of his issue generally (*r*). This canon of construction has been applied even in cases where the donee himself is expressly given only a life estate(s) and the inheritable interest arose by virtue of or by analogy to the application of the rule in *Shelley's Case* (*t*) to the limitations (*a*), in spite of the fact that the rule in *Shelley's Case* itself is not strictly applicable to personal estate (*b*), but ought not to be applied if the result would be entirely to defeat the intention of the testator, apparent from the whole will, and capable without violation of the rules of law of being carried into effect (*c*); for example, the word "heirs" may describe particular persons who are intended to take by purchase (*d*). If the gift is limited to a donee for his life and then to his "issue," *prima facie* the donee takes for life only and the issue take on his death (*e*).

(*r*) *Chandless v. Price* (1796), 3 Ves. 99; *Campbell v. Harding* (1831), 2 Russ. & M. 390, 401, 402, affirmed, *sub nom. Candy v. Campbell* (1834), 8 Bli. (N. S.) 469, 491, H. L.; *Dunk v. Fenner* (1831), 2 Russ. & M. 557; *Simmons v. Simmons* (1836), 8 Sim. 22; *Re Andrew's Will* (1859), 27 Beav. 608, also reported *sub nom. Re Andrews* (1859), 29 L. J. (CH.) 291, where ROMILLY, M.R., at p. 292, said that the rule was analogous to the *cy-près* doctrine as regards similar gifts of realty; *Re Sallery* (1861), 11 I. Ch. R. 236.

(*s*) *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Chatham (Earl) v. Tothill* (1770), 7 Bro. Parl. Cas. 453; *Britton v. Twining* (1817), 3 Mer. 176; *Atkinson v. L'Estrange* (1885), 15 L. R. Ir. 340; *Re Score, Tolman v. Score* (1887), 57 L. T. 40; compare *Theebridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Turner v. Turner* (1783), 1 Bro. C. C. 317.

(*t*) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 226.

(*a*) In the following cases limitations of personal estate took effect as if the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b, applied thereto: *Richards v. Bergavenny (Lady)* (1695), 2 Vern. 324; *Stratton v. Payne* (1726), 3 Bro. Parl. Cas. 99; *Butterfield v. Butterfield* (1748), 1 Ves. Sen. 133; *Glover v. Strothoff* (1786), 2 Bro. C. C. 33; *Robinson v. Fitzherbert* (1786), 2 Bro. C. C. 127; *Kinch v. Ward* (1825), 2 Sim. & St. 409; *Verulam (Earl) v. Bathurst* (1843), 13 Sim. 374; *Douglas v. Congreve* (1838), 1 Beav. 59; *Harvey v. Towell* (1847), 7 Hare, 231, 234, applying the argument of Fearne, Contingent Remainders, 7th ed., p. 190; *Ousby v. Harvey* (1848), 17 L. J. (CH.) 160; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013; *Comfort v. Brown* (1878), 10 Ch. D. 146; *Re Score, Tolman v. Score, supra*. In the following cases personalty was settled by reference to realty, to the limitations of which the rule in *Shelley's Case, supra*, was applicable: *Brouncker v. Bagot* (1816), 1 Mer. 271; *Tate v. Clarke* (1838), 1 Beav. 100; and see the other cases cited in note (*s*), *supra*.

(*b*) See titles PERSONAL PROPERTY, Vol. XXII., p. 414; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 267.

(*c*) *Audsley v. Horn* (1859), 1 De G. F. & J. 229, *per* Lord CAMPBELL, L.C., at p. 236; *Dodds v. Dodds* (1860), 11 I. Ch. R. 374.

(*d*) *Sands v. Dixwell* (1738), cited in *Garth v. Baldwin, supra*, at pp. 652, 661 (*sub nom. Roberts v. Dixwell* (1738), 1 Atk. 607, as to real estate); *Hodgeson v. Bussey* (1740), 2 Atk. 89; *Wilson v. Vansittart* (1770), Amb. 562; *Britton v. Twining, supra, per* GRANT, M.R., at p. 182; *Symers v. Jobson* (1848), 16 Sim. 267; *Bull v. Comberbach* (1858), 25 Beav. 540, 543; and see *Peacock v. Spooner* (1839), 2 Vern. 43, 195, H. L.; *Dafforne v. Goodman* (1699), 2 Vern. 362, adversely criticised in *Lyon v. Mitchell* (1816), 1 Madd. 467, 483.

(*e*) *Knight v. Ellis* (1789), 2 Bro. C. C. 570, which, though doubted in subsequent cases, is recognised and followed in *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 209, 222, C. A.; *Goldney v. Crabb* (1854), 19 Beav. 338; *Waldron v. Boulter* (1856), 22 Beav. 284; *Jackson v. Calvert* (1860), 1 John. & H. 235; *Bannister v. Lang* (1867), 17 L. T. 137; *Foster v. Wybrants* (1874), 11 I. R. Eq. 40; *Re Cullen's Estate*, [1907] 1 I. R. 73; and see *Stonor v.*

## SECT. 6.

**Quantity of Interest Given.**

Gifts by reference to limitations of real estate.

**1404.** Where real and personal estate are blended together in one gift, or where the personal estate is directed to be enjoyed with the real estate, and the limitations in each case are framed in the usual technical terms creating successive estates tail in respect of real estate, the personal estate goes to the person having the first vested estate tail in the real estate (*f*), subject to being defeated by a donee under a prior estate tail coming into existence and taking a vested interest (*g*). This is not a necessary result where the estate tail is created by implication from a gift over on failure of issue (*h*), which as regards the personal estate may be construed to mean a failure of issue at the death of the first taker (*i*).

Successive limitations in tail of personal estate.

**1405.** If personal property is given to a person for life, and after his death to his first and other sons in tail, with remainders in default of such issue over, then if he has a son the latter takes an absolute interest under the above rules, but if he has no son the remainders over are not void but take effect (*k*); an existing ulterior remainderman in tail takes an absolute interest, subject to be divested by the birth of a person born afterwards but taking before him under the prior limitations in tail (*l*).

SUB-SECT. 4.—*Rights Attached to the Gift Defining Interest Given.*

Words defining interest given.

**1406.** Words referring to the rights of disposition or enjoyment by the donee or to the rights of transmission on death, to be attached to the gift, may define the interest with sufficient certainty.

Inference from rights of disposition.

**1407.** Where the interest is defined by the rights of disposition to be attached to the gift, it is a matter of construction of the particular will whether the intention is that the donee should have merely

*Curwen* (1832), 5 Sim. 264. In such a gift of blended real and personal estate the donee may then take an estate tail in the real and a life interest in the personal estate (*Jackson v. Calvert* (1860), 1 John. & H. 235; *Re Longworth, Longworth v. Campbell*, [1910] 1 I. R. 23).

(*f*) *Foley v. Burnell* (1783), 1 Bro. C. C. 274; *Vaughan v. Burslem* (1790), 3 Bro. C. C. 101; *Fordyce v. Ford* (1795), 2 Ves. 536; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; see also titles PERSONAL PROPERTY, Vol. XXII., p. 413; SETTLEMENTS, Vol. XXV., pp. 704 *et seq.*

(*g*) *Re Lowman, Devenish v. Pender*, [1895] 2 Ch. 348, C. A.

(*h*) As to such gifts over, see pp. 833, 850, *post*.

(*i*) *Forth v. Chapman* (1719), 1 P. Wms. 664; *Tudor*, L. C. Real Prop., 4th ed., p. 371; *Atkinson v. Hutchinson* (1734), 3 P. Wms. 258, 260, 261; the reason is that the implication in favour of the issue drawn from such a gift over cannot be supposed to exist in the case of personal property, since they cannot by any construction take under such an implied gift (*Forth v. Chapman, supra*, per Lord PARKER, L.C., at p. 667; see, however, *Re Andrew's Will* (1859), 27 Beav. 608). It is pointed out in *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 208, that in cases where the gift is of personality alone no such rule of construction need be resorted to, for as the gift to the first taker without more would carry an absolute interest, the subsequent gift on an indefinite failure of issue would be necessarily void for remoteness.

(*k*) *Higgins v. Dowler* (1707), 1 P. Wms. 98; *Stanley v. Leigh* (1732), 2 P. Wms. 686; *Sabbarton v. Sabbarton* (1739), Cas. temp. Talb. 245; *Gower v. Grosvenor* (1740), 5 Madd. 337, 347; *Pelham v. Gregory* (1760), 3 Bro. Parl. Cas. 204; *Phipps v. Mulgrave (Lord)* (1796), 3 Ves. 613; *Boydell v. Golightly* (1844), 14 Sim. 327.

(*l*) *Re Lowman, Devenish v. Pender, supra*, at p. 366.

a power of appointment(*m*) or a power incident to his beneficial interest(*n*). There is nothing in the word "disposal" essentially indicating power rather than property apart from the context(*o*); and where there is in the will no explicit reference to any objects or mode of execution or other characteristics of a power, and the only object of the testator's bounty is the donee (whether the gift to the donee is subject or not to executory gifts over), then the court concludes that a beneficial estate in fee simple or absolute interest, according to the nature of the property, is intended(*p*). Thus, a gift of property to a person, to dispose of it at his will and pleasure, or by words to that effect, where there is no gift over in default of disposition, or generally where the context does not refer to a power or trust(*q*), *primâ facie* creates an estate in fee simple in the case of real estate, and an absolute interest in the case of personal estate(*r*).

An absolute interest has been similarly inferred even where the testator contemplated dispositions made only by the will of the donee(*s*), or subject to other restrictions(*a*), or where the gift is of a sum of money to be paid at the death of the donee(*b*).

**1408.** Where there is first a clear absolute gift or gift in fee simple, followed by words sounding like a power(*c*), the court

SECT. 6.  
Quantity of  
Interest  
Given.

Inference  
from par-  
ticular right  
of disposition.

Where clear  
absolute gift  
in first  
instance

(*m*) As to the construction of such gifts in relation to the creation of powers of appointment, see, generally, title POWERS, Vol. XXIII., pp. 7, 8.

(*n*) Thus, "assigns" may be used as a word of limitation to show a power of alienation and nothing more (*Milman v. Lane*, [1901] 2 K. B. 745, 750, C. A.). A devise to a person and his assigns under the law before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), and a devise to a person for life and his assigns in a modern will *primâ facie* give only estates for life (Co. Litt. 9 b); but may be extended by the context (*Re Wall* (1866), 12 Jur. (N. S.) 995).

(*o*) *Nowlan v. Walsh*, *Nowlan v. Wilde* (1851), 4 De G. & Sm. 584, *per* KNIGHT BRUCE, V.-C., at p. 586; but see *Re Maxwell's Will* (1857), 24 Beav. 246, where ROMILLY, M.R., considered that the ordinary meaning of the word gave an absolute interest. In *Hixon v. Oliver* (1806), 13 Ves. 108, Lord ELDON, L.C., at p. 114, said that as power is a restraint upon property, it is never to be implied in such cases.

(*p*) *Reid v. Carleton*, [1905] 1 I. R. 147; and see *Parnell v. Boyd*, [1896] 2 I. R. 571, C. A.; *Re Bogle*, *Bogle v. Yorstoun* (1898), 78 L. T. 457.

(*q*) See *Metcalf v. O'Kennedy* (1904), 4 State Reports, New South Wales, 175; *In the Will of Bourk*, *Cunningham v. Rubenach*, [1907] Victorian Law Reports, 171; *Re Howell*, *Re Buckingham*, *Liggins v. Buckingham*, [1914] 2 Ch. 173.

(*r*) *Anon.* (1553), Bro. (N. C.) 432; *Whiskon and Cleyton's Case* (1588), 1 Leon. 156; *Goodtitle d. Pearson v. Otway* (1753), 2 Wils. 6; *Nowlan v. Walsh*, *Nowlan v. Wilde*, *supra*; *Alexander v. Alexander* (1856), 6 De G. M. & G. 594; *Re Maxwell's Will*, *supra*; *Kellett v. Kellett* (1868), L. R. 3 H. L. 160, 164, 166.

(*s*) *Robinson v. Dusgate* (1690), 2 Vern. 181; *Glover v. Hall* (1849), 16 Sim. 568, *per* SHADWELL, V.-C., at p. 571: "a testamentary power of disposition is one of the incidents of the estate given"; but see *Johnston v. Rowlands* (1848), 2 De G. & Sm. 356; *Evans v. Evans* (1864), 33 L. J. (CH.) 662; *Weale v. Ollive* (No. 2) (1863), 32 Beav. 421, 424, 425.

(*a*) As, for instance, where dispositions in favour of specified persons are prohibited (*Bull v. Kingston* (1815), 1 Mer. 314; and see *Comber v. Graham* (1830), 1 Russ. & M. 450).

(*b*) *Hixon v. Oliver*, *supra*.

(*c*) *Comber v. Graham*, *supra*; *Brook v. Brook* (1856), 3 Sm. & G. 280; *Howorth v. Dewell* (1860), 29 Beav. 18.



## SECT. 6.

## Quantity of Interest Given.

Where clear gift for life in first instance.

Inference from restrictions on rights of disposition.

*primâ facie* gives effect to the absolute gift or gift in fee simple as such (*d*), and even where there is a gift over, if the power is not exercised, holds the gift over inconsistent with that absolute gift (*e*); the context may show, however, that the first gift was not intended to be unrestricted and absolute (*f*).

Where, however, property is given to a person expressly for life, and after his death to be at his disposal without more, it is difficult to infer an intention to give a greater beneficial interest than a life interest (*g*), and even the addition of a right of absolute disposal during the life interest may in such a case give no more than a right of enjoyment *in specie* during the life (*h*); but there is not this difficulty where the life interest is given for the purpose of introducing other limitations (for example, to children), and the further gift is given on failure of these limitations (*i*).

**1409.** A restriction on the donee's right of alienation of an interest in possession, absolute or otherwise, clearly given to him is void as repugnant to the gift (*k*); and where he takes an absolute interest, a gift over on his failure to dispose of the property or of whatever part of the property he does not dispose of is void (*l*). Where, however, there is a doubt as to what interest the donee takes, and he is restrained from alienation of the property (*m*), or there is a gift over on his disposing (*n*) or on his failing to dispose (*o*) of the property, or a gift over in what is remaining at

(*d*) *Lambe v. Eames* (1871), 6 Ch. App. 597; *Re Hutchinson and Tennant* (1878), 8 Ch. D. 540.

(*e*) *Re Mortlock's Trust* (1857), 3 K. & J. 456, 457; *Doe d. Herbert v. Thomas* (1835), 3 Ad. & El. 123. A gift over in default of disposition by an absolute owner is void; see titles GIFTS, Vol. XV., p. 422; PERSONAL PROPERTY, Vol. XXII., p. 410.

(*f*) *Re Stringer's Estate, Shaw v. Jones-Ford* (1877), 6 Ch. D. 1, C. A.

(*g*) *Nowlan v. Walsh, Nowlan v. Wilde* (1851), 4 De G. & Sm. 584, *per* KNIGHT BRUCE, V.-C., at p. 585; *Anon.* (1578), 3 Leon. 71, pl. 108; *Bradley v. Westcott* (1807), 13 Ves. 445; *Reeth v. Seymour* (1828), 4 Russ. 263. The donee was, however, held to take an absolute interest in *Hoy v. Master* (1834), 6 Sim. 568.

(*h*) *Scott v. Josselyn* (1859), 26 Beav. 174; *Re Thomson's Estate, Herring v. Barrow* (1880), 14 Ch. D. 263, C. A.; see, however, *Henderson v. Cross* (1861), 29 Beav. 216.

(*i*) *Goodtitle d. Pearson v. Otway* (1753), 2 Wils. 6; *Re Maxwell's Will* (1857), 24 Beav. 246, 251.

(*k*) See titles GIFTS, Vol. XV., p. 422; PERSONAL PROPERTY, Vol. XXII., p. 410.

(*l*) *Watkins v. Williams, Haverd v. Church* (1851), 2 Mac. & G. 622; *Perry v. Merritt* (1874), L. R. 18 Eq. 152; *Re Dixon, Dixon v. Charlesworth*, [1903] 2 Ch. 458. In such cases the court does not treat the restrictions as forming a context clearly cutting down (see the rule, p. 762, *ante*) the prior clear gift (*Re Jones, Richards v. Jones*, [1898] 1 Ch. 438, 441; *Re Walker, Lloyd v. Tweedy*, [1898] 1 I. R. 5).

(*m*) *Muschamp v. Bluett* (1618), J. Bridg. 132; *Proctor v. Upton* (1749), 5 De G. M. & G. 199, n.; *Mortimer v. Hartley* (1851), 3 De G. & Sm. 316; 6 Exch. 47; *Re Banks' Trusts, Ex parte Hovill* (1855), 2 K. & J. 387; *Magee v. Martin*, [1902] 1 I. R. 367, C. A. But the fact that the testator conceived that he could make the property perpetually inalienable does not alter the force of his words in describing the donees and their interests (*Britton v. Twining* (1817), 3 Mer. 176, 183).

(*n*) *Crumpe v. Crumpe*, [1900] A. C. 127.

(*o*) *Re Stringer's Estate, Shaw v. Jones-Ford, supra*; and see *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84.

his death out of the property (*p*), this restriction may form part of a context leading to the inference that he is to take not an absolute interest or interest in fee simple, but a life or other limited interest to which a right of disposition of the property is not incident, with or without a power of appointment or enjoyment *in specie* (*q*).

SECT. 6.  
Quantity of  
Interest  
Given.

**1410.** Where on the context of the will the donee is given an unrestricted right of enjoyment *in specie* during his life, together with a right of disposition on his death, or generally, he takes an absolute interest (*r*). Where, however, there is no such right of disposition on death, and the testator himself provides for the destination of the property so far as undisposed of on that event, then the donee may have merely the right of enjoyment *in specie* for life, equivalent to a life interest with a limited non-testamentary power of disposition (*s*).

Inference  
from rights  
of enjoyment.

**1411.** Where the words describing the interest refer only to rights of possession personal to the donee and not of disposition, *primâ facie* a life interest only is created (*t*).

Rights  
personal to  
donee.

**1412.** A gift of the use (*a*) or of the use and occupation (*b*), or, it

"Use" or  
use and  
occupation."

(*p*) *Upwell v. Halsey* (1720), 1 P. Wms. 651; *Re Adam's Trusts* (1865), 14 W. R. 18; *Re Sheldon and Kemble* (1885), 53 L. T. 527; *Bibbens v. Potter* (1879), 10 Ch. D. 733; *Roberts v. Thorp* (1911), 56 Sol Jo. 13; and see *Shearer v. Hogg* (1912), 46 Canada Supreme Court Reports, 492. Where in the context apart from such words, a life estate only would be created, this estate is not increased by these words to a larger interest (*Constable v. Bull* (1849), 3 De G. & Sm. 411, 413).

(*q*) *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939; *Re Pounder, Williams v. Pounder* (1886), 56 L. J. (CH.) 113, 114.

(*r*) *Re David's Trusts* (1859), John. 495, 500; *Re Jones, Richards v. Jones*, [1898] 1 Ch. 438; see *Harvey v. Harvey* (1842), 5 Beav. 134 ("full and entire enjoyment" of a leasehold held for life, to the *cestui que vie*).

(*s*) *Re Thomson's Estate, Herring v. Barrow* (1880), 14 Ch. D. 263, C. A.; *Bradley v. Westcott* (1807), 13 Ves. 445; *Pennock v. Pennock* (1871), L. R. 13 Eq. 144; *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344; *Re Sanford, Sanford v. Sanford*, *supra*; *Re Richards, Uglov v. Richards*, [1902] 1 Ch. 76; and see *Re Rowland, Jones v. Rowland* (1902), 86 L. T. 78 (absolute interest there created; but see the criticism of this case in *Re Johnson* (1912), 27 Ontario Law Reports, 472, 477); *Rosenberg v. Scraggs* (1900), 19 New Zealand Law Reports, 196; *Yates v. Yates* (1905), 25 New Zealand Law Reports, 263. In *Re Holden, Holden v. Smith* (1888), 57 L. J. (CH.) 648, followed in *Re Dixon, Dixon v. Dixon* (1912), 56 Sol Jo. 445, a gift over of the "remainder" after the death of the first taker was held to give the first taker a life estate only, and without any right of enjoyment *in specie*; but it has been said in Canada that the case cannot be regarded as a satisfactory decision (*Re Johnson, supra*, at p. 476).

(*t*) *Goodright d. Drewry v. Barron* (1809), 11 East, 220 ("freely to be possessed and enjoyed," which might refer to freedom from incumbrances); *Doe d. Ashby v. Baines* (1835), 2 Cr. M. & R. 23 ("to be possessed and enjoyed"), followed in *Bromitt v. Moor* (1851), 9 Hare, 374, 378; but see *Loveacres d. Mudge v. Blight* (1775), 1 Cowp. 352 ("freely to be enjoyed and possessed" in the context gave a fee simple); *Thomas v. Phelps* (1828), 4 Russ. 348.

(*a*) *Cook v. Gerrard* (1668), 1 Saund. 181, 186.

(*b*) *Welcken v. Elkington* (1578), Plowd. 516, 524; *Coward v. Larkman* (1888), 60 L. T. 1; and see *R. v. Eatington* (1791), 4 Term Rep. 177; *Paramour v. Yardley* (1579), Plowd. 539, 542; *Doe d. Chilcott v. White* (1800), 1 East, 33 (the income of a cottage "and her living in it").

SECT. 6.  
Quantity of  
Interest  
Given.

Inferences  
from  
expressed  
duration of  
interest.

seems, of the right of free occupancy only (c), of a house or land, gives the donee an estate in the land (d), and is *primâ facie* a gift of the rents and profits at all events during the life of the donee (e); and the donee under such a gift need not *primâ facie* personally reside in the house or on the land, but may let or dispose of the property during his life (f). Similarly, a gift of the "possession" or "use and enjoyment" of chattels *primâ facie* gives the donee a life estate (g), and the donee may let the goods on hire (h).

**1413.** A devise to a donee, or to him and his assigns, "for ever" *primâ facie* gives him a fee simple (i). A gift until bankruptcy, alienation, marriage, or other event which must happen, if at all, during the life of the donee, *primâ facie* creates a determinable life interest only (k); but such a gift (l), or a gift "so long as" certain

(c) *Mannox v. Greener* (1872), L. R. 14 Eq. 456.

(d) *Whittome v. Lamb* (1844), 12 M. & W. 813, 820, 821, where a chattel interest only was inferred; compare *Reay v. Rawlinson* (1860), 29 Beav. 88 (a gift of "grass for a cow" in a field created an easement).

(e) As to whether a gift in perpetuity can be inferred, see *Coward v. Larkman* (1888), 60 L. T. 1; *Public Trustee v. Edmond* (1912), 32 New Zealand Law Reports, 202.

(f) *Olive v. Olive* (1854), 2 Eq. Rep. 913; *Rabbeth v. Squire* (1859), 4 De G. & J. 406, 413; *Mannox v. Greener*, *supra*, at p. 461; *National Trustees, Executors and Agency Co., Ltd. v. Keast* (1896), 22 Victorian Law Reports, 447. A contrary intention that occupation is intended to be personal may be shown by a gift over on ceasing to occupy (*Maclaren v. Stainton* (1858), 27 L. J. (CH.) 442; and see *Stone v. Parker* (1860), 29 L. J. (CH.) 874), or by other context (see *Re Varley, Thornton v. Varley* (1893), 62 L. J. (CH.) 652; *Re Stewart, Stewart v. Hislop* (1904), 23 New Zealand Law Reports, 797); even in such a case, however, there is a right of disposition conferred by the Settled Land Acts; see title SETTLEMENTS, Vol. XXV., pp. 624 *et seq.*, 628, note (t). A personal right of residence rent free does not entitle the donee to rents and profits in case of his non-residence (*Parker v. Parker* (1863), 1 New Rep. 608; *May v. May* (1881), 44 L. T. 412). As to conditions of residence imposed on tenants for life, see title SETTLEMENTS, Vol. XXV., p. 638.

(g) *Low v. Carter* (1839), 1 Beav. 426, 430; *Espinasse v. Luffingham* (1848), 3 Jo. & Lat. 186 (plate). For a case of circumstances showing a contrary intention, see *Terry v. Terry* (1863), 33 Beav. 232 (use of book debts and capital); in the case of consumables, an absolute interest is created (*Montresor v. Montresor* (1845), 1 Coll. 693; see p. 528, *ante*.)

(h) *Re Williamson, Murray v. Williamson* (1906), 94 L. T. 813, following *Marshall v. Blew* (1741), 2 Atk. 217, and *Rabbeth v. Squire*, *supra*.

(i) Co. Litt. 9 b; *Chamberlaine v. Turner* (1629), Cro. Car. 119; *Timewell v. Perkins* (1740), 2 Atk. 103; *Eastman v. Baker* (1808), 1 Taunt. 174, 182; *Doe d. Dacre (Lady) v. Roper* (1809), 11 East, 518, referring to the rule as settled without question from 1348 (Y. B. 22 Edw. 3, Mich. 16) to that day, with the exception of a doubt in Perkins, Laws of England, s. 557; *Evans v. Evans* (1864), 33 L. J. (CH.) 662. In *Good v. Good* (1857), 7 E. & B. 295, an estate tail only was created. Such words will not enlarge an express estate tail into a fee simple (*Vernon v. Wright* (1858), 7 H. L. Cas. 35).

(k) *Jordan v. Holkham* (1753), Amb. 209 (during widowhood); *Banks v. Brailwaite* (1863), 32 L. J. (CH.) 198 (alienation); *Re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685 (so long as she continues my widow and unmarried); *Re Mason, Mason v. Mason*, [1910] 1 Ch. 695, C. A. (marriage).

(l) *Rishton v. Cobb* (1839), 5 My. & Cr. 145, criticised in *Re Boddington, Boddington v. Clairat*, *supra*, at pp. 689, 690, and explained in *Re Mason, Mason v. Mason*, *supra*, at pp. 698, 699; and see p. 699, *ante*.



circumstances continue (*m*) (even, for example, a gift so long as the donee remains unmarried (*n*)), may create an estate in fee simple or absolute interest determinable on those circumstances ceasing to exist.

SECT. 6.  
Quantity of  
Interest  
Given.

SUB-SECT. 5.—*Gifts without Words of Limitation or Other Descriptive Context.*

**1414.** By statute (*o*), where any real estate is devised in a modern will (*p*) to any person without any words of limitation, such devise

Gifts of  
real estate.

(*m*) See *Sutcliffe v. Richardson* (1872), L. R. 13 Eq. 606 (gift of annuity “so long as she and my son should live together”).

(*n*) *Re Howard, Taylor v. Howard*, [1901] 1 Ch. 412; *Re Rowland, Jones v. Rowland* (1902), 86 L. T. 78.

(*o*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 28.

(*p*) In wills prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), an estate for life only was *primâ facie* conferred (*Doe d. Brodbelt v. Thomson* (1861), 12 Moo. P. C. C. 116; *Bolton v. Bolton* (1870), L. R. 5 Exch. 145; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 174). A contrary intention to give a fee simple might be inferred, for instance (i.) from the fact that the donee was required personally to undertake burdens, as to pay charges or annuities, the presumption being that the donee was intended to take such an estate as would enable him to comply with the direction, and indemnify himself against loss on taking the burden (*Anon.* (1551), Bro. (N. C.) 406; *Doe d. Willey v. Holmes* (1798), 8 Term Rep. 1; *Goodtill d. Paddy v. Maddern* (1804), 4 East, 496; *Blinston v. Warburton* (1856), 2 K. & J. 400; *Matthews v. Windross* (1856), 2 K. & J. 406; *Lloyd v. Jackson* (1867), L. R. 2 Q. B. 269, 273, 274, Ex. Ch.), a presumption which, however, did not arise on the expense being charged merely on the estate given, and not on the donee personally (*Denn d. Moor v. Mellor* (1794), 5 Term Rep. 558; 2 Bos. & P. 247, H. L.); or (ii.) from the use by the testator in the operative part of the gift of the word “estate,” “property,” or any equivalent expression capable of describing the extent and sum of the testator’s interest as well as the substance of the gift; although such words, used as words of reference, could not be treated as explaining a previous gift which *primâ facie* created only a life estate, and as words describing the subject-matter only, and not the testator’s interest, they might not create a larger interest than was expressly given (*Bailis v. Gale* (1750), 2 Ves. Sen. 48; *Doe d. Bates v. Clayton* (1806), 8 East, 141; *Doe d. Burton v. White* (1847), 1 Exch. 526; (1848), 2 Exch. 797, Ex. Ch.; *Sturgis v. Dunn* (1855), 19 Beav. 135; *Bentley v. Oldfield* (1855), 19 Beav. 225; *Re Pollard’s Estate* (1863), 3 De G. J. & Sm. 541, 556; *Coltsmann v. Coltsmann* (1868), L. R. 3 H. L. 121, 129; *Hill v. Brown*, [1894] A. C. 122, 127, 128, P. C.); or (iii.) from gifts over on certain specified events, the time of which would be immaterial if the donee only took a life estate, and which gift over was not part of a series of limitations, when the court drew the inference that the property was not intended to be given over in any other event (*Burke v. Annis* (1853), 11 Hare, 232, 237; *Re Harrison’s Estate* (1870), 5 Ch. App. 408; *Pickwell v. Spencer* (1872), L. R. 7 Exch. 105, Ex. Ch.; *Andrew v. Andrew* (1875), 1 Ch. D. 410, 418, C. A.); or (iv.) where the property was given to trustees, who by words of inheritance or by other words took a legal estate in fee in trust for the donee, without any ulterior interest in any other person, the presumption being that the equitable interest was commensurate with the legal estate (*Challenger v. Shepherd* (1800), 8 Term Rep. 597; *Smith v. Smith* (1861), 8 Jur. (N. S.) 459; *Yarrow v. Knightly* (1878), 8 Ch. D. 736, 739, 743, C. A.), and *vice versâ* (*Villiers v. Villiers* (1740), 2 Atk. 71, 72; *Challenger v. Shepherd*, *supra*; *Yarrow v. Knightly*, *supra*, at pp. 739, 742). But the mere declaration by the testator of his intention to dispose of his whole estates or the fact of a previous devise to the heir, or the fact that the donee took jointly with the heir, did not exclude the rule (*Peiton v. Banks* (1682), 1 Vern. 65; *Bowen v. Scowcroft* (1837), 2 Y. & C. (Ex.) 640; *Smith v. Smith*, *supra*, at p. 460).

## SECT. 6.

Quantity of  
Interest  
Given.

is construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate (*q*), unless a contrary intention appears by the will (*r*). This rule is applicable only to real estate which exists and belongs to the testator at the time of his death, over which he has then a disposing power, and does not apply to a particular interest in real estate or an annuity or rentcharge which the testator is about to create for the first time by his will (*s*).

Gifts of  
personal  
estate.

Whatever the date of the will, a gift of personal estate to a donee without any context restricting his interest confers on him an absolute interest (*t*).

Inference  
from fiduciary  
character  
of donee.

**1415.** The effect of gifts to the executors of the testator (*u*), or to the trustees of his will (*v*), as regards the character and quantity of interest given, are discussed elsewhere. Under a gift to the executors of another person, whether directly or by way of substitution for him, they *primâ facie* take the gift as part of his estate (*w*), but the will may show that they were intended to take beneficially (*x*).

Gifts of  
income only.

**1416.** A gift in a modern will (*y*) of the "rents and profits" or of the "income" of real estate, indefinitely, even though without words of limitation, passes the fee simple in the land (*a*); the

(*q*) As to the interests which a general devise passes apart from this rule, see p. 694, *ante*.

(*r*) The contrary intention must be gathered from the whole will, as in other cases (*Crumpe v. Crumpe*, [1900] A. C. 127, 131; and see *Pelham-Clinton v. Newcastle (Duke)*, [1902] 1 Ch. 34, C. A., *per* BUCKLEY, J., at p. 37, affirmed, [1903] A. C. 111; *Gravenor v. Watkins* (1871), L. R. 6 C. P. 500; *Quarm v. Quarm*, [1892] 1 Q. B. 184 (devise to several "as joint tenants and not as tenants in common, and to the survivor or longest liver of them, his or her heirs and assigns"); *Re Gannon, Spence v. Martin*, [1914] 1 I. R. 86 (interest described as a tenancy), in which cases a contrary intention appeared). In the following cases a contrary intention was held not to be shown: *Wisden v. Wisden* (1854), 2 Sm. & G. 396 (use of words of limitation in other gifts); *Brook v. Brook* (1856), 3 Sm. & G. 280 (gift to married woman for her separate property with power to appoint the same to her husband and children). The creation of successive estates after the gift in question is an indication of contrary intention, but is not necessarily an indication of an intention to create only life estates (*Re Pennefather, Savile v. Savile*, [1896] 1 I. R. 249, 260). Restrictions on alienation (see p. 772, *ante*) may be such an indication of contrary intention (*Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, 942).

(*s*) *Nichols v. Hawkes* (1853), 10 Hare, 342, *per* TURNER, V.-C., at pp. 343, 344.

(*t*) As to the creation of successive interests generally, see p. 527, *ante*; title PERSONAL PROPERTY, Vol. XXII., p. 413; as to gifts for life of consumables, see p. 528, *ante*.

(*u*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 269.

(*v*) See title TRUSTS AND TRUSTEES, pp. 92 *et seq.*, *ante*.

(*w*) *Stocks v. Dodsley* (1836) 1 Keen, 325; *Long v. Watkinson* (1852), 17 Beav. 471; *Leak v. Macdowall* (No. 2) (1863), 33 Beav. 238; *Trethewy v. Helyar* (1876), 4 Ch. D. 73; *Re Valdez's Trusts* (1888), 40 Ch. D. 159, 162.

(*x*) *Sanders v. Franks* (1817), 2 Madd. 147; *Wallis v. Taylor* (1836), 8 Sim. 241.

(*y*) In wills to which the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), does not apply, the gift would itself, and without any assistance from the context, create merely an estate for life (*Hodson v. Ball* (1848), 14 Sim. 558, 571).

(*a*) *Plenty v. West* (1848), 6 C. B. 201; *Mannox v. Greenier* (1872),



context may, however, show an intention that the gift should not be indefinite (*b*).

**1417.** A gift of an annuity not existing before is *primâ facie* for the life of the donee only, but the intention of the testator to give a larger interest to the donee or to make the annuity perpetual may be inferred from the language of the will in various ways (*c*).

SECT. 6.  
Quantity of  
Interest  
Given.

Gift of  
annuity.

SUB-SECT. 6.—*Expression of the Testator's Motive or Purpose.*

**1418.** If the purpose of the testator in making a gift is stated, and it relates to the mode of application of the gift for the benefit of certain objects and is not merely personal to the donee (for example, a gift to a person for the benefit of his children (*d*), or of himself and his children (*e*)), such purpose, if the context requires,

Effect of  
stated  
purpose.

L. R. 14 Eq. 456; *Re Martin, Martin v. Martin*, [1892] W. N. 120. Such a gift amounts to a gift of the land itself; see p. 697, *ante*.

(*b*) Compare note (*i*), p. 698, *ante*.

(*c*) See title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 486 *et seq.*, where the subject of the duration of annuities is fully dealt with.

(*d*) Such a gift, according to the mode of expression and the context, may make the donee, though entitled to obtain transfer of the fund (*Cooper v. Thornton* (1790), 3 Bro. C. C. 96; *Robinson v. Tickell* (1803), 8 Ves. 152) and to dispose of it (*Wood v. Richardson* (1840), 4 Beav. 174; *McIsaac v. Beaton* (1905), 37 Canada Supreme Court Reports, 143), a mere trustee (see title TRUSTS AND TRUSTEES, p. 92, *ante*), without beneficial interest (*Blakeney v. Blakeney* (1833), 6 Sim. 52; *Wetherell v. Wilson* (1836), 1 Keen, 80; *Inderwick v. Inderwick* (1844), 13 Sim. 652; *Barnes v. Grant* (1856), 26 L. J. (CH.) 92; *Wainford v. Heyl* (1875), L. R. 20 Eq. 321; *Re de la Hunty, O'Connor v. Butler*, [1907] 1 I. R. 507, 511; *Re Hickey, Hickey v. Hickey*, [1913] 1 I. R. 390, C. A., disapproving *Re Berryman, Berryman v. Berryman*, [1913] 1 I. R. 21), so that the benefit to the children does not fail by the death of their parent in the life of the testator (*Ford v. Fowler* (1840), 3 Beav. 146; *Hodgson v. Green* (1842), 11 L. J. (CH.) 312).

(*e*) Such a gift may give the donee a beneficial interest in the entire fund subject to a trust to apply a sufficient part of the fund for the support of the children, with or without some discretion as to the application of it (*Baikes v. Ward* (1842), 1 Hare, 445, 450; *Longmore v. Elcum* (1843), 2 Y. & C. Ch. Cas. 363; *Crockett v. Crockett* (1848), 2 Ph. 553), which the court will not interfere with if exercised in good faith (*Costabadie v. Costabadie* (1847), 6 Hare, 410, 414; *Hart v. Tribe* (1854), 18 Beav. 215; 19 Beav. 149), but the parent is liable to account (*Woods v. Woods* (1836), 1 My. & Cr. 401, 409); or again, subject to a personal obligation of maintaining the children, and without liability to account so long as that obligation is performed from some source or other (*Hadow v. Hadow* (1838), 9 Sim. 438; *Leach v. Leach* (1843), 13 Sim. 304; *Browne v. Paull, Hoggins v. Paull* (1850), 1 Sim. (N. S.) 92, 104; *Re Robertson's Trusts* (1858), 6 W. R. 405; and see *Gilbert v. Bennett* (1839), 10 Sim. 371; *Scott v. Key* (1865), 11 Jur. (N. S.) 819; *Lambe v. Eames* (1871), 6 Ch. App. 597). In such cases, where an obligation, charge or trust is created, the court may direct an inquiry as to the proper amount to be applied (*Hamley v. Gilbert* (1821), Jac. 354 (there ordered in spite of express exemption from liability in the will; but compare *Thurston v. Essington* (1727), Jac. 361, n., H. L.); *Re Booth, Booth v. Booth*, [1894] 2 Ch. 282; *K'Eogh v. K'Eogh*, [1911] 1 I. R. 396). Where the children take beneficially, they take, according to the context, either concurrently with their parent (*Jubber v. Jubber* (1839), 9 Sim. 503; *Wilson v. Maddison* (1843), 2 Y. & C. Ch. Cas. 372; *Re Nolan, Sheridan v. Nolan*, [1912] 1 I. R. 416) or in succession to him (*Chambers v. Atkins* (1823), 1 Sim. & St. 382; *Re Whitty, Evans v. Evans* (1881), 43 L. T. 692).



SECT. 6.  
Quantity of  
Interest  
Given.

Benefit to  
donee in a  
particular  
manner.

may become binding on the donee by way of trust (*f*) or condition (*g*); but if the context allows (*h*), the purpose is treated merely as the motive of the testator in making the gift, which is intended to increase the funds of the donee to enable him to accomplish that purpose (*i*), and the donee takes an unfettered interest (*k*).

**1419.** If a gift is of specified amount, and the purpose is to benefit the donee personally in a particular manner, it is a question of construction of the particular will whether the primary object of the testator is to make the specified gift to the donee, or to have the specified purpose accomplished. *Primâ facie*, in a gift otherwise unconditional, the primary object is to make the specified gift; and the gift is unaffected by the purpose expressed (*l*) and takes effect, although the satisfaction of the purpose of the testator does not exhaust the whole fund, or becomes impossible through no act or default of the donee, or has already been accomplished (*m*);

(*f*) See title TRUSTS AND TRUSTEES, pp. 1 *et seq.*, *ante*; as to the construction of precatory words, see *ibid.*, pp. 13 *et seq.*, *ante*.

(*g*) The question is in such cases whether the words create a gift for the particular purpose only, or a gift subject to the performance of a particular purpose (*King v. Denison* (1813), 1 Ves. & B. 260; *Croome v. Croome* (1889), 59 L. T. 582, C. A.; 61 L. T. 814, H. L.; *Re West, George v. Grose*, [1900] 1 Ch. 84). As to cases when words such as "subject to," "paying," or "on condition" are used, see p. 792, *post*.

(*h*) In such cases the inference that an unfettered interest is intended may be drawn from the absence of any expression excluding the donee from taking beneficially (*Thorp v. Owen* (1843), 2 Hare, 607, 615, 616), or the fact of difficulty in ascertaining the amount intended to be applied for the purposes specified in every possible state of circumstances (*ibid.*; *Cowman v. Harrison* (1852), 10 Hare, 234, 239), or that the specified object necessarily depends on the choice of the named person, although he may desire it for his own convenience (*Barrs v. Fewkes* (1864), 2 Hem. & M. 60, 65; see title TRUSTS AND TRUSTEES, p. 93, *ante*), or that apart from the will the donee is already under an obligation for the specified object (*Byne v. Blackburn* (1858), 26 Beav. 41).

(*i*) *Thorp v. Owen*, *supra*, at p. 614; *Benson v. Whittam, Hemming v. Whittam* (1831), 5 Sim. 22, 32.

(*k*) *Thorp v. Owen*, *supra*; *Ward v. Biddles* (1847), 16 L. J. (CH.) 455; *Leigh v. Leigh* (1848), 12 Jur. 907; *Mackett v. Mackett* (1872), L. R. 14 Eq. 49, 53; *Farr v. Hennis* (1881), 44 L. T. 202, C. A.; *Re Adams and Kensington Vestry* (1884), 26 Beav. 41).

(*l*) *Cope v. Wilmot* (1772), Amb. 704 (advancement in business); *Isherwood v. Payne* (1800), 5 Ves. 677 ("for any purpose she should think proper"); *Paice v. Canterbury Archbishop* (1807), 14 Ves. 364, 370; *Leche v. Kilmorey (Lord)* (1823), Turn. & R. 207 (to purchase army commission); *Amherst (Lord) v. Leeds (Duchess)* (1842), 12 Sm. 476 (to pay rent of donee's residence); *Hutchinson v. Rough* (1879), 40 L. T. 289 (to establish donee in profession); *Dowling v. Dowling*, [1902] 1 I. R. 79, 83; *Re Harbison, Morris v. Larkin*, [1902] 1 I. R. 103. As to legacies to buy an annuity, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 481; and see, generally, title TRUSTS AND TRUSTEES, p. 28, *ante*.

(*m*) As, for instance, gifts to bind an infant to be apprentice (*Barlow v. Grant* (1684), 1 Vern. 255 (death of infant); *Nevill v. Nevill* (1701), 2 Vern. 431 (donee entitled to payment before specified age); *Barton v. Cooke* (1800), 5 Ves. 461 (entitled though not apprenticed)), or other purposes (*Gough v. Bult* (1847), 16 Sim. 45, 54 (discretionary purposes); *Lockhart v. Hardy* (1846), 9 Beav. 379 (to pay off a mortgage foreclosed in testator's life); *Adams v. Lopdell* (1890), 25 L. R. Ir. 311; *Hammond v. Neame*

and the donee, if *sui juris*, or his representative after his death (*n*), is *primâ facie* entitled to payment, without the testator's executors being bound to see to the application of the gift (*o*). Where, however, the specified purpose is the primary object, the donee is entitled to the gift, but only so far as applicable to that purpose (*p*), and for no other purpose (*q*); the gift may be so expressed that the cost of accomplishing that purpose may have to be paid out of the estate of the testator although the fund given is insufficient (*r*); and in so far as the purpose cannot be accomplished, or becomes impossible, the gift fails (*s*).

SECT. 6.  
Quantity of  
Interest  
Given.

**1420.** Where a clear gift is made, and the application of the gift is left to the discretion of another person, and his discretion is not exercised, the donee is entitled to the gift irrespective of its application (*t*). On the other hand, the donee is not so entitled where the discretion extends to deciding what is the amount of the gift and whether it shall be given at all (*u*).

Gift at  
discretion  
of named  
person.

**1421.** Where a fund is given, without specifying any donee, for particular purposes for the benefit of certain other property (for example, to plant trees on an estate), the fund belongs to the persons entitled to the latter property (*a*).

Gift to benefit  
particular  
property.

(1818), 1 Swan. 35 (maintenance of children who did not exist); *Parsons v. Coke* (1858), 27 L. J. (CH.) 828 (to carry on business sold by testator); *Palmer v. Flower* (1871), L. R. 13 Eq. 250 (purchase of army commission: right of purchase abolished); *Re Segelcke, Ziegler v. Nicol*, [1906] 2 Ch. 301 (gift of legacy to make donee's gifts up to an amount already exceeded).

(*n*) *Barlow v. Grant* (1684), 1 Vern. 255; *Lewes v. Lewes* (1848), 16 Sim. 266.

(*o*) *Apreece v. Apreece* (1813), 1 Ves. & B. 364 (gift to buy a ring); *Re Skinner's Trusts* (1860), 1 John. & H. 102 (printing a book); *Knox v. Hotham (Lord)* (1845), 15 Sim. 82 (purchase of house); *Noel v. Jones* (1848), 16 Sim. 309 (education of infant); *Dowling v. Dowling*, [1902] 1 I. R. 79 (purchase of house). The mere fact that a third party would benefit if the legacy were applied for the specified purpose does not affect the legatee's right (*Adams v. Loddell* (1890), 25 L. R. Ir. 311; *Mexborough (Earl) v. Saville* (1903), 88 L. T. 131 (gift to pay estate duty)).

(*p*) Capital as well as income (*Re Black, Falls v. Alford*, [1907] 1 I. R. 486, C. A.).

(*q*) Compare *Dick's Trustees v. Dick* (1911), 48 Sc. L. R. 325 (gift for education of donee in his profession: special diploma there held not included).

(*r*) *Milner v. Milner* (1748), 1 Ves. Sen. 106 (gift of miscalculated sum to make up daughter's fortune to named amount); *Re Sanderson's Trust* (1857), 3 K. & J. 497.

(*s*) *Re De Crespigny, De Crespigny v. De Crespigny*, [1886] W. N. 24, C. A.; compare *Re Ward's Trusts* (1872), 7 Ch. App. 727.

(*t*) *Gough v. Bult* (1847), 16 Sim. 45, per Lord COTTENHAM, L.C., at p. 54; *Beevor v. Partridge* (1840), 11 Sim. 229; *Re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204; compare *Gude v. Worthington* (1849), 3 De G. & Sm. 389; and see title TRUSTS AND TRUSTEES, pp. 19, 28, ante.

(*u*) *Cowper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Re Sanderson's Trust, supra*; *Re Ward's Trusts* (1872), 7 Ch. App. 727.

(*a*) *Lonsdale (Earl) v. Berchtoldt (Countess)* (1857), 3 K. & J. 185; *Re Bowes, Strathmore (Earl) v. Vane*, [1896] 1 Ch. 507; compare *Re Colson's Trusts* (1853), Kay, 133; *Cox v. Sutton* (1856), 2 Jur. (N. S.) 733 (gift as a repairing fund for the benefit of the persons in possession of an estate); *Kennedy v. Kennedy* (1913), 109 L. T. 833, P. C.

## SECT. 6.

Quantity of  
Interest  
Given.Gifts in joint  
tenancy.Joint estates  
for life with  
separate  
inheritances.SUB-SECT. 7.—*Concurrent Gifts.*(i.) *Joint Tenancy and Tenancy in Common.*

**1422.** Where property is given to several persons concurrently, the questions whether these persons take as joint tenants or tenants in common (*b*), and in the latter case what shares they take (*c*), depend on the context of the whole will. They *primâ facie* take as joint tenants (*d*); but in considering the context it has been said that anything which in the slightest degree indicates an intention to divide the property negatives the idea of a joint tenancy (*e*), and that in a case of ambiguity the court leans to the construction which creates a tenancy in common in preference to that which creates a joint tenancy (*f*).

In certain cases, to give effect to the whole will, the severance in interest is made to commence at a future time; thus, joint estates for life and separate inheritances may be created, for example, in gifts of real estate to several persons, who cannot all marry, and the heirs of their bodies (*g*), or in other cases on a sufficient context, as, for example, where the heirs taking the inheritance are defined by reference to the respective donees (*h*).

(*b*) As to the nature of joint tenancy, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 199 *et seq.*; as to tenancy in common, see *ibid.*, pp. 206 *et seq.* As to gifts to corporations and others, see title CORPORATIONS, Vol. VIII., p. 366.

(*c*) A husband and wife, when taking with other persons, *primâ facie* take one share between them; as to this rule of construction, see title HUSBAND AND WIFE, Vol. XVI., pp. 354, 355; *Re Jeffery, Nussey v. Jeffery*, [1914] 1 Ch. 375; as to the tenancy by entireties of a husband and wife under the law before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), see *ibid.*, p. 354; as to a devise to "heirs" who are co-heiresses, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 8, 9, note (*b*); *Re Baker, Pursey v. Holloway* (1898), 79 L. T. 343.

(*d*) *Shore (Lady) v. Billingsley* (1687), 1 Vern. 482; *Morley v. Bird* (1798), 3 Ves. 628, 630; *Stuart v. Bruce* (1798), 3 Ves. 632; *Crooke v. De Vandes* (1802), 9 Ves. 197, 204.

(*e*) *Robertson v. Fraser* (1871), 6 Ch. App. 696, *per* Lord HATHERLEY, L.C., at p. 699, followed in *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206, 211. The mere fact that the interest is to be divided is not sufficient to make a tenancy in common of the capital (*Crooke v. De Vandes, supra*, at p. 206). A description of the donees as "joint tenants," although a technical description, is not necessarily fatal to a tenancy in common (*Booth v. Alington* (1857), 3 Jur. (N. S.) 835). As to the numerous expressions which indicate a tenancy in common, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 207, note (*g*); see *Gordon v. Atkinson* (1847), 1 De G. & Sm. 478 (direction to transfer personal estate).

(*f*) *Joliffe v. East* (1789), 3 Bro. C. C. 25; *Re Woolley, Wormald v. Woolley, supra, per* JOYCE, J., at p. 211; *Bennett v. Houldsworth*, [1911] W. N. 47.

(*g*) Littleton's Tenures, s. 283; *Huntley's Case* (1563), Dyer, 326 a; *Cook v. Cook* (1706), 2 Vern. 545, 546; *Barker v. Gyles* (1727), 3 Bro. Parl. Cas. 104; *Forrest v. Whiteway* (1849), 3 Exch. 367; *Edwards v. Champion* (1853), 3 De G. M. & G. 202, 216; Shep. Touch. (ed. Preston) 442. The rule appears to have been recognised in the House of Lords (*Wilkinson v. Spearman* (undated), cited in *Cook v. Cook, supra* (limitation by deed)); see *Edwards v. Champion* (1847), 1 De G. & Sm. 75, 79, note (*d*).

(*h*) *Re Atkinson. Wilson v. Atkinson* [1892] 3 Ch. 52 ("for A. B. and C. and for their respective heirs, executors," etc.), following *Re Tiverton*



**1423.** There is no necessity in the case of a gift by will for the application of the rule affecting conveyances operating at common law (*i*), that there can be no joint tenancy where the co-tenants come into existence at different times, or their interests vest at different times (*k*), although in both cases the joint tenants must take the same quantity of interest (*l*); but the fact that the vesting of a gift in a will must take place at different times otherwise than by the donees coming into being at different times has been treated as an indication of a tenancy in common (*m*).

SECT. 6.  
Quantity of  
Interest  
Given.

Effect of  
vesting at  
different  
times.

**1424.** In a gift to a number of persons, and the "survivors" of them, or "with benefit of survivorship," these words may be used as words of limitation, creating a joint tenancy even where the named persons take originally as tenants in common (*n*).

"Survivors"  
as word of  
limitation.

**1425.** If there is to be a sharing, the shares must *primâ facie* be equal (*o*).

Shares equal.

(ii.) *Distribution per Capita and per Stirpes.*

**1426.** In a gift to a number of donees (for example, to the children of several persons), whether taking as a class or combination of classes or not, the distribution between them may be intended to be made *per capita*, in which case each donee takes a share equal in amount to the share of each other donee, or *per stirpes*, in which case each family or stock takes an equal share with every other family or stock, and such share is then subdivided equally between the members of such family or stock; *primâ facie* the distribution is made *per capita* and not *per stirpes* (*p*).

Distribution,  
*primâ facie*,  
*per capita*.

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*Market Act, Ex parte Tanner* (1855), 20 Beav. 374, and *Doe d. Littlewood v. Green* (1838), 4 M. & W. 229, where, however, the estates in possession of the donees were expressly for life only; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 208.

(i) See *ibid.*, pp. 202, 203.

(k) *Ibid.*; *M'Gregor v. M'Gregor* (1859), 1 De G. F. & J. 63, 73, C. A.

(l) *Woodgate v. Unwin* (1831), 4 Sim. 129, explained in *M'Gregor v. M'Gregor, supra*, at p. 73; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 202, 203.

(m) *Hand v. North* (1863), 10 Jur. (N. S.) 7 (gift to two persons "as they attain twenty-one"), explaining *Woodgate v. Unwin, supra*, as decided on this ground.

(n) *Doe d. Borwell v. Abey* (1813), 1 M. & S. 428; *Wisden v. Wisden* (1854), 2 Sm. & G. 396; *Haddelsey v. Adams* (1856), 22 Beav. 266, approved in *Taaffe v. Conmee* (1862), 10 H. L. Cas. 64, 83; *Wiley v. Chanteperdrix*, [1894] 1 I. R. 209, 220; and see *Gooch v. Gooch* (1853), 3 De G. M. & G. 366, explained in *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535.

(o) *Robertson v. Fraser* (1871), 6 Ch. App. 696, 700; *Fisher v. Anderson* (1880), 4 Canada Supreme Court Reports, 406, 419.

(p) For examples in cases of gifts to a class, see *Weld v. Bradbury* (1715), 2 Vern. 705 (the children of J. S. and J. N.); *Butler v. Stratton* (1791), 3 Bro. C. C. 367 (descendants of A. and B.); *Lincoln (Lady) v. Pelham* (1804), 10 Ves. 166, 175; *Tomlin v. Hatfield* (1841), 12 Sim. 167; *Turner v. Hudson* (1847), 10 Beav. 222 (parents and children "to be classed together"); *Pattison v. Pattison* (1854), 19 Beav. 638 ("their said children"); *Re Lloyd's Estate, Baker v. Mason* (1856), 2 Jur. (N. S.) 539; *Armitage v. Williams* (1859), 27 Beav. 346; *Rook v. A.-G.* (1863), 31 Beav. 313; *Weldon v. Hoyland* (1862), 4 De G. & J. 564 (issue); *Re Stone, Baker*

## SECT. 6.

Quantity of  
Interest  
Given.

Inference  
from contexts  
in favour of  
distribution  
*per stirpes*.

**1427.** The context of the whole will, however, may require a stirpital distribution (*q*), as, for example, where the gift is to a number of parents and their children in such a manner that the children are substituted for (*r*) or take on the death of their respective parents (*s*); and gifts to several parents and at, or after, their deaths to their children, or to their issue, have received this

*v. Stone*, [1895] 2 Ch. 196, C. A. (children of the aforesaid). For examples in cases of gifts to a combination of classes, see *Northey v. Strange* (1716), 1 P. Wms. 340, 343 (children and grandchildren); *Barnes v. Patch* (1803), 8 Ves. 604; *Dugdale v. Dugdale* (1849), 11 Beav. 402; *Cancellor v. Cancellor* (1862), 2 Drew. & Sm. 194 (children and issue); *Re Fox's Will* (1865), 35 Beav. 163 (surviving brothers and sister and their children). For an example in case of a gift to named persons and a class, taking together as a single class, see *Kekewich v. Barker* (1903), 88 L. T. 130, H. L. For examples in cases of gifts to named persons, taking as individuals, together with a class, see *Blackler v. Webb* (1726), 2 P. Wms. 383; *Butler v. Stratton* (1791), 3 Bro. C. C. 367; *Lenden v. Blackmore* (1840), 10 Sim. 626; *Dowding v. Smith* (1841), 3 Beav. 541; *Paine v. Wagner* (1841), 12 Sim. 184; *Rickabe v. Garwood* (1845), 8 Beav. 579; *Cunningham v. Murray* (1847), 1 De G. & Sm. 366; *Baker v. Baker* (1847), 6 Hare, 269; *Amson v. Harris* (1854), 19 Beav. 210; *Tyndale v. Wilkinson* (1856), 23 Beav. 74; *Re Harper, Plowman v. Harper*, [1914] 1 Ch. 70. For an example in case of a gift to a number of persons as individuals and not as a class, see *Cooke v. Bowen* (1840), 4 Y. & C. (Ex.) 244. The rule is applied although the bequest is to persons who, under the statutory rule of distribution on the testator's intestacy, would take *per stirpes* (*Lincoln (Lady) v. Pelham* (1804), 10 Ves. 166, 176); and the fact that the persons taking are living relatives of the testator and the children of deceased relatives of the same relationship does not ordinarily take the case out of the rule (*Blackler v. Webb*, *supra*; *Amson v. Harris*, *supra*; *Payne v. Webb* (1874), 31 L. T. 637; *Evans v. Turner* (1904), 23 New Zealand Law Reports, 825; but compare *Re Walbran, Milner v. Walbran*, [1906] 1 Ch. 64 ("to be equally divided between children of A. and B."), distinguished in *Re Harper, Plowman v. Harper*, *supra*, at p. 75).

(*q*) *Brett v. Horton* (1841), 4 Beav. 239, 242; *Nettleton v. Stephenson* (1849), 3 De G. & Sm. 366 (gift over to others of the class *per stirpes*); *Archer v. Legg* (1862), 31 Beav. 187, 193 (gift over); *Re Sibley's Trusts* (1877), 5 Ch. D. 494. As, for instance, where the number of shares is mentioned and is equal to the number of the parents (*Overton v. Bannister* (1841), 4 Beav. 205), or the words imply a further subdivision of a share (*Davis v. Bennett* (1862), 4 De G. F. & J. 327, 329; *Capes v. Dalton* (1902), 86 L. T. 129, C. A.), or there is a reference to the Statutes of Distribution (*Mattison v. Tanfield* (1840), 3 Beav. 131; *Lewis v. Morris* (1854), 19 Beav. 34).

(*r*) *Alker v. Barton* (1842), 12 L. J. (Ch.) 16; *Rowland v. Gorsuch, Price v. Gorsuch* (1789), 2 Cox, Eq. Cas. 187; *Congreve v. Palmer* (1852), 16 Beav. 435; *Palmer v. Crutwell* (1862), 8 Jur. (N. S.) 479; *Timins v. Stackhouse* (1858), 27 Beav. 434; *Gowling v. Thompson* (1868), L. R. 11 Eq. 366, n., C. A.; *Re Alchorne, Eade v. Bowmer* (1911), 130 L. T. Jo. 528; but see *Atkinson v. Bartrum* (1860), 28 Beav. 219. As to substitutional gifts, see p. 729, *ante*. No presumption in favour of distribution *per stirpes* arises in case of an original alternative gift to issue (*Abbey v. Howe* (1847), 1 De G. & Sm. 470); but the description of issue by reference to their "respective" parents (*Re Coulden, Coulden v. Coulden*, [1908] 1 Ch. 320, 326), or a direction that the issue are to take their parents' share (*Shand v. Kidd* (1854), 19 Beav. 310), are indications of distribution *per stirpes*.

(*s*) The word "respective" in such cases points to a stirpital distribution (*Archer v. Legg*, *supra*, at p. 191; *Re Campbell's Trusts* (1886), 33 Ch. D. 98, C. A.; *Hunt v. Dorsett* (1855), 5 De G. M. & G. 570; compare *Booth v. Vicars* (1844), 1 Coll. 6; *Smith v. Streatfield* (1816), 1 Mer. 358, 361; *Ayscough v. Savage* (1865), 13 W. R. 373, C. A.).

construction as meaning at or after their respective deaths (*t*). Where, however, the children of all the parents are mentioned together as forming a single group or class to take under a single gift without any other indication of distribution *per stirpes*, the children take *per capita* (*u*). If the gift is postponed to the death of all the parents, then where the intermediate income after the death of any parent is given to or is to be applied for the benefit of his children *per stirpes*, this fact is an element to be considered in favour of distribution of the capital *per stirpes* (*w*), but does not rebut a clear direction that the distribution is to be *per capita* (*a*).

**1428.** In the case of a gift where issue are substituted for or take after their respective ancestors, the members of each set of issue *primâ facie* take *per capita* as between themselves the share which is distributed *per stirpes* to them (*b*); but the context may show that the substitution is distributive throughout and a *per stirpes* distribution intended (*c*). A characteristic of distribution *per stirpes* is that remote descendants do not take in competition with a living immediate ancestor of their own who takes under the gift (*d*).

**1429.** The determination of the persons forming the stocks from which the *stirpes* are to spring is a matter of construction of each will; it appears that, *primâ facie*, the stocks should be persons who might themselves take under the gift, as, for example, the original takers for

SECT. 6.  
Quantity of  
Interest  
Given.

Substitution  
of issue.

Determina-  
tion of stocks.

(*t*) *Tanière v. Parkes* (1825), 2 Sim. & St. 383; *Flinn v. Jenkins* (1844), 1 Coll. 365; *Arrow v. Mellish* (1847), 1 De G. & Sm. 355; *Willes v. Douglas* (1847), 10 Beav. 47; *Waldron v. Boulter* (1856), 22 Beav. 284; *Turner v. Whittaker* (1856), 23 Beav. 196; *Wills v. Wills* (1875), L. R. 20 Eq. 342; *Barnaby v. Tassell* (1871), L. R. 11 Eq. 363; *Re Hutchinson's Trusts* (1882), 21 Ch. D. 811; but see *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658, *per Lord DAVEY*, at p. 686: "it is certainly open to the contention that the gifts over after the death of such children to their heirs of the body did not take effect until the death of the survivor of them."

(*u*) *Stephens v. Hide* (1734), Cas. temp. Talb. 27; *Pearce v. Edmeades* (1838), 3 Y. & C. (EX.) 246; *Stevenson v. Gullan* (1854) 18 Beav. 590 (surviving children); *Abrey v. Newman* (1852), 16 Beav. 431; *Swabey v. Goldie* (1875), 1 Ch. D. 380, C. A. (inconvenience of keeping intermediate income in suspense did not prevent rule being applied).

(*w*) *Brett v. Horton* (1841), 4 Beav. 239, 242; *Re Campbell's Trusts* (1886), 33 Ch. D. 98, C. A.; and see *Bradshaw v. Melling* (1853), 23 L. J. (CH.) 602 (express reference to trust of income). It appears, however, that such a fact is of itself insufficient to raise a presumption in favour of distribution *per stirpes* (*Re Stone*, *Baker v. Stone*, [1895] 2 Ch. 196, C. A., *per LOPES*, L. J., at p. 200). A mere discretionary trust is insufficient (*Nockolds v. Locke* (1856), 3 K. & J. 6).

(*a*) *Re Stone*, *Baker v. Stone*, *supra*.

(*b*) *Armstrong v. Stockham* (1845), 7 Jur. 230; *Birdsall v. York* (1859), 5 Jur. (N. S.) 1237; *Gowling v. Thompson* (1868), L. R. 11 Eq. 366, n., C. A.; *Barnaby v. Tassell* (1871), L. R. 11 Eq. 363; *Re Sibley's Trusts* (1877), 5 Ch. D. 494; as to the shares of substituted donees, see pp. 729, 734, *ante*.

(*c*) *Ross v. Ross* (1855), 20 Beav. 645; *Re Orton's Trust* (1866), L. R. 3 Eq. 375; *Gibson v. Fisher* (1867), L. R. 5 Eq. 51.

(*d*) *Pearson v. Stephen* (1831), 2 Dow & Cl. 328, H. L.; *Dick v. Lacy* (1845), 8 Beav. 214; *Amson v. Harris* (1854), 19 Beav. 210; *Re Bennett's Trust* (1857), 3 K. & J. 280, 284; *Palmer v. Crutwell* (1862), 8 Jur. (N. S.) 479; *Gibson v. Fisher* (1867), L. R. 5 Eq. 51; *Re Rawlinson*, *Hill v. Withall*, [1909] 2 Ch. 36, 38.



SECT. 6.  
Quantity of  
Interest  
Given.

Gifts clearly  
cumulative.

Presumption  
in case of  
gifts in same  
instrument.

Gifts in  
different  
instruments.

whom the *stirpes* are substituted (*e*), and not ancestors of such takers (*f*).

SUB-SECT. 8.—*Cumulative and Substituted Gifts.*

**1430.** A testator may well intend to give two or more gifts, of equal or unequal amounts, to the same donee, and where the intention to do so is clear, it is effectuated (*g*).

**1431.** Where two legacies are given by the same testamentary instrument to the same person described in the same terms in each case (*h*), and are of the same specific thing or of the same specified amount, the second is presumed to be merely a repetition of the first (*i*), and the legatee *primâ facie* takes only one such legacy; but if such legacies are of different specified amounts (*k*), or have substantially different incidents (*l*), or if one is a residuary gift and the other a specific or pecuniary legacy (*m*), the second legacy is presumed to be cumulative, and the legatee *primâ facie* takes both (*n*).

**1432.** If the same specific thing is given by two different testamentary instruments (*o*) to the same person, the second gift is

(*e*) *Robinson v. Shepherd* (1863), 4 De G. J. & Sm. 129; *Re Wilson, Parker v. Winder* (1883), 24 Ch. D. 664; *Re Dering, Neale v. Beale* (1911), 105 L. T. 404.

(*f*) See *Gibson v. Fisher* (1877), L. R. 5 Eq. 51, where the context required such a determination of the stocks.

(*g*) *Burkinshaw v. Hodge* (1874), 22 W. R. 484; see also *Re Segelcke, Ziegler v. Nicol*, [1906] 2 Ch. 301, where the additional gift was held not to be cut down by the expression of an intention to make up the earlier gift to a certain amount, in fact less than the earlier gift; *Re Dyke, Dyke v. Dyke* (1881), 44 L. T. 568, 570. The question in each case is what is the intention collected from the whole will (*Guy v. Sharp* (1833), 1 My. & K. 589, 603). As to the presumption against double portions in the case of a child and a parent or person *in loco parentis*, where one gift is non-testamentary, see title EQUIT, Vol. XIII., p. 129; as to the conditions attached to the gifts, see p. 794, *post*.

(*h*) The probate in treating the instruments as the same or different is binding on the court of construction (*Baillie v. Butterfield* (1787), 1 Cox, Eq. Cas. 392; *Brine v. Ferrier* (1835), 7 Sim. 549); see pp. 629, 633, *ante*.

(*i*) *Garth v. Meyrick* (1779), 1 Bro. C. C. 30; *Holford v. Wood* (1798), 4 Ves. 76, 86, 91; *Heming v. Clutterbuck* (1827), 1 Bli. (N. S.) 479, H. L., where the judgment is based on an alleged finding of the Ecclesiastical Court that the two instruments were one will; *Brine v. Ferrier, supra*.

(*k*) *Hooley v. Hatton* (1773), 1 Bro. C. C. 390, n.; *Curry v. Pile* (1787), 2 Bro. C. C. 225.

(*l*) *Mackinnon v. Peach* (1838), 2 Keen, 555; *Ford v. Ruxton* (1844), 1 Coll. 403; *Inglefield v. Coghlan* (1845), 2 Coll. 247; *Thompson v. Teulon, Teulon v. Teulon* (1852), 22 L. J. (CH.) 243; *Wildes v. Davies* (1853), 22 L. J. (CH.) 495, 497; and see *Whyte v. Kearney* (1827), 3 Russ. 208. In *Manning v. Thesiger* (1833), 3 My. & K. 29, where the times of payment were different, and *Greenwood v. Greenwood* (1776), 1 Bro. C. C. 31, n. (one legacy to legatee's separate use), the differences were not sufficient to render the legacies cumulative.

(*m*) *Kirkpatrick v. Bedford, Bedford v. Kirkpatrick* (1878), 4 App. Cas. 96, 103, 109; *Gordon v. Alexander* (1858), 4 Jur. (N. S.) 1097.

(*n*) For a case of context to the contrary, see *Yockney v. Hansard* (1844), 3 Hare, 620 (second annuity in substitution for first).

(*o*) See note (*h*), *supra*.

presumed to be mere repetition of the first (*p*). In general, however, if by different testamentary instruments two legacies, whether of the same or different amounts, are given to the same person, they are presumed to be additional to each other (*q*).

SECT. 6.  
Quantity of  
Interest  
Given.

**1433.** The context of the instruments may, however, lead to a contrary inference (*r*); thus, where the later gift is of the same specified amount as the earlier (*a*), and is expressed to be given for the same cause or motive (*b*), the later gift is *primâ facie* merely a repetition of the first (*c*); and generally, whatever the amounts of the legacies, the later instrument may purport to explain (*d*),

Inferences  
from context.

(*p*) *St. Albans (Duke) v. Beauclerk* (1743), 2 Atk. 636, per Lord HARDWICKE, L.C., at p. 640; *Hooley v. Hatton* (1773), 1 Bro. C. C. 390, n., per ASHTON, J., in each case discussing the authorities in the civil law.

(*q*) *Foy v. Foy* (1758), 1 Cox, Eq. Cas. 163; *Baillie v. Butterfield* (1787), 1 Cox, Eq. Cas. 392; *Ridges v. Morrison* (1784), 1 Bro. C. C. 389; *Beynon v. Beynon* (1810), 17 Ves. 34, 43; *Lord v. Sutcliffe* (1828), 2 Sim. 273; *Wray v. Field* (1826), 2 Russ. 257; *Mackenzie v. Mackenzie* (1826), 2 Russ. 262; *Robley v. Robley* (1839), 2 Beav. 95, 101; *Tweeddale v. Tweeddale* (1840), 10 Sim. 453; *Forbes v. Lawrence* (1844), 1 Coll. 495; *Radburn v. Jervis*, *Hare v. Hill* (1840), 3 Beav. 450; *Lee v. Pain* (1844), 4 Hare, 201, 215, 231; *Lobley v. Stocks* (1854), 19 Beav. 392; *Townshend v. Mostyn* (1858), 26 Beav. 72; *Johnstone v. Harrowby (Earl)* (1859), 1 De G. F. & J. 183; *Cresswell v. Cresswell* (1868), L. R. 6 Eq. 69, 76. The presumption is strengthened by any substantial difference between the gifts (*Suisse v. Lowther (Lord)* (1843), 2 Hare, 424, 433; *Masters v. Masters* (1718), 1 P. Wms. 421, 423; *Lee v. Pain*, *supra*, at pp. 223, 224 (legacies carrying interest from different dates and to legatee by different descriptions)).

(*r*) The fact that other legacies to other donees in the same will are given in terms expressly making them cumulative is some indication that legacies not so described are substitutional (*Allen v. Callow* (1796), 3 Ves. 289; *Barclay v. Wainwright* (1797), 3 Ves. 462; *Russell v. Dickson* (1842), 2 Dr. & War. 133, 139), but is of slight importance in rebutting a presumption applicable to the case (*Mackenzie v. Mackenzie*, *supra*, at p. 273; *Suisse v. Lowther (Lord)*, *supra*, at p. 430; and see *Wray v. Field*, *supra*); and the fact that legacies are given in terms making them substitutional does not make other legacies not so described substitutional, where the presumption that they are cumulative is otherwise applicable (*Re Armstrong*, *Mayne v. Woodward* (1893), 31 L. R. Ir. 154).

(*a*) There is no presumption of repetition raised if in either instrument there is no motive or no motive other than the testator's own bounty (*Suisse v. Lowther (Lord)*, *supra*, at p. 432), or a different motive expressed, although the sums are the same, or where the same motive is expressed in both and the legacies are of different amounts (*Hurst v. Beach* (1821), 5 Madd. 351, 358, 359).

(*b*) *Hurst v. Beach*, *supra*; *Wray v. Field* (1822), Madd. & G. 300, per LEACH, V.-C., at p. 303; *Suisse v. Lowther (Lord)*, *supra*, per WOOD, V.-C., at p. 432. In *Wilson v. O'Leary* (1872), 7 Ch. App. 448, JAMES, L.J., at p. 455, said he did not know exactly what was meant by the expression "the same cause," as used in the rule, instancing legacies to a child or friend, which are made because the donee is a child or friend, and that perhaps the same might be said of every case of testamentary bounty except the giving a certain sum to an executor for his trouble. Where the gift in each case is to a person by description, for example, to "my servant," the descriptive words are not an expression of motive (*Roch v. Callen* (1848), 6 Hare, 531, 534); and see *Suisse v. Lowther (Lord)*, *supra*.

(*c*) *St. Albans (Duke) v. Beauclerk*, *supra*, per Lord HARDWICKE, L.C., at p. 640, adopting the rule of the civil law; *Beynon v. Beynon*, *supra* (to executor for his trouble).

(*d*) *Moggridge v. Thackwell* (1792), 1 Ves. 464, per Lord THURLOW, L.C., at p. 473.

SECT. 6.  
Quantity of  
Interest  
Given.

repeat (*e*), or be in substitution for (*f*) the earlier instrument in respect of the gift, or otherwise to be the final declaration of the testator's intentions (*g*), when accordingly the later gift supersedes the earlier: the above canons of construction are applicable only to cases in which there is no internal evidence of intention in the instruments themselves (*h*).

SUB-SECT. 9.—*Successive Interests.*

Presumption  
as to interests  
of donees  
named  
together.

**1434.** The context of a will may show that persons named together as donees were intended to take successively (*i*), either in the order of their names (*k*) or according to seniority in age (*l*), whichever is appropriate to the context and the circumstances of the case; without such a context a gift to persons named together

(*e*) *Moggridge v. Thackwell* (1792), 1 Ves. 464 ("simple repetition, where it is exact and punctual, has been regarded as sufficient proof" that the legacies were not cumulative); *Tatham v. Drummond* (1864), 33 L. J. (CH.) 438; and see *Hubbard v. Alexander* (1876), 3 Ch. D. 738; *Beynon v. Beynon* (1810), 17 Ves. 34, 42 (gift of income of trust legacy altered). Thus, many legacies may be given to the same donees in the same or nearly the same terms as in the prior instrument (*Coote v. Boyd* (1785), 1 Bro. C. C. 448; 2 Bro. C. C. 521; *Barclay v. Wainwright* (1797), 3 Ves. 462; *Whyte v. Whyte* (1873), L. R. 17 Eq. 50 (instruments of same date and contents); and see the cases cited in note (*f*), *infra*. In *Wilson v. O'Leary* (1872), 7 Ch. App. 448, this was not sufficient in the context and circumstances of that case to rebut the presumption that the legacies were cumulative.

(*f*) *St. Albans (Duke) v. Beauclerk* (1743), 2 Atk. 636; *Jackson v. Jackson* (1788), 2 Cox, Eq. Cas. 35; *Osborne v. Leeds (Duke)* (1800), 5 Ves. 369, 382; *A.-G. v. Harley* (1819), 4 Madd. 273; *Gillespie v. Alexander* (1824), 2 Sim. & St. 124; *Simon v. Barber* (1829), Tambl. 14; *Fraser v. Byng* (1829), 1 Russ. & M. 90, 101, 102; *Robley v. Robley* (1839), 2 Beav. 95; *A.-G. v. George* (1843), 12 L. J. (CH.) 165; *Suisse v. Lowther (Lord)* (1843), 2 Hare, 424, 437; *Kidd v. North* (1846), 2 Ph. 91; *Duncan v. Duncan* (1859), 27 Beav. 392; *Tuckey v. Henderson* (1863), 33 Beav. 174; *Bell v. Park*, [1914] 1 I. R. 158, C. A.

(*g*) *Russell v. Dickson* (1853), 4 H. L. Cas. 293 (recital that testator had not time to alter will); compare *Sawrey v. Rumsey* (1852), 5 De G. & Sm. 698 (alteration as to a legacy in a will already altered by a previous codicil).

(*h*) *Kidd v. North*, *supra*, per Lord COTTENHAM, L.C., at p. 97.

(*i*) As to successive interests in consumables, see p. 528, *ante*; as to the rule of law with regard to the construction of successive interests in real estate, see p. 663, *ante*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 212 *et seq.*; as to the construction of successive interests in settled property generally, see title SETTLEMENTS, Vol. XXV., pp. 521 *et seq.*; as to the construction in certain cases of successive gifts of real estate each sufficient to carry the fee simple, see p. 673, *ante*.

(*k*) *Stratford v. Powell* (1807), 1 Ball & B. 1. Similarly, if the testator gives one of a number of like things to each of several donees, it appears that *prima facie* the legatees exercise their rights of selection according to the priority of the gifts (*Duckmanton v. Duckmanton* (1860), 5 H. & N. 219, per MARTIN, B., and WATSON, B., at p. 222; *Asten v. Asten*, [1894] 3 Ch. 260, per ROMER, J., at p. 263; see note (*n*), p. 531, *ante*).

(*l*) *Ongley v. Peale* (1713), 2 Ld. Raym. 1312; *Lewis d. Ormond v. Waters* (1805), 6 East, 336 (first and other sons); *Young v. Sheppard* (1847), 10 Beav. 207 ("to devolve in succession upon my remaining children"); *Honywood v. Honywood* (1905), 92 L. T. 814 (first and other sons); and see *Cradock v. Cradock* (1858), 4 Jur. (N. S.) 626. In the case of real estate, a direction for settlement on children in succession may be "an epitome of a strict settlement" (*Doe d. Phipps v. Mulgrave (Lord)* (1793), 5 Term Rep. 320, 324; *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613, 623).



as donees is *primâ facie* not construed to give them estates in succession (a).

**1435.** In certain cases a gift of a succession of interests in real estate to donees, some of whom are not allowed by law to take as purchasers, is construed under the *cy-près* doctrine to be a gift of an estate tail in one of them, where that estate if allowed to descend unbarred would carry the property to the donees and no others (b); and words referring to successive generations may be descriptive of the descent of an estate tail and used as words of limitation (c).

SUB-SECT. 10.—*Particular Gifts.*

(i.) *Gifts to a Person and his Children.*

**1436.** In a gift to a donee “and his children” or to a donee “and his issue” (d), the last words in each case are capable of being used as words of limitation (e), or words of description of persons to take either concurrently with or in succession to the named donee (f), or in substitution for him (g).

**1437.** Where there is an immediate devise of real estate to a person and his children, and he has at the date of the will (h) no child, then *primâ facie* the word “children” is taken to be a word of limitation and the named person has an estate tail (i); the

SECT. 6.  
Quantity of  
Interest  
Given.

*Cy-près*  
construction.

Possible con-  
structions of  
gift to A. and  
his children  
etc.

Canons of  
construction  
of devises.

(a) *De Windt v. De Windt* (1866), L. R. 1 H. L. 87; *Surtees v. Surtees* (1871), L. R. 12 Eq. 400; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520, C. A. (in a gift to a class for life “we have no right to import the word ‘successive’ or the word ‘successively’ or the words ‘for the time being’ or any words of that sort” (*ibid.*, per JESSEL, M.R., at pp. 529, 530)); *Allgood v. Blake* (1873), L. R. 8 Exch. 160, 169, 170.

(b) As to the *cy-près* doctrine in this connexion, see titles PERPETUITIES, Vol. XXII., pp. 367 *et seq.*; POWERS, Vol. XXIII., p. 52.

(c) *Wollen v. Andrews* (1824), 2 Bing. 126; *Fetherston v. Fetherston* (1835), 3 Cl. & Fin. 67, H. L. (“heirs male, according to their seniority”); *Trash v. Wood* (1839), 4 My. & Cr. 324 (to “T.’s children and so on for ever”); *Snowball v. Procter* (1843), 2 Y. & C. Ch. Cas. 478 (to children “and their children after them respectively”); *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571; *Forsbrook v. Forsbrook* (1867), 3 Ch. App. 93; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 406; see p. 766, *ante*.

(d) As to gifts to a donee and his issue, see p. 791, *post*.

(e) See pp. 752, 766, *ante*.

(f) *Lampley v. Blower* (1746), 3 Atk. 396, *per* Lord HARDWICKE, L.C., at p. 397.

(g) See p. 729, *ante*.

(h) *Seale v. Barter* (1801), 2 Bos. & P. 485; *Clifford v. Koe* (1880), 5 App. Cas. 447, 453, 463, 469, 471. The Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), has not affected the rule in this respect (*Grieve v. Grieve* (1867), 36 L. J. (CH.) 932, 933).

(i) This is the rule in *Wild’s Case* (1599), 6 Co. Rep. 16 b, 17 a (*sub nom. Richardson v. Yardley*, Moore (K. B.), 397, pl. 519; *Anon.*, Gouldsb. 139, pl. 47), as stated in *Byng v. Byng* (1862), 10 H. L. Cas. 171, *per* Lord CRANWORTH, L.C., at p. 178; *Sweetapple v. Bindon* (1705), 2 Vern. 536; *Cook v. Cook* (1706), 2 Vern. 545; *Wharton v. Gresham* (1776), 2 Wm. Bl. 1083 (“to A. and his sons in tail male” gave A. an estate tail; compare *Stevens v. Lawton* (1588), Cro. Eliz. 21; *Trevor v. Trevor* (1847), 1 H. L. Cas. 239 (a case of executory trust; issue took as purchasers). The reason for the rule is stated in *Wild’s Case*, *supra*: “the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent for the gift is immediate”; compare *Radcliffe v. Buckley* (1804), 10 Ves. 195, 201.

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context may show, however, that the unborn children are to take as purchasers (*k*). On the other hand, if he has a child or children at the time of the devise, then the will is *prima facie* construed as giving a joint estate to him and his children as purchasers (*l*); even in the latter case, however, the context may show that the word is a word of limitation and that an estate tail is intended (*m*), or that the children take in succession to their parents and as purchasers (*n*).

It seems that for the purpose of these canons of construction an only child *en ventre sa mère* is not regarded as in existence (*o*).

When rule  
is applied.

**1438.** The rule only applies where the testator has not sufficiently indicated his intention; it has no application therefore where the devise to the children would, without reference to the rule, be a gift in succession to and not concurrently with their parent (*p*). The court has always considered itself at liberty to disregard the rule in

Accordingly, the rule in *Wild's Case* (1599), 6 Co. Rep. 16 b, 17 a, is inapplicable unless the interests of the parent and children are both concurrent; thus it does not apply to gifts to the parent for life and after his death to his children (*Chandler v. Gibson* (1901), 2 Ontario Law Reports, 442; *Grant v. Fuller* (1902), 33 Canada Supreme Court Reports, 34, 37; *Re Sharon and Stuart* (1906), 12 Ontario Law Reports, 605, 609, 610; and see the text, *infra*); but it appears that the rule is not confined to cases where those interests are immediate, but applies also to postponed gifts (*Broadhurst v. Morris* (1831), 2 B. & Ad. 1; but see *Buffar v. Bradford* (1741), 2 Atk. 220, 222 (legacy postponed to life estate: "it is the time of possession in the present case, which takes it out of the reasoning in *Wild's Case*")).

(*k*) *Re Moyles' Estate* (1878), 1 L. R. Ir. 155, C. A. (words of limitation applying to children's interest). The addition of words of limitation does not affect the rule where they can be read as referring to the first donee himself and as describing his interest (*Wharton v. Gresham* (1776), 2 Wm. Bl. 1083; *Cormack v. Copous* (1853), 17 Beav. 397, 401). The addition of a power of appointment in the parent does not necessarily preclude the application of the rule (*Seale v. Barter* (1801), 2 Bos. & P. 485; *Clifford v. Koe* (1880), 5 App. Cas. 447, 457, 458, 469). The application of the rule is assisted by a gift over on failure of issue indefinitely (*Clifford v. Koe*, *supra*, at pp. 454, 468; see *Broadhurst v. Morris*, *supra* (failure of "such" issue at death), but such a gift over does not create an estate tail in the parent (compare *p. 850, post*) where there are indications that the children are to take as purchasers in fee simple (*Doe d. Davy v. Burnsall* (1794), 6 Term Rep. 30 (to A. and the issue of her body (in the context meaning children) as tenants in common if more than one)). The rule applies to a limitation to the donee "and his child or children for ever" (*Davie v. Stevens* (1780), 1 Doug. (K. B.) 321; *Broadhurst v. Morris*, *supra*).

(*l*) *Wild's Case*, *supra*; *Oates d. Hatterley v. Jackson* (1742), 2 Stra. 1172.

(*m*) *Wood v. Baron* (1801), 1 East, 259; *Webb v. Byng* (1856), 2 K. & J. 669, 673, affirmed, *sub nom. Byng v. Byng* (1862), 10 H. L. Cas. 171, 181, 182 (inferences against the rule drawn from name and arms clause and the fact that heirlooms would be enjoyed jointly if the rule applied); *Tyrone (Earl) v. Waterford (Marquis)* (1860), 1 De G. F. & J. 613, 624 ("children in succession").

(*n*) *Jeffery v. Honywood* (1819), 4 Madd. 398 (where words of limitation were added to the limitation to the issue); *Bowen v. Scowcroft* (1837), 2 Y. & C. (Ex.) 640, 661. It was said, however, in *Webb v. Byng*, *supra*, per WOOD, V.-C., at p. 673, that *Jeffery v. Honywood*, *supra*, was overruled in *Broadhurst v. Morris*, *supra*, but in the last-mentioned case no *ratio decidendi* is reported and *Jeffery v. Honywood*, *supra*, was not cited; see also note (*r*), p. 789, *post*.

(*o*) *Roper v. Roper* (1867), L. R. 3 C. P. 33; see p. 742, *ante*.

(*p*) *Re Jones, Lewis v. Lewis*, [1910] 1 Ch. 167, per JOYCE, J., at p. 175; *Re Buckmaster's Estate* (1883), 47 L. T. 514.



both its branches where an adherence to it would defeat the intention of the testator as collected from other passages of his will (*q*).

Moreover, in a case where there is a devise of real estate to a named person, and after his decease to his children, although he has no children at the time of the devise, yet every child which he has may take under the limitation by way of remainder (*r*).

**1439.** The above rule has strictly no application to personal estate (*s*), but in cases where in bequests to a person and his children the word “children” is used as a word of limitation, the named person takes an absolute interest (*a*). Under a bequest of personal estate to a named person and his children the parent and the children *primâ facie* take concurrently (*b*) as joint tenants (*c*), but the context may point to a different conclusion (*d*),

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life with  
remainder  
to children.  
Canon of  
construction  
of bequests.

(*q*) *Byng v. Byng* (1862), 10 H. L. Cas. 171, *per* Lord CRANWORTH, L.C., at p. 178; *Clifford v. Koe* (1880), 5 App. Cas. 447, *per* Lord SELBORNE, L.C., at p. 453, and Lord WATSON, at p. 471. The rule was excluded on this ground in *Grieve v. Grieve* (1867), L. R. 4 Eq. 180 (gift of furniture with the real estate), doubted in *Clifford v. Koe*, *supra*, at pp. 461, 462.

(*r*) The resolution in *Wild's Case* (1599), 6 Co. Rep. 16 b, 17 a; *Ginger d. White v. White* (1742), Willes, 348 (to the children of J. successively . . . and to their heirs); *Doe d. Liversage v. Vaughan* (1822), 5 B. & Ald. 464; and see note (*k*), p. 788, *ante*.

(*s*) *Audsley v. Horn* (1858), 26 Beav. 195; S. C. (1859), 1 De G. F. & J. 229, *per* Lord CAMPBELL, L.C., at p. 236, where, however, a gift over assisted the construction of the gift as creating successive interests; *Re Jones, Lewis v. Lewis*, [1910] 1 Ch. 167. In *Stokes v. Heron* (1845), 12 Cl. & Fin. 161, H. L., reversing S. C. (1842), 2 Dr. & War. 89 (SUGDEN, L.C.), and affirming S. C. (1841), 3 I. Eq. R. 168 (Lord PLUNKET, L.C.), Lord BROUGHAM, at pp. 183 *et seq.*, considered that the rule (probably meaning the second branch of the rule; see the text, *infra*, and note (*b*), *infra*), applied to personal estate, and referred to *Buffar v. Bradford* (1741), 2 Atk. 220, *Doe d. Gigg v. Bradley* (1812), 16 East, 399, and *Oates d. Hatterley v. Jackson* (1742), 2 Stra. 1172, as supporting that opinion, whilst Lord CAMPBELL, at p. 198, inclined to that opinion, but left the question open. In cases of bequests of personal estate the word “children” is not, as a rule, a word of limitation (*Buffar v. Bradford*, *supra*).

(*a*) *Doe d. Gigg v. Bradley*, *supra*, where a child existed at the date of the will; *Cape v. Cape* (1837), 1 Y. & C. (EX.) 543.

(*b*) *Alcock v. Ellen* (1692), Freem. (CH.) 185; *Buffar v. Bradford*, *supra*; *Pyne v. Franklin* (1832), 5 Sim. 458; *De Witte v. De Witte* (1840), 11 Sim. 41; *Sutton v. Torre* (1842), 6 Jur. 234 (compare *Cator v. Cator* (1851), 14 Beav. 463, on the same will); *Beales v. Crisford* (1843), 13 Sim. 592 (“B. and his family,” construed to mean “children”); *Bustard v. Saunders* (1843), 7 Beav. 92; *Mason v. Clarke* (1853), 17 Beav. 126; *Newill v. Newill* (1872), 7 Ch. App. 253; and see *Jubber v. Jubber* (1839), 9 Sim. 503; *Salmon v. Tidmarsh* (1859), 5 Jur. (N. S.) 1380, where the children took at twenty-one. The class of children is ascertained according to the usual rules (see pp. 714 *et seq.*, *ante*); and, therefore, no child born after the death of the testator, in the case of an immediate gift, can be let in (*De Witte v. De Witte*, *supra*); but in the case of a postponed gift, after-born children may be let in (*Cook v. Cook* (1706), 2 Vern. 545; *Read v. Willis* (1840), 1 Coll. 86; *Lenden v. Blackmore* (1840), 10 Sim. 626; but see *Scott v. Scott* (1845), 15 Sim. 47).

(*c*) See the cases cited in note (*b*), *supra*. The context showed that the donees took as tenants in common in *Eccard v. Brooke* (1790), 2 Cox, Eq. Cas. 213; *Lenden v. Blackmore*, *supra*; *Paine v. Wagner* (1841), 12 Sim. 184; *Cunningham v. Murray* (1847), 1 De G. & Sm. 366 (not appealed from on this point (1848), 17 L. J. (CH.) 407); *Salmon v. Tidmarsh* (1859) 5 Jur. (N. S.) 1380.

(*d*) *Caffary v. Caffary* (1844), 8 Jur. 329 (subsequent gift showing that



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and it has been said (e) that slight circumstances have been laid hold of by the courts as enabling them to come to the conclusion that a gift for life to the named person and after his death to his children was intended (f). The interests are presumed to be successive, for example, where all the children of the donee, whether born before or after the death of the testator, are intended to take (g), or where there is a gift over on failure of issue of the parent, or other provision showing that the property is contemplated as still subsisting undivided at the death of the parent (h), or otherwise inconsistent with the parent taking an interest in the capital together with the children (i).

parent took absolutely). If the gift is to a married woman and her children free from the control of her husband, or with any like condition giving her a separate use and applying to the whole fund, a succession of interests is indicated, for otherwise the separate use could not be applied to the whole fund (*French v. French* (1840), 11 Sim. 257; *Bain v. Lescher* (1840), 11 Sim. 397; *Froggatt v. Wardell* (1850), 3 De G. & Sm. 685; *Jeffrey v. De Vitre* (1857), 24 Beav. 296, not following *Witte v. Witte* (1840), 11 Sim. 41; *Bustard v. Saunders* (1845), 7 Beav. 92); but a separate use applying only to the wife's interest in the whole fund is not sufficient to indicate such a succession of interests (*Re Seyton, Seyton v. Satterthwaite* (1887), 34 Ch. D. 511 (statutory provision for the benefit of "his wife for her separate use and of his children"). The fact that the gift is to the testator's wife and his children does not exclude the ordinary rule that they take concurrently (*Newill v. Newill* (1872), 7 Ch. App. 253, 259; and compare *Re Seyton, Seyton v. Satterthwaite, supra*; *Re Davies's Policy Trusts*, [1892] 1 Ch. 90, not following *Re Adam's Policy Trusts* (1883), 23 Ch. D. 525). In a gift to a person, his wife and children, the rule applies subject to the rule as to the effect of gifts to a person and his wife with other persons (*Gordon v. Whilldon* (1848), 11 Beav. 170); see title HUSBAND AND WIFE, Vol. XVI., p. 354; p. 780, *ante*.

(e) *Re Wilmot, Wilmot v. Betterton* (1897), 76 L. T. 415, *per* STIRLING, J., at p. 417; *Crockett v. Crockett* (1848), 2 Ph. 553, *per* Lord COTTENHAM, L.C., at p. 555; *Newill v. Newill, supra*, at p. 256; *Re Jones, Lewis v. Lewis*, [1910] 1 Ch. 167, *per* JOYCE, J., at p. 172.

(f) *Newman v. Nightingale* (1787), 1 Cox, Eq. Cas. 341 (to A. or her children for ever); *Crawford v. Trotter* (1819), 4 Madd. 361; *Cator v. Cator* (1851), 14 Beav. 463 (addition to previous settled legacy). Thus, a direction that the fund is "to be secured for their use" or similar direction has been considered to show an intention to settle (*Vaughan v. Headfort (Marquis)* (1840), 10 Sim. 639; *French v. French* (1840), 11 Sim. 257 (in trust as aforesaid); *Combe v. Hughes* (1872), L. R. 14 Eq. 415; *Re Mills, Mills v. Mills* (1902), 22 New Zealand Law Reports, 425), although a gift to the named person as trustee for himself and children, without more, is not sufficient (*Newill v. Newill, supra*, at p. 258). A separate gift to two of the children affected the decision in *Re Owen's Trusts* (1871), L. R. 12 Eq. 316. As to whether or in what cases a power of appointment among the children may be held to be created, see *Ward v. Grey* (1858), 26 Beav. 485, 494, observed upon in *Hart v. Tribe* (1863), 32 Beav. 279, 280; *Bradshaw v. Bradshaw*, [1908] 1 I. R. 288.

(g) *Morse v. Morse* (1829), 2 Sim. 485; *Froggatt v. Wardell* (1850), 3 De G. & Sm. 685; *Jeffrey v. De Vitre, supra*; *Audsley v. Horn* (1858), 26 Beav. 195, affirmed (1859), 1 De G. F. & J. 226; *Ward v. Grey, supra* ("A. and her children" spoken of as "A. and her family" in another codicil).

(h) *Gawler v. Cadby* (1821), Jac. 346; *Dawson v. Bourne* (1852), 16 Beav. 29; *Audsley v. Horn, supra*, at p. 235 (gift over if "they," meaning the children, died without issue); *Re Jones, Lewis v. Lewis, supra*, at p. 173.

(i) *Garden v. Pulteney, Southcote v. Bath (Earl)* (1765), 2 Eden, 323 (if there should be but one younger son, the whole to him); *Parsons v. Coke* (1858),

(ii.) *Gifts to a Person and his Issue.*

## SECT. 6.

**Quantity of Interest Given.**

**1440.** In the case of a devise of real property to a person "and his issue" the word "issue" is *primâ facie* used as a word of limitation (*k*); the devise is then equivalent to a devise to the donee and the heirs of his body, and he therefore takes an estate tail (*l*). Particularly, the word "issue" in such a gift is a word of limitation where there are no issue at the date of the will (*m*). Where the context, however, shows that the issue are to take under the gift as purchasers, then they *primâ facie* take as joint tenants with the named person (*n*).

Devises to a person and his issue.

**1441.** In a gift of personal estate to a person and his issue (*o*) they *primâ facie* take by purchase (*p*), and concurrently as joint tenants (*q*), but the context and the circumstances may show an intention to the contrary. Thus, gifts of personal estate to a person and his issue have in several cases conferred an absolute interest on him (*r*), particularly where there was a gift over on failure of issue generally (*s*); in such cases the context showed that the words

Bequests to person and his issue.

4 Drew. 296 (issue to take parents' share); *Newill v. Newill* (1872), 7 Ch. App. 253, 257, 258 (direction that children should take shares in whole fund), approving *Armstrong v. Armstrong* (1869), L. R. 7 Eq. 518, 522.

(*k*) *Tate v. Clarke* (1838), 1 Beav. 100, 105; *Slater v. Dangerfield* (1846), 15 M. & W. 263, 272.

(*l*) *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, *per* Lord CRANWORTH, L.C., at p. 872; *Martin v. Swannell* (1840), 2 Beav. 249; *Re Coulden, Coulden v. Coulden*, [1908] 1 Ch. 320, *per* PARKER, J., at p. 324: "the reason is that an estate tail in the ancestor is the only way of providing for all the issue of the ancestor, and the courts have assumed that in a devise to one and his issue, the whole line of issue is intended"; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 230, note (*a*).

(*m*) The rule in *Wild's Case* (1599), 6 Co. Rep. 16 b, 17 a; *Campbell v. Bouskell* (1859), 27 Beav. 325; *Underhill v. Roden* (1876), 2 Ch. D. 494, 499; see p. 787, *ante*. As to devises to a person for life with remainder to his issue, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 229, note (*t*), where the effect of the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b, on such devises is considered.

(*n*) *Re Wilmot, Wilmot v. Betterton* (1897), 76 L. T. 415, where the second branch of the rule in *Wild's Case*, *supra*, was applied, although there were no issue in existence. By force of the context the issue may take in succession to their ancestor (*Doe d. Gilman v. Elvey* (1803), 4 East, 313 (to A. and his issue as tenants in common if more than one), following *Doe d. Davy v. Burnsall* (1794), 6 Term Rep. 30; *Trevor v. Trevor* (1847), 1 H. L. Cas. 239 (to A. and her issue in tail male in strict settlement); *Re Lawrence (Lord), Lawrence v. Lawrence* (1914), 137 L. T. Jo. 213).

(*o*) As to bequests to a person for his life and after his death to his issue, see note (*e*), p. 769, *ante*.

(*p*) *Longworth v. Campbell*, [1910] 1 I. R. 23, 35; *Re Taylor's Trusts, Taylor v. Blake*, [1912] 1 I. R. 1, 9.

(*q*) *Re Wilmot, Wilmot v. Betterton*, *supra*, at p. 417; *Law v. Thorp* (1858), 4 Jur. (N. S.) 447, where on the context the donees took as tenants in common with benefit of survivorship between them.

(*r*) *Fereyes v. Robertson* (1731), Bunb. 301; *Howston v. Ives* (1764), 2 Eden, 216; *Butler v. Ommamey* (1827), 4 Russ. 70 (pecuniary legacy); *Donn v. Penny* (1815), 1 Mer. 20; *Lyon v. Mitchell* (1816), 1 Madd. 467; *Samuel v. Samuel* (1845), 9 Jur. 222; *Parkin v. Knight* (1846), 15 Sim. 83; and see *A.-G. v. Bright* (1836), 2 Keen, 57; *Tate v. Clarke*, *supra*; *Jordan v. Lowe* (1843), 6 Beav. 350, commented on in *Ex parte Wynch* (1854), 5 De G. M. & G. 188, 209, C. A.

(*s*) *Donn v. Penny*, *supra*; *Beaver v. Nowell* (1858), 25 Beav. 551; *Re Andrew's Will* (1859), 27 Beav. 608.

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were used as words of limitation, and it seems that there is no canon of construction to indicate when they are so used (*t*); in several cases under such a limitation the issue have taken alternatively only, in case their ancestor was not in existence at the time of distribution, either by way of substitution (*u*) or by way of original gift (*w*), or have taken in succession to their parent (*x*).

SECT. 7.—*Conditional Gifts.*

SUB-SECT. 1.—*Conditions in General.*

Words *primâ facie* not conditional.

**1442.** Where the testator has by any means (*a*) clearly attached conditions or obligations to his gifts, his expressed intention is paramount (*b*); but where the will is not clear, it is a settled rule of construction that words are not construed as importing a condition, particularly a condition of forfeiture, if they are fairly capable of another interpretation (*c*).

Creation of trust or charge.

Words expressing a condition may be treated as forming words of limitation (*d*) or merely creating a trust (*e*) or charge, particularly if the gift is a devise to the testator's heir-at-law (*f*).

A gift upon condition that the donee makes certain payments for the benefit of other persons (*g*), or a gift subject to such payments (*h*),

(*t*) "That the word 'issue' may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on each particular instrument, the court which has to interpret such instrument being unfettered by any general rule" (*Re Coulden, Coulden v. Coulden*, [1908] 1 Ch. 320, *per* PARKER, J., at p. 324). To hold "issue" in such a case to be a word of limitation would, by conferring an absolute interest on the ancestor, deprive the issue of all benefit under the will (*ibid.*).

(*u*) *Butter v. Ommaney* (1827), 4 Russ. 70 (residue); *Pearson v. Stephen* (1831), 5 Bli. (N. s.) 203, H. L.; *Dick v. Lacy* (1845), 8 Beav. 214; *Re Stanhope's Trusts* (1859), 27 Beav. 201.

(*w*) *Re Coulden, Coulden v. Coulden, supra*, at p. 325.

(*x*) *Parsons v. Coke* (1858), 4 Drew. 296.

(*a*) "Equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed" (*Re Williams, Williams v. Williams*, [1897] 2 Ch. 12, C. A., *per* LINDLEY, L.J., at p. 18). As to uncertainty in a condition, see p. 584, *ante*.

(*b*) *Bastin v. Watts* (1840), 3 Beav. 97 (vested shares only held to be divested, though an absurd provision); *Archbold v. Austin-Gourlay* (1880), 5 L. R. Ir. 214 (testator, thinking that his rights were contingent, made contingent disposition).

(*c*) *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35, *per* Lord WESTBURY, at p. 41; *Wright v. Wilkin* (1862), 31 L. J. (Q. B.) 7, 196, Ex. Ch.; as to divesting, see, further, p. 822, *post*; see also *Yates v. University College, London* (1875), L. R. 7 H. L. 438.

(*d*) *Page v. Hayward* (1705), 2 Salk. 570; *Pelham Clinton v. Newcastle (Duke)*, [1902] 1 Ch. 34, C. A., affirmed, [1903] A. C. 111.

(*e*) *Oddie v. Brown* (1859), 4 De G. & J. 179, 194; *Wright v. Wilkin, supra*.

(*f*) *Boraston's Case* (1587), 3 Co. Rep. 19 a; Tudor, L. C. Real Prop., 4th ed., pp. 427, 432; *Smith v. Alterley* (1672), Freem. (Ch.) 136.

(*g*) *Hodge v. Churchward* (1847), 16 Sim. 71; *Cunningham v. Foot* (1878), 3 App. Cas. 974; *Re Oliver, Newbold v. Beckitt* (1890), 62 L. T. 553.

(*h*) *Hughes v. Kelly* (1843), 3 Dr. & War. 482 (a settlement); *Jacquet v. Jacquet* (1859), 27 Beav. 332; *Proud v. Proud* (1862), 32 Beav. 234; *Re Cowley, Souch v. Cowley* (1885), 53 L. T. 494.



is generally construed, in cases where in the circumstances existing at the date of the will some surplus could remain out of the property after making the payments, as constituting those payments a charge on the property given (*i*); and in cases where no substantial surplus could remain after making the payments at the date of the will, as constituting the donee a trustee of the property (*k*). When the surplus is appropriated to a purpose which may or may not require the whole of it to be applied, the question is one of construction of the particular will (*l*).

SECT. 7.  
Conditional  
Gifts.

**1443.** A condition attached to the first of a series of gifts may attach alone to that one, or generally throughout the series (*m*).

In a gift expressly made "in the same manner" as another gift, the reference may be to the conditions attached by the testator (*n*) to the mode of enjoyment only (*o*), and not to the mode of settlement, if any, of that gift (*p*), or other restrictions (*q*) (as appears to be the construction *primâ facie* adopted (*r*)), or, especially if there is nothing else to refer to, may be to all the gifts over and other conditions of that gift (*s*).

Conditions  
attaching to  
a series.  
Gifts by  
reference.

(*i*) As to the charge made in the case of a gift of an annuity out of the income of a fund, and "subject" thereto a gift of the *corpus*, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 493, notes (*i*), (*k*).

(*k*) *Wright v. Wilkin* (1860), 2 B. & S. 232, affirmed (1862), 2 B. & S. 259, Ex. Ch.; *A.-G. v. Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1; *Bird v. Harris* (1870), L. R. 9 Eq. 204; *Re Corcoran, Corcoran v. O'Kane*, [1913] 1 I. R. 1, 7. In both cases the refusal to perform the condition or the death of the donee does not disappoint those entitled under the condition (*Re Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431, C. A.). The question has arisen chiefly in cases of charitable gifts of sums payable out of income (*Thetford School Case* (1610), 8 Co. Rep. 130 b; see title CHARITIES, Vol. IV., pp. 176 *et seq.*).

(*l*) *A.-G. v. Wax Chandlers' Co.*, *supra*, at pp. 9, 10.

(*m*) For examples of cases where the application of a condition to several gifts was in question, see *Cockrill v. Pitchforth* (1845), 1 Coll. 626; *Doe d. Bailey v. Sloggett* (1850), 5 Exch. 107; *Paylor v. Pegg* (1857), 24 Beav. 105 (gifts commencing with "likewise"), distinguishing *Boosey v. Gardener* (1854), 5 De G. M. & G. 122; *Gordon v. Gordon* (1871), L. R. 5 H. L. 254; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192, 209; *Re M'Garrity, Ballance v. M'Garrity* (1912), 46 I. L. T. 175. For examples where the question of vesting is concerned, see p. 802, *post*.

(*n*) As a rule, the court does not look for conditions affixed by law to the donees' interests (*Ord v. Ord* (1866), L. R. 2 Eq. 393, 396).

(*o*) As, for instance, the separate use (*Shanley v. Baker* (1799), 4 Ves. 731), or tenancy in common (*Lumley v. Robbins* (1853), 10 Hare, 621, 629; *Re Wilder's Trusts* (1859), 27 Beav. 418), or condition as to marriage, if valid (*Younge v. Furse* (1857), 8 De G. M. & G. 756), attached to the gift referred to.

(*p*) *Eames v. Anstee* (1863), 33 Beav. 264, 267; *In the Will of Green, Crowson v. Wild*, [1907] Victorian Law Reports, 284.

(*q*) As, for instance, a restriction on the class of persons taking may not be imported (*Yardley v. Yardley* (1858), 26 Beav. 38; *Pigott v. Wilder* (1858), 26 Beav. 90; *Re Wilder's Trusts*, *supra*; see, *contra*, *Swift v. Swift* (1863), 32 L. J. (CH.) 479).

(*r*) There is no inflexible rule on the subject (*Pigott v. Wilder*, *supra*).

(*s*) *Ross v. Ross* (1845), 2 Coll. 269, *per* KNIGHT BRUCE, V.-C., at p. 272 ("intimating the manner in which the absolute interest was to be carved and divided"); *Re Liverpool Dock Acts, Re Colshead's Will* (1852), 2 De G. & J. 690; *Auldjo v. Wallace* (1862), 31 Beav. 193; *Re Shirley's Trusts* (1863), 32 Beav. 395; *Ord v. Ord*, *supra*; and see *Milsom v. Awdry* (1800), 5 Ves. 465, 467.

SECT. 7.  
Conditional  
Gifts.

Cumulative  
and substi-  
tuted legacies.

Legacies given expressly (*t*) or impliedly (*u*) in addition to or in substitution for a legacy previously given, so as to vary the amount of that legacy (*x*), are *primâ facie* subject to the like conditions, if any, as are imposed on the original legacy (*a*), in respect of the mode of enjoyment of such legacy (*b*), but the context or the circumstances may exclude this rule (*c*). It does not apply, unless the context requires it (*d*), to cases where its application would alter the limitations of the property, so as to make the property pass under a gift over or course of settlement (*e*), or where the character of the gifts is entirely

(*t*) The rule applies more especially to such cases of an express declaration; the presumption is that the testator merely intended to alter the amount of the legacy (*Re Boden, Boden v. Boden*, [1907] 2 Ch. 132, 149, 150, C. A.).

(*u*) *Johnstone v. Harrowby (Earl)* (1859), 1 De G. F. & J. 183; but the rule is apparently doubted in this respect in *Re Boden, Boden v. Boden*, *supra*, per FLETCHER MOULTON, L.J., at pp. 149, 150.

(*x*) It seems that the rule is confined to questions of amount, though it may not be impossible to extend it (*Re Joseph, Pain v. Joseph*, [1908] 2 Ch. 507, per FARWELL, L.J., at p. 512); see *Barry v. Crundall* (1835), 7 Sim. 430 (in the context trustees only were changed); *Fenton v. Farington* (1856), 2 Jur. (N. S.) 1120 (alteration of fund provided for payment).

(*a*) *Leacroft v. Maynard* (1791), 3 Bro. C. C. 233 (charged on same fund); *Crowder v. Clowes* (1794), 2 Ves. 449 (raisable out of same property); *Cooper v. Day* (1817), 3 Mer. 154; *Shaftesbury (Earl) v. Marlborough (Duke)* (1835), 7 Sim. 237 (cases as to legacy duty); *Martin v. Drinkwater* (1840), 2 Beav. 215; *Day v. Croft* (1842), 4 Beav. 561 (separate use); *Bristow v. Bristow* (1842), 5 Beav. 289 (charged on same fund); *Warwick v. Hawkins* (1852), 5 De G. & Sm. 481 (separate use); *Giesler v. Jones* (1858), 25 Beav. 418 (payment postponed to death of tenant for life of original legacy); *Duncan v. Duncan* (1858), 25 Beav. 392 (provision for increase not applying to original legacy); *Johnstone v. Harrowby (Earl)* (1859), 1 De G. F. & J. 183, 191 (out of same fund, free of legacy duty); *Duffield v. Currie* (1860), 29 Beav. 284 (same time of payment); *Re Smith* (1862), 2 John. & H. 594, 600 (determination on insolvency); *Re Boddington, Boddington v. Clairat* (1884), 25 Ch. D. 685, C. A. (condition as to widowhood); *Re Benyon, Benyon v. Grieve* (1884), 51 L. T. 116 (condition as to remaining in testator's service); *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344 (payment deferred to death of tenant for life of original legacy); *Re Boden, Boden v. Boden*, *supra* (annuities charged alike on income alone); see *Re Crichton's Settlement, Sweetman v. Batty* (1912), 106 L. T. 588 (limitation of gift during spinsterhood). In particular, as to the cases where one legacy is given free of legacy duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 241, note (s); but compare *Burrows v. Cottrell* (1830), 3 Sim. 375; *Re Boden, Boden v. Boden*, *supra*, per FLETCHER MOULTON, L.J., *dissentiente*, at p. 150.

(*b*) Conditions as to the mode of settlement are *primâ facie* not imported; the rule may thus be applied where the original legacy is given absolutely or subject to defeasance, but not as a rule in other cases (*Re Mores' Trust* (1852), 10 Hare, 171, per TURNER, V.-C., at p. 176; *Mann v. Fuller* (1854), Kay, 624, per WOOD, V.-C., at p. 626; *Cooney v. Nicholls* (1881), 7 L. R. Ir. 107, 115, C. A. (cases where the original legacy was settled and the donee was tenant for life); *Re Joseph, Pain v. Joseph*, *supra*, at p. 511; and see note (s), p. 793, *ante*).

(*c*) *Re Mores' Trust*, *supra*; *Overend v. Gurney* (1834), 7 Sim. 128 (original legacy immediate; additional legacy out of proceeds of sale of residue after a life estate); *Goodman v. Goodman* (1847), 1 De G. & Sm. 695 (presumption against intestacy; restriction on alienation); *King v. Tootel* (1858), 25 Beav. 23 (donee taking as specifically named and as member of contingent class).

(*d*) See *Re Freme's Contract*, [1895] 2 Ch. 778, C. A.

(*e*) *Alexander v. Alexander* (1842), 5 Beav. 518; *Re Mores' Trust*, *supra*, at p. 673; *Re Gibson* (1861), 2 John. & H. 656, 673; *Hargreaves v. Pennington*



different (*f*), or where in the case of a substituted legacy the legatee of the substituted legacy is not the same as the legatee of the original legacy (*g*).

SECT. 7.  
Conditional  
Gifts.

Accruer  
clauses.

A clause of accruer, which divests and disposes of the share of a donee dying before a particular time, or in particular circumstances, *primâ facie* refers only to the original share of that donee, and does not extend to shares which themselves have accrued under such clause (*h*). A similar rule applies in other cases where the description of the property subject to the clause of accruer is not necessarily comprehensive both of the donee's original share and of his other shares or of his whole interest under the gifts in question, including the clauses of accruer (*i*), but does not apply where the clause clearly refers to his whole interest in the fund (*k*), or to a plurality of shares of a single donee (*l*). The word "share" alone, or a similar word, may also be explained by the context to mean the donee's whole interest (*m*), for example, by any expression directing the accrued shares to devolve in a similar way to the original shares (*a*), or by a context treating the accrued

(1864), 34 L. J. (CH.) 180; *Hill v. Jones* (1868), 37 L. J. (CH.) 465; *Re Joseph, Pain v. Joseph*, [1908] 2 Ch. 507, 511, C. A. In *Cookson v. Hancock* (1836), 2 My. & Cr. 606, the trusts of the original legacy attached to the substituted legacy on the context of the will and codicil.

(*f*) *Alexander v. Alexander* (1842), 5 Beav. 518 (pecuniary legacy substituted for residue); *Tibbs v. Elliott* (1865), 34 Beav. 424 (residue, not subject to substitutionary gift of original legacy); *Re Howe, Wilkinson v. Ferniehough* (1910), 103 L. T. 185.

(*g*) *Chatteris v. Young* (1827), 2 Russ. 183; *Haley v. Bannister* (1857), 23 Beav. 336; *Re Joseph, Pain v. Joseph*, *supra*.

(*h*) *Rudge v. Barker* (1735), Cas. temp. Talb. 124; *Ex parte West* (1784), 1 Bro. C. C. 575; *Crowder v. Stone* (1827), 3 Russ. 217, 223; *Rickett v. Guillemard* (1841), 12 Sim. 89.

(*i*) *Woodward v. Glasbrook* (1700), 2 Vern. 388 (his part or share); *Perkins v. Micklethwaite* (1714), 1 P. Wms. 274 (portion); *Bright v. Rowe* (1836), 3 My. & K. 316 (her, his, or their portion or portions); *Rickett v. Guillemard*, *supra* (his, her, or their shares); *Jones v. Hall* (1849), 16 Sim. 500 (his share and portion); *Maddison v. Chapman* (1858), 4 K. & J. 709, 716 (the part of the deceased); *Goodwin v. Finlayson* (1858), 25 Beav. 65 (his or her part: "the word 'share' of itself is not sufficient to carry over accrued shares" (*ibid.*, per ROMILLY, M.R., at p. 70)); *Evans v. Evans* (1858), 25 Beav. 81, 88 (his or her share). *Pain v. Benson* (1744), 3 Atk. 78 (his, her, or their shares), is adversely criticised on this point. A description of the property subject to the clause of accruer in terms such as "his, her, or their share or shares" may be read *reddendo singula singulis*, "shares" corresponding to "their," and, therefore, as not denoting a plurality of the shares of a single donee (*Bright v. Rowe*, *supra*; *Rickett v. Guillemard*, *supra*; *Wilmot v. Flewitt* (1865), 11 Jur. (N. S.) 820, 821; *Sutton v. Sutton* (1892), 30 L. R. Ir. 251, 268, C. A. (a deed)).

(*k*) *Goodman v. Goodman* (1847), 1 De G. & Sm. 695 (the interest and capital of child dying); *Douglas v. Andrews* (1851), 14 Beav. 347, 353 (the part and parts, share and shares and interest of him, her or them); *Re Crawhall's Trust* (1856), 8 De G. M. & G. 480 (with benefit of survivorship); *Re Henriques' Trusts*, [1875] W. N. 187 (part share and interest).

(*l*) *Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218, 224; *Clifton v. Crawford* (1900), 27 Ontario Appeal Reports, 315, 319.

(*m*) *Doe d. Clift v. Birkhead* (1849), 4 Exch. 110.

(*a*) *Giles v. Melsom* (1873), L. R. 6 H. L. 24; *Eyre v. Marsden* (1838), 4 My. & Cr. 231; *Leeming v. Sherratt* (1842), 2 Hare, 14, 25.



SECT. 7.  
Conditional  
Gifts.

Conditions  
generally of  
accrued  
shares.

Alteration  
and implica-  
tion of  
conditions.

Contingency  
happening  
in testator's  
lifetime.

and original shares as blended, or as devolving together (*b*), or treating the whole property as subject to a gift over in an aggregate mass (*c*).

Generally, the conditions applicable to an original share are not applicable to the share accrued thereto under a clause of accruer (*d*), unless the intention is shown or can be inferred to the contrary (*e*).

**1444.** The conditions of a gift may be altered by the court to conform to the rest of the will where the context makes such alteration necessary (*f*), or may be inferred from the context of the whole will and the circumstances of the case (*g*); the court, however, does not readily insert words to prevent vesting (*h*).

**1445.** Whenever there is an interest validly limited by will, either by way of remainder or by way of executory interest, if all the preceding estates have failed or determined and the events on which the interest is limited have taken effect, it is in general immaterial whether this has happened in the lifetime of the testator or after his decease (*i*). Thus, in cases of a gift over on a prior named individual donee dying in any contingent circumstances (*k*),

(*b*) *Milsom v. Awdry* (1800), 5 Ves. 465; *Douglas v. Andrews* (1851), 14 Beav. 347, 351, 352. As to directions that a share of residue given under a previous gift shall fall into residue, either generally or in certain events, see p. 713, *ante*.

(*c*) *Worlidge v. Churchill* (1792), 3 Bro. C. C. 465; *Barker v. Lea* (1823), Turn. & R. 413, 415; *Eyre v. Marsden* (1838), 2 Keen, 564, 575; *Sillick v. Booth* (1842), 1 Y. & C. Ch. Cas. 117, 121; *Doe d. Clift v. Birkhead* (1849), 4 Exch. 110; *Dutton v. Crowdy* (1863), 33 L. J. (CH.) 241; *Re Henriques' Trusts*, [1875] W. N. 187.

(*d*) *Gibbons v. Langdon* (1833), 6 Sim. 260; *Ranelagh v. Ranelagh* (1841), 4 Beav. 419 (original gift for life); *Jones v. Hall* (1849), 16 Sim. 500; *Leigh v. Moseley* (1851), 14 Beav. 605 (no tenancy in common in accrued shares); *Ware v. Watson* (1855), 7 De G. M. & G. 248 (direction for settlement of daughter's share only applied to original share).

(*e*) *Milsom v. Awdry*, *supra*; (in manner aforesaid); *Cursham v. Newland* (1839), 2 Beav. 145; *Re Jarman's Trusts* (1865), L. R. 1 Eq. 71 (separate use attaching to the "share or shares"); *Giles v. Melsom* (1873), L. R. 6 H. L. 24 (gift of life estate in "the hereditaments so specifically devised," following all the operative devises and accruer clause); *Sutton v. Sutton* (1891), 30 L. R. Ir. 251, 260, C. A.; see also *Trickey v. Trickey* (1832), 3 My. & K. 560, 565.

(*f*) *Lunn v. Osborne*, *Pruen v. Osborne* (1834), 7 Sim. 56 (gift over on certain children not leaving issue omitted); *Doe d. Leach v. Micklem* (1805), 6 East, 486 (gift to A. for life "or if she should survive B. and C. over," read "and after her death or"); *Perrin v. Lyon*, *Lyon v. Geddes* (1807), 9 East, 170 (gift over "as if my daughter were dead," read "as if she were dead under age and unmarried"). As to examples of change of "and" into "or," and *vice versa*, see pp. 824 *et seq.*, *post*. As to the general principle in changing words, see p. 674, *ante*.

(*g*) As to the conditions attached to a gift to an executor, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 270; as to the conditions attaching to alternate gifts, whether original or substitutional, see p. 733, *ante*; and as to cases where vesting is concerned, compare p. 802, *post*.

(*h*) *Walker v. Mower* (1852), 16 Beav. 365; *Hope v. Potter* (1857), 3 K. & J. 206; *Re Litchfield*, *Horton v. Jones* (1911), 104 L. T. 631, 632.

(*i*) *Varley v. Winn* (1856), 2 K. & J. 700, 705.

(*k*) As where the gift over is on death before twenty-one, and the prior donee dies during the life of the testator not having attained twenty-one

or dying before any specified time or event (*l*), the gift over as a rule takes effect if the prior donee so dies during the life of the testator (*m*). A gift over on a prior donee dying without having attained a vested interest takes effect if that prior donee dies in the lifetime of the testator, although he otherwise satisfies the conditions of the prior gift (*a*). The will, however, on its true construction may refer only to events taking place after the death of the testator, or other time (*b*).

SECT. 7.  
Conditional  
Gifts.

SUB-SECT. 2.—*Vesting of Gifts.*

(i.) *Canons Applicable to both Real and Personal Estate.*

**1446.** On the construction of the particular will it may be plain that a condition is or is not a condition precedent (*c*); the same condition may in one case be precedent and in another subsequent (*d*). In the first instance the context of the whole will must

Construction  
in general  
as to vesting.

(*Ledsome v. Hickman* (1708), 2 Vern. 611; *Perkins v. Micklethwaite* (1715), 1 P. Wms. 274 (death before twenty-one or marriage); *Northey v. Strange* (1717), 1 P. Wms. 340, 343; *Willing v. Baine* (1731), 3 P. Wms. 113). Similarly, if the gift over is on death without issue (*Mackinnon v. Peach* (1838), 2 Keen, 555, 560; *Varley v. Winn* (1856), 2 K. & J. 700), or on death without issue, who become entitled under an intermediate gift (*Rackham v. De La Mare* (1864), 2 De G. J. & Sm. 74, C. A.), or on death leaving issue (*Rheeder v. Ower* (1791), 3 Bro. C. C. 240).

(*l*) As, for instance, on death before payment (*Ive v. King* (1852), 16 Beav. 46, 54), or before division of the estate (*Bretton v. Lethulier* (1710), 2 Vern. 653), or before the legacy becomes payable (*Darrel v. Molesworth* (1700), 2 Vern. 378; *Walker v. Main* (1819), 1 Jac. & W. 1; *Humphreys v. Howes* (1830), 1 Russ. & M. 639).

(*m*) As to the general rule of law in cases of failure of a prior interest, see p. 605, *ante*.

(*a*) *Re Gaitskell's Trust* (1873), L. R. 15 Eq. 386.

(*b*) *Chapman v. Perkins*, [1905] A. C. 106.

(*c*) As, for instance, "provided A. marry B." (*Davis v. Angel* (1862), 4 De G. F. & J. 524; *Fitzgerald v. Ryan*, [1899] 2 I. R. 637, 647, 663, C. A.; *Kiersey v. Flahavan*, [1905] 1 I. R. 45; see also *Re Emson*, *Grain v. Grain* (1905), 93 L. T. 104 ("subject to" trustees being appointed governors); *Re Welstead* (1858), 26 Beav. 612 (bequest for purchase of nomination). As to the distinction between conditions precedent and conditions subsequent, see p. 585, *ante*.

(*d*) *Robinson v. Comyns* (1735), Cas. temp. Talb. 164, 166; *Doe d. Planner v. Scudamore* (1800), 2 Bos. & P. 289 ("a condition is to be construed as precedent or subsequent according as the intention of the testator may require, per Lord ELDON, C.J., and HEATH, J., at pp. 295, 297); *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 157, 183; *Murphy v. Broder* (1874), 9 I. R. C. L. 123, 130. It has been suggested that a condition is likely to be a condition precedent, for example, where the condition involves anything in the nature of consideration (*Acherley v. Vernon* (1725), Willes, 153, per WILLES, C.J.; Theobald, Wills, 7th ed., p. 568), such as a release of dower (*Wheddon v. Oxenham* (1731), 2 Eq. Cas. Abr. 546, pl. 24), or where the nature of the interest is such as to allow time for the performance of the act before enjoyment, or where the condition is capable of being performed instantly (Jarman, Wills, 6th ed., p. 1475). These suggestions are considered in *Fitzgerald v. Ryan*, [1899] 2 I. R. 637, 646, 647, C. A. For cases where the allowance of a period of time for the performance of the condition, extending to the life of the donee, did not prevent the condition being precedent, see also *Randall v. Payne* (1779), 1 Bro. C. C. 55; *Re M'Mahon*, *M'Mahon v. M'Mahon*, [1901] 1 I. R. 489, C. A.; *Horrigan v. Horrigan*, [1904] 1 I. R. 29, 271; *Kiersey v. Flahavan*, [1905] 1 I. R. 45 (cases of devises conditional on marriage with a named person, or into a named family).

SECT. 7.  
Conditional  
Gifts.

Presumption  
as to con-  
ditions and  
vesting.

When applied.

be considered (*e*); and the presumption in favour of vesting (*f*) is applied only where the context is not clear (*g*).

If, however, on construction it is doubtful whether a condition is precedent or subsequent, the court *primâ facie* takes it as subsequent; a condition is not construed as precedent unless clearly so intended, where a construction of the condition as subsequent is consistent with the whole will (*h*). Accordingly, in cases of doubt, the presumption is in favour of the early vesting of the gift at the testator's death or at the earliest moment after that date which is possible in the context (*i*), whether it is of real (*k*) or personal (*l*) estate; and it is presumed that the testator intended the gift to be vested, subject to being divested, rather than to remain in suspense (*m*).

Cases where the presumption is rendered especially applicable are those where the interest created is a remainder (*n*), or where the donees are the children of a named person as a class (*o*), or where the gift is of a residuary personal estate or residuary real and personal estate (*p*).

(*e*) *Egerton v. Brownlow* (*Earl*) (1853), 4 H. L. Cas. 1, 132, 157; compare *Carlton v. Thompson* (1867), L. R. 1 Sc. & Div. 232, 235.

(*f*) See the text, *infra*.

(*g*) *Hickling v. Fair*, [1899] A. C. 15, 27.

(*h*) *Egerton v. Brownlow* (*Earl*), *supra*, at pp. 157, 182, 183, 189; *Woodhouse v. Herrick* (1855), 1 K. & J. 352, 359, 360; *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391; *Re Greenwood*, *Goodhart v. Woodhead*, [1903] 1 Ch. 749, 755, C. A.

(*i*) *Re Blakemore's Settlement* (1855), 20 Beav. 214, 217; *Darley v. Perceval*, [1900] 1 I. R. 129, 135, 136. Since a will is ambulatory until death (see p. 509, *ante*), the testator cannot make a legacy vest at the date of the will; and a provision to that effect does not prevent lapse (*Browne v. Hope* (1872), L. R. 14 Eq. 343; see p. 607, *ante*).

(*k*) *Driver d. Frank v. Frank* (1818), 8 Taunt. 468, Ex. Ch.; *Duffield v. Duffield* (1829), 3 Bli. (N. S.) 260, 311, 331, H. L.; *Re Wrightson*, *Battie-Wrightson v. Thomas*, [1904] 2 Ch. 95, 103, C. A.

(*l*) *Brocklebank v. Johnson* (1855), 20 Beav. 205, 215; *Re Merrick's Trusts* (1866), L. R. 1 Eq. 551, 557; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192, 211.

(*m*) *Taylor v. Graham* (1877), 3 App. Cas. 1287, *per* Lord BLACKBURN, at p. 1297; *Hickling v. Fair*, *supra*, at pp. 30, 36.

(*n*) *Driver d. Frank v. Frank* (1814), 3 M. & S. 25, 37; (1818), 8 Taunt. 468, Ex. Ch., following *Doe d. Comberbach v. Perryn* (1789), 3 Term Rep. 484, 494; and see *Ives v. Legge* (1743), 3 Term Rep. 488, n.; *Re Watkins*, *Maybery v. Lightfoot*, as reported (1913), 108 L. T. 237, C. A., *per* BUCKLEY, L.J., who dissented, at p. 240, reversed, *sub nom. Lightfoot v. Maybery*, [1914] W. N. 180, H. L.; the reason given is that keeping the remainder contingent might in many cases exclude the issue of a person intended to take in tail, by the parents dying before the remainder became vested. As to remainders in general, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 212 *et seq.*

(*o*) *M'Lachlan v. Taitt* (1860), 2 De G. F. & J. 449, *per* Lord CAMPBELL, L.C., at p. 454; *Selby v. Whittaker* (1877), 6 Ch. D. 239, C. A., *per* JAMES, L.J., at p. 249, and COTTON, L.J., at p. 251. There may be no reason for the application of the presumption in the case of a child if all the testator's descendants living at the period of distribution are provided for (*Re Deighton's Settled Estates* (1876), 2 Ch. D. 783, C. A.).

(*p*) *Love v. L'Estrange* (1727), 5 Bro. Parl. Cas. 59; *Booth v. Booth* (1799), 4 Ves. 399; *Oddie v. Brown* (1859), 4 De G. & J. 179, 194, C. A.; *Pearman v. Pearman* (1863), 33 Beav. 394, 396; *West v. West* (1863), 4 Giff. 198. Such gifts carry the intermediate interest, whether vested or



**1447.** Where a condition can be fairly read as postponing merely the right of possession or of obtaining payment, transfer, or conveyance, so that there is an express or implied distinction between the time of vesting and time of enjoyment, this construction is adopted, if the rest of the context allows (*q*). This construction is particularly applicable where the postponement is for the convenience of the testator's estate (*r*), or is occasioned by the gift of some prior interest filling up the interval (*s*).

Thus, where the testator suspends the enjoyment until payment of his debts (*t*), or other incident of administration of his estate (*a*), *primâ facie* the vesting is not suspended until such payment or other event; the nature of the provision shows that it is merely the enjoyment which is postponed. On the other hand, there may be an intention clearly expressed (*b*) to suspend vesting until such an event (*c*), to which effect must be given however inconvenient it may be (*d*). Similarly, although if the context is clear vesting of a legacy may be postponed until actual payment (*e*), in a case of doubt the court interprets a gift apparently vesting on payment as vesting when the legacy becomes payable (*f*).

SECT. 7.  
**Conditional Gifts.**

Presumption grounded on nature of postpone-ment.

**1448.** Where the testator uses the technical word "vest," by Use of word "vest."

contingent; see p. 814, *post*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 273 *et seq.*

(*q*) As to real estate, see *Montgomerie v. Woodley* (1800), 5 Ves. 522, 526; *Bingley v. Broadhead* (1803), 5 Ves. 522; *Duffield v. Duffield* (1829), 1 Dow & Cl. 268, H. L., *per* BEST, C.J., at p. 311; *Peard v. Kekewich* (1852), 15 Beav. 166, 171; *Dennis v. Frend* (1863), 14 I. Ch. R. 271 (donee "not to become entitled to or take the estate" until twenty-three). As to personal estate, see p. 816, *post*; *Dodson v. Hay* (1791), 3 Bro. C. C. 404, 410; *Re Panter, Panter-Downs v. Bally* (1906), 22 T. L. R. 431 (to go to him when he is married and has a house of his own). As to a mixed fund, see *M'Lachlan v. Taitt* (1860), 2 De G. F. & J. 449 (children to become beneficially interested on the death of parent).

(*r*) See the text, *infra*; as to legacies payable out of personal estate, see p. 813, *post*; and as to legacies charged on real estate, see p. 821, *post*.

(*s*) See pp. 806, 814, 822, *post*; compare *Kirby v. Bangs* (1900), 27 Ontario Appeal Reports, 17, 30, 31.

(*t*) *Carter v. Barnardiston* (1790), 3 Bro. Parl. Cas. 64; *Tewart v. Lawson* (1874), L. R. 18 Eq. 490; *Marshall v. Holloway* (1820), 2 Swan. 432, *per* Lord ELDON, L.C., at p. 446; *Bacon v. Procter* (1822), Turn. & R. 31, 40.

(*a*) As, for instance, investment as directed (*Sitwell v. Bernard* (1801), 6 Ves. 520), or performance of trusts (*Birds v. Askey* (No. 1) (1857), 24 Beav. 615).

(*b*) In such a case the court does not allow the legatees to be prejudiced by the delay of the executors or trustees (*Small v. Wing* (1730), 5 Bro. Parl. Cas. 66; *Gaskell v. Harman* (1804), 11 Ves. 489; *Bernard v. Montague* (1816), 1 Mer. 422; *Astley v. Essex* (Earl) (1871), 6 Ch. App. 898).

(*c*) As, for instance, until payment of debts or discharge of incumbrances (*Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142, 144; *Bernard v. Montague*, *supra*; *Tewart v. Lawson*, *supra*, at p. 495; *Re Bewick, Ryle v. Ryle*, [1911] 1 Ch. 116), or until sale or getting in of the estate (*Elwin v. Elwin* (1803), 8 Ves. 547 (to named persons, if living at time of sale); *Blight v. Hartnoll* (1881), 19 Ch. D. 294 (to class of grandchildren living at time of sale)).

(*d*) *Gaskell v. Harman* (1804), 6 Ves. 159; 11 Ves. 489, 497.

(*e*) *Ibid* ("whether pecuniary or residuary" legacies).

(*f*) *Stapleton v. Palmer* (1793), 4 Bro. C. C. 490; *Gaskell v. Harman*, *supra*; compare the cases of gifts over on death before payment, p. 831, *post*.

SECT. 7.  
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Gifts.

directing, for example, that the gift is to vest on a certain event, this word must *primâ facie* be given its proper legal meaning of vesting in interest (*g*), and the gift is then contingent until the happening of the event (*h*), whether the gift is of real or personal estate (*i*). The context may show, however, by indications that the donee takes a vested interest before the specified event, that the word "vest" is used in another sense, for example in the sense of "fall into possession" (*a*), or "become payable" (*b*), or "be indefeasibly vested" (*c*); in the last case the gift may be vested, subject only to be divested if the event does not happen. A direction with regard to vesting of a gift to a class may, on the construction of a particular will, even introduce a new category of persons to share in the gift (*d*).

Contingency  
in description  
of donee.

**1449.** An estate or interest must remain contingent until there is a person (*e*) having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in the will (*f*).

(*g*) *Re Baxter's Trusts* (1864), 10 Jur. (N. S.) 845, 847; *Hale v. Hale* (1876), 3 Ch. D. 643, 646. For the general rule, see p. 655, *ante*, and the cases in note (*h*), *infra*.

(*h*) *Glanvill v. Glanvill* (1816), 2 Mer. 38; *Russell v. Buchanan* (1836), 7 Sim. 628; *Ring v. Hardwick* (1840), 2 Beav. 352; *Griffith v. Blunt* (1841), 4 Beav. 248; *Comfort v. Austen* (1841), 12 Sim. 218; *Re Thruston's Trusts* (1849), 17 Sim. 21; *Re Blakemore's Settlement* (1858), 20 Beav. 214; *Re Morse's Settlement* (1855), 21 Beav. 174; *Rowland v. Tawney* (1858), 26 Beav. 67; *Wakefield v. Dyott* (1858), 4 Jur. (N. S.) 1098; *Re Arnold's Trusts* (1863), 33 Beav. 163, 173; *Richardson v. Power* (1865), 19 C. B. (N. S.) 780, Ex. Ch.; *Lushington v. Penrice*, *Penrice v. Lushington* (1868), 18 L. T. 507; *Creeth v. Wilson* (1882), 9 L. R. Ir. 216, 223; and see *Re Wrightson*, *Battie-Wrightson v. Thomas*, [1904] 2 Ch. 95, where the testator drew a distinction between vesting and falling into possession. A provision for maintenance out of "vested or expectant" shares in such a case does not alter the meaning of the word "vest" (*Bull v. Pritchard* (1846), 5 Hare, 567, 572; *Re Thatcher's Trusts* (1858), 26 Beav. 365, 369; and see *Pickford v. Brown*, *Brown v. Brown* (1856), 2 K. & J. 426).

(*i*) *Re Featherstone's Trusts* (1882), 22 Ch. D. 111, *per* KAY, J., at p. 114: "words like these mean the same whether the property is real or personal."

(*a*) *Simpson v. Peach* (1873), L. R. 16 Eq. 208.

(*b*) *Williams v. Haythorne*, *Williams v. Williams* (1871), 6 Ch. App. 782, 788. For a case where a distinction was expressly drawn between vesting and payment in the will, see *Ellis v. Maxwell* (1841), 3 Beav. 587.

(*c*) *Berkeley v. Swinburne* (1848), 16 Sim. 275, 281, 282; *Taylor v. Frobisher* (1852), 5 De G. & Sm. 191; *Poole v. Bott* (1853), 11 Hare, 33, 37, 38; *Barnet v. Barnet* (1861), 29 Beav. 239; *Re Baxter's Trusts*, *supra*; *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389; *Re Parr's Trusts* (1871), 41 L. J. (CH.) 170; *Armytage v. Wilkinson* (1878), 3 App. Cas. 355, 372, 373, P. C.; *Best v. Williams*, [1890] W. N. 189.

(*d*) *Williams v. Russell* (1863), 10 Jur. (N. S.) 168; *Draycott v. Wood* (1856), 5 W. R. 158; *Sheffield v. Kennett* (1859), 27 Beav. 207, affirmed (1859), 4 De G. & J. 593; see p. 715, *ante*; and see *Bickford v. Chalker* (1854), 2 Drew. 327, where a direction as to vesting was rejected.

(*e*) Using the word in its widest sense, as including all entities capable of being a donee.

(*f*) *Procter v. Bath and Wells (Bishop)* (1794), 2 Hy. Bl. 358 (the first son of A. that should be bred a clergyman); *Duffield v. Duffield* (1829), 1 Dow & Cl. 268, H. L., *per* BEST, C.J., at p. 11 (such children as should attain twenty-one), following *Stephens v. Stephens* (1736), Cas. temp. Talb. 228 (such son as should attain twenty-one); *Leake v. Robinson* (1817), 2 Mer. 363, 385; *Re Laing*, *Laing v. Morrison*, [1912] 2 Ch. 386, 392. As

Where the postponement of the gift is on account of some qualification attached to the donee, the gift is *primâ facie* contingent on this qualification being acquired (*g*).

A gift to a person, “at,” “if,” “as soon as,” “when,” or “provided” he attains a certain age, without further context to govern the meaning of the words, is contingent, and vests only on attainment of the required age (*h*), which is a quality or description which the donee must in general possess in order to claim under the gift (*i*). In a similar gift to a class, the specified age in general determines the persons who may claim as members of the class (*k*).

Such words, however, in various contexts have been held not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of a vested estate (*l*).

**1450.** Similarly, an estate or interest remains contingent until

to the ascertainment of the donee, the rules stated pp. 713 *et seq.*, *ante*, may determine the vesting; see *Driver d. Frank v. Frank* (1818), 8 Taunt. 468, Ex. Ch. (remainders to second and other sons, vested as they came into existence).

(*g*) As to gifts to persons “living” at a particular time, see p. 714, *ante*; *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258 (“then living” held to mean “who or whose issue shall be then living”; compare *per* 726 *et seq.*, *ante*); as to gifts to survivors, see p. 724, *ante*; *Jones v. Davies* (1880), 28 W. R. 455; *Whitby v. Von Luedecke*, [1906] 1 Ch. 783; and compare title PERPETUITIES, Vol. XXII., p. 305, note (*s*).

(*h*) As to real estate, see *Re Francis, Francis v. Francis*, [1905] 2 Ch. 295, following *Johnson v. Gabriel and Bellamy* (1588), Cro. Eliz. 122, cited as *Grant's Case*, and explained in *Lampet's Case* (1613), 10 Co. Rep. 46 b, 50 a; *Love v. Love* (1881), 7 L. R. Ir. 306 (“on his attaining” twenty-three); *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583, H. L., *per* TINDAL, C.J., at pp. 590, 591; *Fearne*, Posthumous Works, p. 191; *Doe d. Wheedon v. Lea* (1789), 3 Term Rep. 41, *per* ASHURST, J., at p. 43. As to personal estate, see *Stapleton v. Cheales* (1711), Prec. Ch. 317; *Tudor, L. C. Real Prop.*, 4th ed., p. 438; *Atkinson v. Turner* (1740), 2 Atk. 41; *Hanson v. Graham* (1801), 6 Ves. 239, 243—245; *Tudor, L. C. Real Prop.*, 4th ed., p. 440; *Butcher v. Leach* (1843), 5 Beav. 392; *Mair v. Quiller* (1843), 2 Y. & C. Ch. Cas. 465; *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570, 573, C. A.

(*i*) *Leake v. Robinson* (1817), 2 Mer. 363, 385, 386. As to how far a gift to a class at twenty-one may be affected by an alternative gift, if there is but a single member of the class, to that member at birth, or *vice versâ*, see *Judd v. Judd* (1830), 3 Sim. 525; *Hunter v. Judd* (1833), 4 Sim. 455; *Walker v. Mower* (1852), 16 Beav. 365 (gift over on death of parent without leaving a child; only child took at birth); *Johnson v. Foulds* (1868), L. R. 5 Eq. 268 (gift over in case no such child or all such children should die before attaining vested interest; only child took at birth); *Re Fletcher, Doré v. Fletcher* (1886), 53 L. T. 813 (gift over if no child lived to attain vested interest; only child, dying before twenty-one, did not take).

(*k*) As to real estate, see *Duffield v. Duffield, supra*; *Newman v. Newman* (1839), 10 Sim. 51; *Kennedy v. Sedgwick* (1857), 3 K. & J. 540. As to personal estate, see *Leake v. Robinson, supra*; *Bull v. Pritchard* (1826), 1 Russ. 213; *Porter v. Fox* (1834), 6 Sim. 485 (mixed fund); *Chance v. Chance* (1853), 16 Beav. 572; *Merlin v. Blagrove* (1858), 25 Beav. 125; *Thomas v. Wilberforce* (1862), 31 Beav. 299; *Bowyer v. West* (1871), 24 L. T. 414; *Re Williams, Spencer v. Brighthouse* (1886), 54 L. T. 831. As to the ascertainment of classes, see p. 714, *ante*.

(*l*) *Andrew v. Andrew* (1875), 1 Ch. D. 410, C. A., *per* JAMES, L.J., at p. 417 (referring, it appears, to *Simmonds v. Cock* (1861), 29 Beav. 455, and the cases mentioned in notes (*q*), (*r*), p. 807, *post*, notes (*s*)—(*c*), p. 808, *post*; as to personality, see p. 810, *post*); *Re James* (1884), 51 L. T. 596, 597.

#### SECT. 7. Conditional Gifts.

Gift at a  
specified age.

Contingency  
in the subject  
of gift.



**SECT. 7.**  
**Conditional**  
**Gifts.**

Contingencies  
in successive  
gifts.

the property the subject-matter of the gift (*m*) and the precise extent of the interest of the donee (*n*) become ascertainable.

**1451.** A contingency which is a condition precedent to vesting of a particular estate or interest *primâ facie* applies to all interests dependent on that estate or interest or limited in immediate succession to that estate or interest as a continuous series (*o*), but not to other limitations (*p*). Further, even if gifts follow other gifts as if all contingent on a certain event (*a*), the court may infer from the will, taken as a whole, that it was a mere inaccuracy of expression, and that the contingency was really only meant to apply to such of the subsequent trusts and limitations as necessarily depended for their existence on the happening of the event in question (*b*).

Contingencies  
equivalent to  
"subject to  
the previous  
gifts."

**1452.** Words which, though in the form of a condition, merely denote that the gift is to come into possession on the failure or at the determination of prior interests, do not as a general rule form a condition precedent to vesting (*c*). In order, however, that a gift

(*m*) *Wood v. Drew* (1864), 33 Beav. 610; compare *Redington v. Browne* (1893), 32 L. R. Ir. 347, 356, 357; *Re Coulson's Trusts*, *Prichard v. Coulson* (1907), 97 L. T. 754.

(*n*) *Re Thompson*, *Thompson v. Thompson*, [1906] 2 Ch. 199, 202. As, for instance, a gift to a class; the members are intended to take in shares to be regulated in amount, augmented, or diminished according to the number of the other members (*Cattlin v. Brown* (1853), 11 Hare, 372, 377; *Hale v. Hale* (1876), 3 Ch. D. 643, 646, C. A., approved in *Pearks v. Moseley* (1880), 5 App. Cas. 714).

(*o*) *Davis v. Norton* (1726), 2 P. Wms. 390; *Doe d. Watson v. Shippard* (1779), 1 Doug. (K. B.) 75; *Toldervy v. Colt* (1836), 1 Y. & C. (Ex.) 621; *Cattley v. Vincent* (1852), 15 Beav. 198; *Paylor v. Pegg* (1857), 24 Beav. 105; *Hill v. Hill* (1860), 8 W. R. 536; and see *Gray v. Golding* (1860), 6 Jur. (N. S.) 474, H. L. For instances of contrary intention generally, inferred from the scope of the will, see *Sheffield v. Coventry (Earl)* (1852), 2 De G. M. & G. 551; *Boosey v. Gardener* (1854), 5 De G. M. & G. 122.

(*p*) *Partridge v. Foster* (No. 2) (1866), 35 Beav. 545.

(*a*) *Pearson v. Rutter* (1853), 3 De G. M. & G. 398, 406 (affirmed, without affecting this point, *sub nom. Grey v. Pearson* (1857), 6 H. L. Cas. 61); *Sheffield v. Coventry (Earl)*, *supra*; *Boosey v. Gardener*, *supra*; *Duffield v. M'Master*, [1906] 1 I. R. 333, C. A.

(*b*) *Quicke v. Leach* (1844), 13 M. & W. 218 (devises preceded by "in case my son J. shall attain twenty-five, and I shall have any other child . . . living at . . . my death"; some took effect though testator had no other child); *Napper v. Sanders* (1632), Hut. 118, approved in *Lethieullier v. Tracy* (1754), 3 Atk. 774, *per Lord HARDWICKE*, L.C., at pp. 781, 782; *Horton v. Whittaker* (1786), 1 Term Rep. 346; *Eaton v. Hewitt* (1862), 2 Drew. & Sm. 184; and see *Re Blight*, *Blight v. Hartnoll* (1880), 13 Ch. D. 858; *Doe d. Lees v. Ford* (1853), 2 E. & B. 970, 974, 983 (settlement).

(*c*) *Webb v. Hearing* (1616), Cro. Jac. 415 (if daughters should outlive prior donees); *Pearsall v. Simpson* (1808), 15 Ves. 29 ("after decease of S. in case he shall become entitled to such interest"); *Massey v. Hudson* (1817), 2 Mer. 130 ("in case E. should survive my wife," the life tenant); *Hillerson v. Lowe* (1843), 2 Hare, 355, 369, 371; *Key v. Key* (1853), 4 De G. M. & G. 73, 79 ("in case annuitants or any of them shall survive K."); *Walker v. Simpson* (1855), 1 K. & J. 713; *Re Smith's (Betty) Trusts* (1865), L. R. 1 Eq. 79 ("in case of the death of E. during the life of J."); *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35 ("in case E. should come to the possession of the said estate"); *Chellev v. Martin* (1873), 28 L. T. 662, 664; *Leadbeater v. Cross* (1876), 2 Q. B. D. 18, 22; and compare *Franks v. Price* (1838), 5 Bing. (N. C.) 37; *Re Blight*, *Blight v.*

in such terms may be vested, the condition upon which the gift is dependent must involve no incident but what is essential to the failure or determination of the interests previously limited (*d*), and must be equivalent to "subject to the interests previously given" (*e*); if any superadded condition, not connected with the previous limitation, is imposed by the testator, that condition must be fulfilled prior to vesting (*f*).

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Conditional  
Gifts.

**1453.** If an ultimate gift is made to take effect on the failure of a preceding gift in a particular manner, but the court can gather that the meaning of the testator is that the ultimate limitation should take effect on the failure of the preceding gift in any manner whatever, then, although the language in which the ultimate gift is expressed does not in terms apply to the event which has happened, the ultimate gift takes effect, and the particular manner of failure of the preceding gift is not a condition precedent to vesting (*g*).

Gift over on  
particular  
event taking  
effect  
generally.

This principle does not, however, enable a gift over to take effect on an event not provided for where the prior donees come into existence and satisfy the conditions of their gift during the life of the testator, and the failure of the prior gift is due to lapse by the deaths of the prior donees in the life of the testator (*h*).

*Hartnoll* (1880), 13 Ch. D. 858. "It is impossible to annex to an estate previously clearly given an additional condition from words which are capable of being rendered historically, that is, which may be interpreted as a description only of what must occur before the estate given to the person in remainder can arise" (*Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35, *per* Lord WESTBURY, at p. 41). The principle may be applied not only where the contingency in question is a condition subsequent for the determination of the previous gift, but where it is a condition precedent to that gift (*Re Sanforth's Will*, [1901] W. N. 152). A gift in default of appointment under a power is not of itself contingent on the exercise of that power; as to the divesting of such gifts by appointments under the power, see title POWERS, Vol. XXIII., p. 45.

(*d*) *Maddison v. Chapman* (1858), 4 K. & J. 709, *per* WOOD, V.-C., at p. 719; *M'Kay v. M'Kay*, [1901] 1 I. R. 109, 120.

(*e*) "The true way of testing limitations of this nature is this: Can the words which in form import contingency be read as equivalent to 'subject to the interests previously limited'?" (*Maddison v. Chapman*, *supra*, *per* WOOD, V.-C., at p. 719, affirmed (1859), 3 De G. & J. 536; *Re Martin, Smith v. Martin* (1885), 53 L. T. 34, *per* KAY, J., at p. 35; *Re Shuckburgh's Settlement*, *Robertson v. Shuckburgh*, [1901] 2 Ch. 794, 798; compare *Birds v. Askey* (No. 1) (1857), 24 Beav. 615).

(*f*) *Maddison v. Chapman*, *supra*, at p. 720; *Edgeworth v. Edgeworth*, *supra*, *per* Lord HATHERLEY, L.C., at p. 40; *Merchants' Bank of Canada v. Keefer* (1885), 13 Canada Supreme Court Reports, 515 (the words "if then living" there added a contingency because they were otherwise redundant).

(*g*) *Jones v. Westcomb* (1711), Prec. Ch. 316; *Prestwidge v. Groombridge* (1833), 6 Sim. 171; *Lenox v. Lenox* (1839), 10 Sim. 400, 409; *Wing v. Angrave* (1860), 8 H. L. Cas. 183, 200; *Re Chappell's Trust* (1862), 10 W. R. 573; and see *Walmesley v. Vaughan* (1857), 1 De G. & J. 114, 124. The leading case, that of *Curius and Coponius* (B.C. 68), Cicero, Oratio pro Cæciliâ, c. 18, cited in *Wing v. Angrave*, *supra*, *per* Lord CAMPBELL, L.C., at p. 200; *Hall v. Warren* (1861), 9 H. L. Cas. 420, 429, 430, affirming *Warren v. Rudall*, *Hall v. Warren* (1858), 4 K. & J. 603, 610, where the case of *Curius and Coponius*, *supra*, is fully quoted.

(*h*) As, for instance, where the gift over is on death of the prior donee before attaining twenty-one, or satisfying some other condition which is satisfied during the testator's life (*Calthorpe v. Gough* (1789), 3 Bro. C. C. 395, n.; 4 Term Rep. 707, n.; *Doo v. Brabant* (1791), 3 Bro. C. C.

## SECT. 7.

## Conditional Gifts.

Restriction on this canon of construction.

Examples of application.

**1454.** In all these cases it is necessary to find in the will and the nature of the provision some indication of the intention of the testator to this effect(*i*); the event upon which the gift over is alleged to come into operation, as well as upon the events expressly mentioned in the will, must be an event implied by, if not expressly indicated by, the will(*k*).

Thus, if there is a conditional limitation over of an estate defeating a prior absolute interest, and the latter by any means whatever is out of the way, the subsequent limitation may take effect(*l*). Again, where there is a prior particular interest given, with remainder to a person unborn, and on the death of the donee in remainder, or on his death under age, there is a gift over, then, though the unborn person never came into existence(*m*) and so could not literally fulfil the condition of dying, or dying under twenty-one, it is inferred that the gift over is to take effect(*n*), whenever it can do so in immediate succession to the prior

393; 4 Term Rep. 706; *Humberstone v. Stanton* (1813), 1 Ves. & B. 385; *Cox v. Parker* (1856), 22 Beav. 168). In *Williams v. Chitty*, *Chitty v. Chitty* (1797), 3 Ves. 545, the contrary contention was abandoned. These cases were explained in *Kellett v. Kellett* (1871), 5 I. R. Eq. 298, 305. The same rule applies in a case where the prior donees are a class (*Brookman v. Smith* (1872), L. R. 7 Exch. 271, approving *Tarbut v. Tarbut* (1830), 4 L. J. (CH.) 129); and it appears to apply to a gift by way of substitution (see p. 729, *ante*), where the events giving rise to the substitutional gift do not happen (see *Hannam v. Sims* (1858), 2 De G. & J. 151, C. A., *per* TURNER, L.J., at p. 154). The fact that the prior gift fails by reason of some rule of law, such as the law of mortmain, may not, however, prevent the gift over from taking effect according to this principle (*Hall v. Warren* (1861), 9 H. L. Cas. 420, disapproving *A.-G. v. Hodgson* (1846), 15 Sim. 146, and *Philpott v. St. George's Hospital* (1855), 21 Beav. 134, reversed on another point (1857), 6 H. L. Cas. 338). As to cases where the event provided for happens, and the prior donee dies in the life of the testator, see p. 796, *ante*.

(*i*) *Re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640, C. A., *per* BOWEN, L.J., at p. 656; and see *Eastwood v. Lockwood* (1867), L. R. 3 Eq. 487, 492; *Pride v. Fooks* (1858), 3 De G. & J. 252, 267, C. A.

(*k*) *Underwood v. Wing* (1855), 4 De G. M. & G. 633; *M'Carthy v. M'Carthy* (1878), 1 L. R. Ir. 189, 196, 197.

(*l*) *Avelyn v. Ward* (1750), 1 Ves. Sen. 420; *Re Sheppard's Trusts* (1854), 1 K. & J. 269, 276; *Barnes v. Jennings* (1866), L. R. 2 Eq. 448, 451; *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35, 40; see also *Re Green's Estate* (1860), 1 Drew. & Sm. 68; *Re Smith's (Betty) Trusts* (1865), L. R. 1 Eq. 79, 83.

(*m*) See *Foster v. Cook* (1891), 3 Bro. C. C. 347 (child still-born: gift over literally took effect).

(*n*) *Jones v. Westcomb* (1711), Prec. Ch. 316 (to child testator's wife was then *enroute* with, there being no such child); *Andrews d. Jones v. Fulham* (1738), 2 Stra. 1092; *Gulliver d. Fulham v. Wickett* (1741), 1 Wils. 105 (against the opinion of the Court of Common Pleas on the same will in *Roe d. Fulham v. Wickett* (1741), Willes, 303; as to these cases, see *Frogmorton d. Bramstone v. Holyday* (1765), 3 Burr. 1618, *per* Lord MANSFIELD, C.J., at p. 1624; and note (*o*), p. 805, *post*); *Underwood v. Wing*, *supra*, at p. 662; *Fonnereau v. Fonnereau* (1745), 3 Atk. 314; *Statham v. Bell* (1774), Cowp. 40. So where the prior donees are a class (*Meadows v. Parry* (1812), 1 Ves. & B. 124; *Murray v. Jones*, *Fawcett v. Jones* (1813), 2 Ves. & B. 313; *Mackinnon v. Peach* (1833), 2 My. & K. 202; *Wilson v. Mount* (1840), 2 Beav. 397; *Doe d. Evers v. Challis* (1852), 18 Q. B. 224, 230, Ex. Ch., affirmed, *sub nom.* *Evers v. Challis* (1859), 7 H. L. Cas. 531; *Lanphier v. Buck* (1865), 2 Drew. & Sm. 484; *Beardsley v. Beynon* (1865), 13 W. R. 831).



limitation in the manner of a remainder (o). In cases where a gift is made with an obligation imposed on the donee to do some act, with a gift over in default of performance, then it is inferred that the gift over is also to take effect if the donee dies in the testator's lifetime without having performed the condition (p) or fails to come into existence (q).

Where the testator makes a gift to a woman of an interest for her life if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, without more, then the gift over takes effect upon the determination of her estate, whether she marries again or not; upon her marriage, if she marries, and upon her death, if not (r). Conversely where the first gift is during widowhood, and the gift over is on death, the court infers that the gift over is to take effect also on remarriage (s).

So, too, where, after a gift to one person for his life or until some event such as bankruptcy, there is a gift over on some of such events, but the other events are ignored by the testator, the court infers that the gift over is also to take effect on death or on the other events, in a case where the inference is consistent with the whole will (t).

SECT. 7.  
Conditional  
Gifts.

Gift over on  
marriage or  
death inter-  
changeably.

Bankruptcy  
or death  
inter-  
changeably.

(o) In *Evers v. Challis* (1859), 7 H. L. Cas. 531, 549, 555, the case of *Gulliver d. Fulham v. Wickett* (1741), 1 Wils. 105, is explained as based on the doctrines relating to contingent remainders; and the gift in *Evers v. Challis*, *supra*, was held valid and able to take effect as a contingent remainder. The doctrine does not apply to a gift over by way of executory devise, the contingencies in which cannot be split so as accurately to correspond with the events that have happened (*Hancock v. Watson*, [1902] A. C. 14). It applies, however, to limitations of personal estate which may take effect immediately on the termination of prior limitations in the manner of a remainder (*Jones v. Westcomb* (1711), Prec. Ch. 316).

(p) *Avelyn v. Ward* (1750), 1 Ves. Sen. 420 (devise on condition prior devisee gave a release, and if he neglected, then over); *Doe d. Wells v. Scott* (1814), 3 M. & S. 300 (devise on condition of assuring certain lands in a certain manner, and in default, then over); *Underwood v. Wing* (1855), 4 De G. M. & G. 633, 662, 663.

(q) *Scatterwood v. Edge* (1698), 1 Salk. 229.

(r) *Brown v. Cutter* (1681), T. Raym. 427; *Luxford v. Cheeke* (1683), 3 Lev. 125; *Jordan v. Holkham* (1753), Amb. 209; *Gordon v. Adolphus* (1769), 3 Bro. Parl. Cas. 306; *Meeds v. Wood* (1854), 19 Beav. 215; *Browne v. Hammond* (1858), John. 210; *Brown v. Jarvis* (1860), 2 De G. F. & J. 168; *Walpole v. Laslett* (1862), 1 New Rep. 180; *Eaton v. Hewitt* (1862), 2 Drew. & Sm. 184; *Wardroper v. Cutfield* (1864), 10 Jur. (N. S.) 194; *Underhill v. Roden* (1876), 2 Ch. D. 494, 497; *Re Mason, Mason v. Mason*, [1910] 1 Ch. 695, C. A.; *Re Cane, Ruff v. Sivers* (1890), 63 L. T. 746; and see *O'Donoghue v. O'Donoghue*, [1906] 1 I. R. 482 (settlement). This doctrine was held not to extend to a gift over to the woman with other persons on her remarriage, so as to make it take effect on her death, in *Pile v. Salter* (1832), 5 Sim. 411; but this case is said to be wrongly decided in *Underhill v. Roden*, *supra*, and has not been followed in *Wardroper v. Cutfield*, *supra*, and *Scarborough v. Scarborough* (1888), 58 L. T. 851.

(s) *Bainbridge v. Cream* (1852), 16 Beav. 25; *Stanford v. Stanford* (1886), 34 Ch. D. 362; *Re Dear, Helby v. Dear* (1889), 58 L. J. (CH.) 659; *Stainer v. Hodgkinson* (1903), 73 L. J. (CH.) 179, 183. n.; and see *Re Carleton* (1909), 28 New Zealand Law Reports, 1066; and compare p. 718. *ante*, as to the ascertainment of a class on such events. *Contra*, as to settlement *inter vivos*, *Re Wyatt, Gowan v. Wyatt* (1889), 60 L. T. 920.

(t) *Etches v. Etches* (1856), 3 Drew. 441 (gift until bankruptcy; gift over on death implied); *Re Seaton, Ellis v. Seaton*, [1913] 1 Ch. 614

## SECT. 7.

Conditional  
Gifts.

Inferences  
from gifts  
over or  
other clauses.

**1455.** A gift over or other clause may be an indication of intention more or less valuable according to the context and the circumstances (*a*). Ambiguous words in an original gift may be explained by unambiguous words in a gift over (*b*) or other subsequent clause (*c*); but where the words in an original gift are plain and unambiguous taken by themselves, a gift over confined to one particular event does not compel the court to place a forced construction upon the original gift (*d*).

A gift to a donee at a specified age, followed by a gift over on his death before that age without issue, is *prima facie* vested independently of that age (*e*).

Exclusion of  
heir etc.

**1456.** In a case where the court finds an intention expressed that a person claiming under the testator as on intestacy shall not take in any event, but the testator has only expressly provided for other persons to take in certain contingencies, the latter contingencies may sometimes be disregarded as conditions precedent, and the gift in the will may take effect as a vested interest in all events (*f*).

Except in such cases, however, the title of the heir-at-law or person claiming on a failure of the gift or for want of disposition by the testator is not excluded merely by reason that the testator has not contemplated all contingencies; such person takes on every event that the testator has not provided for (*g*).

(gift until she should receive a legacy); compare *Re Akeroyd's Settlement*, *Roberts v. Akeroyd*, [1893] 3 Ch. 363, C. A. (gift over on bankruptcy implied), distinguishing *Re Tredwell*, *Jeffray v. Tredwell*, [1891] 2 Ch. 640. The distinction in all these cases is between a limitation for a definite period with a gift over on some of the events defining that period, when the above rules may apply, and a limitation followed by an executory gift over on any collateral contingency, which is to determine the first estate sooner than it would otherwise be determined (*Sheffield v. Orrery* (Lord) (1745), 3 Atk. 282, 285; *Walpole v. Laslett* (1862), 1 New Rep. 180).

(*a*) *Boughton v. James* (1844), 1 Coll. 26, *per* KNIGHT BRUCE, V.-C., at p. 44.

(*b*) *Ralph v. Carriek* (1879), 11 Ch. D. 873, 884, C. A.; and see *Judd v. Judd* (1830), 3 Sim. 525, reconsidered in *Hunter v. Judd* (1833), 4 Sim. 455.

(*c*) As, for instance, an advancement clause or hotchpot clause, as in *Vivian v. Mills* (1839), 1 Beav. 315; *Harrison v. Grimwood* (1849), 12 Beav. 192, 199, differently reported 18 L. J. (CH.) 485; *Walker v. Simpson* (1855), 1 K. & J. 713, 720; and see *Re Jacob's Will* (1861), 7 Jur. (N. S.) 302; *Re Turney*, *Turney v. Turney*, [1899] 2 Ch. 739, 746, 748 (provision for interest on the "respective portions" of children until they attained twenty-five, and gift over of the "share" of a child not attaining twenty-five to a stranger).

(*d*) *Re Rawlinson*, *Hill v. Withal*, [1909] 2 Ch. 36, 39; and see *Walker v. Mower* (1852), 16 Beav. 365.

(*e*) *Bland v. Williams* (1834), 3 My. & K. 411, *per* LEACH, M.R., at p. 417: "If, upon a death under" [the specified age], "issue was left, then the gift over is not to take place"; *Mytton v. Boodle* (1834), 6 Sim. 457; *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583, H. L., where the question addressed to the judges omitted the words "without leaving issue," in order, apparently, to have the case of *Doe d. Hunt v. Moore* (1811), 14 East, 601 (a case of real estate; see p. 807, *post*), reconsidered; *Wetherell v. Wetherell* (1863), 1 De G. J. & Sm. 134; *Whitter v. Bremridge* (1866), L. R. 2 Eq. 736 (residue; gift over on donee not attaining specified age or leaving male issue); *O'Reilly v. Walsh* (1872), 6 I. R. Eq. 555; *Re Bateman's Trusts* (1873), L. R. 15 Eq. 355.

(*f*) *Bradford v. Foley* (1779), Doug. (K. B.) 63 (heir-at-law). For cases of exclusion of next of kin, see note (*w*), p. 518, *ante*.

(*g*) *Amherst v. Lytton* (1729), 5 Bro. Parl. Cas. 254; *Sheffield v. Orrery*



(ii.) *Canons Applicable to Real Estate.*

## SECT. 7.

## Conditional Gifts.

Rule as to remainders.

**1457.** The principal rule as to real estate is the rule of law that a legal limitation (*h*) which in its inception can operate as a remainder shall be allowed to do so (*i*), and apart from statute (*k*) shall not operate as an executory devise. The court is unwilling to hold that the estate in fee is in abeyance (*l*).

**1458.** The gift may be vested, where it may take effect as a remainder and the contingencies described are those on which the preceding interests determine and the gift should come into possession (*m*). Thus, the words "in default of issue" or "in default of such issue" introducing a gift after an estate tail are considered and used as apt words for introducing a remainder, and not as words of contingency (*n*), and may be so even after gifts for life only to the issue (*o*); and the gift may take effect although issue has come into existence and failed (*p*).

Contingencies referring to determination of prior interests.

Similarly, where real estate is devised to a person and his heirs or to a person generally when or if he shall attain a specified age, the circumstance that a prior estate to endure pending his attainment of that age has been given to some other person, either for the benefit of the subsequent devisee himself, whether generally or in a particular manner, as for his education and maintenance (*q*), or for the benefit of the prior devisee or other persons (*r*), is an indication

Gifts at specified age with interim gift.

(*Lord*) (1745), 3 Atk. 282, 285, 286; *Doe d. Vessey v. Wilkinson* (1788), 2 Term Rep. 209, 218; *Shulldham v. Smith* (1817), 6 Dow, 22, H. L.; *Dicken v. Clarke* (1837), 2 Y. & C. (Ex.) 572.

(*h*) As to a doubt with regard to the effect of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), on the existence of such limitations in a will subject to the Act, see title PERPETUITIES, Vol. XXII., p. 314, note (*n*); and compare *Re Malin, National Trustees, etc. Co., Ltd. v. Loughnan*, [1912] Victorian Law Reports, 259, *per* L'BECKETT, J., at p. 263.

(*i*) This is known as the rule in *Purefoy v. Rogers* (1671), 2 Saund. 380; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 232. As to this rule being independent of intention, see p. 663, *ante*.

(*k*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 8; Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), s. 1; see, generally, title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 225, 226.

(*l*) *Pearks v. Moseley* (1880), 5 App. Cas. 714, *per* Lord SELBORNE, L.C., at p. 721.

(*m*) *Boraston's Case* (1587), 3 Co. Rep. 19 a; Tudor, L. C. Real Prop., 4th ed., p. 427; *Leadbeater v. Cross* (1876), 2 Q. B. D. 18 (if donees in tail "should die" without leaving lawful issue leaving subsequent donees surviving); see the general rule, p. 802, *ante*.

(*n*) *White v. Summers*, [1908] 2 Ch. 256, *per* PARKER, J., at p. 271.

(*o*) *Goodright d. Lloyd v. Jones* (1815), 4 M. & S. 88.

(*p*) *Doe d. Dacre (Baroness) v. Dacre (Dowager Lady)* (1798), 1 Bos. & P. 250; *Lewis d. Ormond v. Waters* (1805), 6 East, 336; *Ashley v. Ashley* (1833), 6 Sim. 358, 363.

(*q*) *Goodtitle d. Hayward v. Whitby* (1757), 1 Burr. 228; *Denn d. Satterthwaite v. Satterthwaite* (1765), 1 Wm. Bl. 519; *Stanley v. Stanley* (1809), 16 Ves. 491; *Goodtitle d. Revell v. Parker* (1813), 1 M. & S. 692 (renewable leaseholds); *Warter v. Hutchinson* (1823), 1 B. & C. 721; S. C. (1821), 5 Moore (C. P.), 143; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636, 663, 665; *Jackson v. Marjoribanks* (1841), 12 Sim. 93; *Greene v. Potter* (1843), 2 Y. & C. Ch. Cas. 517, 522; *Milroy v. Milroy* (1844), 14 Sim. 48 (blended fund); *Bird v. Bird* (1842), 6 Jur. 1030; *Re Mottram* (1864), 10 Jur. (N. S.) 915.

(*r*) *Boraston's Case* (1587), 3 Co. Rep. 19 a; *Taylor d. Smith v. Biddall* (1678), 2 Mod. Rep. 289; *Mansfield v. Dugard* (1713), 1 Eq. Cas. Abr. 194, pl. 4; *Doe d. Morris v. Underdown* (1741), Willes, 293; *Doe d. Wheedon v.*



SECT. 7.  
Conditional  
Gifts.

Gift from and  
after death  
of life tenant.

that the attainment of that age is not the time when the estate is to vest, but is an event on the happening of which the estate, already vested, is either to come into possession or to be divested (s).

On the other hand, a devise, after a prior gift for life, to a child of the life tenant or other donee if attaining a specified age is not made vested merely by the fact that it is expressed to take effect "from and after" the death of the life tenant (*t*), although this expression may be of importance if there are other indications of such an intention (*a*).

Gift over.

**1459.** An inference that the gift is vested is drawn, in a suitable context (*b*), from the circumstance that the estate is given over in the event of the first devisee dying under the specified age with or without other contingencies, even where there is no express provision for the meantime (*c*). This is on the ground that the

*Lea* (1789), 3 Term Rep. 41; *Parkin v. Knight* (1846), 15 Sim. 83, 86; *James v. Wynford* (*Lord*) (1832), 1 Sm. & G. 40; compare *Hook v. Taylor* (1706), 2 Vern. 561 (maintenance until placed out apprentice).

(s) *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583, H. L., *per* TINDAL, C.J., at p. 591.

(t) *Alexander v. Alexander* (1855), 16 C. B. 59; *Re Williams, Spencer v. Brighthouse* (1886), 54 L. T. 831; *Re Jobson, Jobson v. Richardson* (1889), 44 Ch. D. 154.

(a) *Andrew v. Andrew* (1875), 1 Ch. D. 410, C. A., where, as pointed out in *Re Jobson, Jobson v. Richardson, supra, per* NORTH, J., at p. 158, there was a gift over in default of the tenant for life having a son; *Re James* (1884), 51 L. T. 596; compare *Tatham v. Vernon* (1861), 29 Beav. 604, 617. In *Simmonds v. Cock* (1861), 29 Beav. 455, the condition as to age was held to be subsequent in the particular context.

(b) The rule is inapplicable where the context is unsuitable, as where there is an express direction as to vesting, or the specified age is an element in the description of the donee (*Russell v. Buchanan* (1836), 7 Sim. 628; *Bull v. Pritchard* (1846), 5 Hare, 567; *Blagrove v. Hancock* (1848), 16 Sim. 371).

(c) *Edwards v. Hammond* (1683), 3 Lev. 132; 1 Bos. & P. (N. R.) 324, n. (surrender of copyholds: remainder to eldest son and his heirs, if he live to attain twenty-one; if he die before twenty-one, to surrenderor and his heirs); *Bromfield v. Crowder* (1805), 1 Bos. & P. (N. R.) 313, affirmed (1811), H. L. (see 14 East, 604) (remainder to J. B. if he should attain twenty-one, but in case he died under twenty-one and C. D. should survive him, over); *Doe d. Roake v. Nowell* (1813), 1 M. & S. 327, affirmed, *sub nom. Randall v. Doe d. Roake* (1817), 5 Dow, 202, H. L. (remainder to R.'s children equally at twenty-one; but if only one child should live to attain such age, to him or her, at twenty-one; and in case R. died without lawful issue, or such issue should die before twenty-one, over); *Doe d. Hunt v. Moore* (1811), 14 East, 601 (immediate devise to M. when he attained twenty-one, but in case he died before twenty-one, over); *Farmer v. Francis* (1824), 2 Bing. 151; (1826), 2 Sim. & St. 505 (gift of residue, in remainder after life estates to A. and B., to children of B. living at death of survivor of A. and B. equally when and as they respectively attain twenty-four; but in case there shall be no such issue, or being such all shall die without lawful issue under twenty-four, over); *Doe d. Dolley v. Ward* (1839) 9 Ad. & El. 582 (remainder to such of A.'s children as she now has or may have, sons at twenty-three, daughters at twenty-one; and in case of the death of any child or children, if a son under twenty-three, and if a daughter under twenty-one, over to the survivors; and in case only one child etc., to such child so attaining such age); *Phipps v. Ackers, supra*; *S. C.* (1835), 3 Cl. & Fin. 702, 715, H. L. (trust for A. when and so soon as he should attain twenty-one; but in case he should die before he should attain twenty-one, without leaving issue of his body, over); *Hepworth v. Scale* (1855), 1 Jur. (N. S.) 698 (trust for H. and his heirs if he should attain twenty-one, and if he should die before twenty-one,

court discovers an intention that the first devisee should take all that the testator has to give, except whatever interest the person claiming under the devise over is entitled to, which gives the first devisee the immediate interest subject to being divested under the gift over (*d*). There is no difference in this respect with regard to legal or equitable interests (*e*), or with regard to devises to individuals or to classes (*f*).

A similar inference has been made where the original gift was apparently contingent on surviving a life tenant, but there was a gift over if the donee should die in the lifetime of the life tenant without leaving issue (*g*). It is difficult to make such an inference where the gift over is contingent on an event which cannot happen until after the death of the first taker (*h*), or has no relation to the first taker's interest (*i*), or if the attainment of a specified age is part of the description of the donee, or otherwise the description of the donee itself contains a contingency; in such cases a gift in the interim or a gift over has no effect in making the gift vested (*a*). Particularly, there is a difference (*b*) between a gift to such a person as attains, or to such of a number of persons as attain, a specified

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Conditional  
Gifts.

Contingencies  
to which  
rules are  
applicable.

over); and see *Re Dennis* (1903), 5 Ontario Law Reports, 46. *Doe d. Dolley v. Ward* (1839), 9 Ad. & El. 582, however, appears to be decided on the ground that by the form of the original gift the devise was vested at birth, with a postponed time of enjoyment (see p. 799, *ante*); and it was said that the devise over to the other children did not make such a distinction as to escape from the authority of *Doe d. Roake v. Nowell* (1813), 1 M. & S. 327; see *Doe d. Dolley v. Ward*, *supra*, at p. 606. In *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583, H. L., the question addressed to the judges omitted the words "without leaving issue of his body," so that the limitations submitted to them were similar to the limitations in *Doe d. Hunt v. Moore* (1811), 14 East, 601, which had been doubted in *Phipps v. Ackers* (1835), 3 Cl. & Fin. 702, H. L., *per* Lord BROUGHAM, at pp. 715, 716; no importance appears to have been attached to the omitted words in the speeches in the House of Lords. These cases were cited with approval in *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, at pp. 224, 225, 226.

(*d*) *Phipps v. Ackers*, (1842), 9 Cl. & Fin. 583, H. L., *per* TINDAL, C.J., at pp. 591, 592; *Bull v. Pritchard* (1846), 5 Hare, 567, *per* WIGRAM, V.-C., at p. 571, adopted in *Boulton v. Beard* (1853), 3 De G. M. & G. 608, *per* TURNER, L.J., at p. 613.

(*e*) *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583, H. L., *per* Lord BROUGHAM, at p. 599; *Stanley v. Stanley* (1809), 16 Ves. 491 (executory trust).

(*f*) *Doe d. Roake v. Nowell*, *supra*; *Doe d. Dolley v. Ward*, *supra*, at p. 607.

(*g*) *Finch v. Lane* (1870), L. R. 10 Eq. 501 (life interest to wife, and after her death to H. if living at death of wife, but if she should die in lifetime of wife without leaving issue surviving). But a gift over on the death of the donee before the tenant for life, simply and without any further contingency, does not raise the same inference (*Doe d. Planner v. Scudamore* (1800), 2 Bos. & P. 289). As to the effect of gifts at a specified age followed by a gift over on death under the specified age without issue, see p. 806, *ante*.

(*h*) *L'Estrange v. L'Estrange* (1890), 25 L. R. Ir. 399, 417, C. A.

(*i*) *Price v. Hall* (1868), L. R. 5 Eq. 399, 403 ("the contingency which is introduced does not fit in with the prior interest given").

(*a*) *Duffield v. Duffield* (1829), 3 Bli. (N. S.) 260, 333. H. L.; *Festing v. Allen* (1843), 12 M. & W. 279; *Bull v. Pritchard* (1846), 5 Hare, 567, 571, 572; *Holmes v. Prescott* (1864), 10 Jur. (N. S.) 507; *Rhodes v. Whitehead* (1865), 2 Drew. & Sm. 532, 536; *Price v. Hall*, *supra*, at p. 402.

(*b*) *Doe d. Dolley v. Ward*, *supra*, at pp. 605, 606; *Holmes v. Prescott*, *supra*, *per* WOOD, V.-C., at p. 513; *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693, *per* PARKER, J., at p. 699; see, however, *Re Mid-Kent Railway Act*, 1856, *Ex parte Styant* (1859), John. 387, 396.

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Conditional  
Gifts.

Property  
to which  
rules are  
applicable.

age (*c*), and a gift to all those persons at that age (*d*), or who attain that age (*e*); the latter forms of gift can much more easily be construed as vested, especially if they take effect as remainders.

**1460.** The rules applicable to real estate apply also to a fund, whether entirely composed of personal estate or a mixed fund, which is directed to be converted into real estate (*f*).

A trust for sale of real estate, and for payment of the proceeds to certain donees, ascertained without reference to the time or other features of the sale, where the sale is merely for the purpose of division, and for the convenience of the estate, does not make the sale a condition precedent to vesting of their interests (*g*).

(iii.) *Canons Applicable to Legacies out of Personal Estate.*

Property  
to which  
rules apply.

**1461.** The following rules apply to specific legacies of personal

(*c*) Such a devise was held contingent on attaining the specified age in limitations construed as operating as contingent remainders in *Brackenbury v. Gibbons* (1875), 2 Ch. D. 417; *Symes v. Symes*, [1896] 1 Ch. 272; *White v. Summers*, [1908] 2 Ch. 256; and in gifts operating as executory limitations in *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211 (equitable estate); *Re Lechmere and Lloyd* (1881), 18 Ch. D. 524; *Miles v. Jarvis* (1883), 24 Ch. D. 633; *Dean v. Dean*, [1891] 3 Ch. 150; *Re Bourne, Rymer v. Harpley* (1887), 56 L. T. 388.

(*d*) See *Farmer v. Francis* (1824), 2 Bing. 151; S. C. (1826), 2 Sim. & St. 505; *Doe d. Dolley v. Ward* (1839), 9 Ad. & El. 582; *Attwater v. Attwater* (1853), 18 Beav. 330.

(*e*) Such a gift vested at birth, subject to be divested on failure to attain the age in *Riley v. Garnett* (1849), 3 De G. & Sm. 629, explained in *Re Finch, Abbiss v. Burney, supra*, per JESSEL, M.R., at p. 222, as decided on the ground that a power to grant leases during minorities had no meaning unless minors had an interest; *Andrew v. Andrew* (1875), 1 Ch. D. 410, C. A. (as to which case, see note (*a*), p. 808, *ante*); *Muskett v. Eaton* (1875), 1 Ch. D. 435, where a reference to children born in due time after the death of the tenant for life showed that the attainment of a specified age was not part of the description; see *Re Finch, Abbiss v. Burney, supra*. The rule of construction on which these cases were decided depends partly on the law as to contingent remainders, and partly on the principle that as to real estate the courts are unwilling to hold the fee to be in abeyance (*Pearks v. Moseley* (1880), 5 App. Cas. 714, per Lord SELBORNE, L.C., at p. 721). Even in case of a remainder, such words *primâ facie* make the gift contingent, and these cases have no application to wills where the limitations are not legal remainders (*Festing v. Allen* (1843), 12 M. & W. 279, 300, 301; *Holmes v. Prescott* (1864), 10 Jur. (N. S.) 507; *Rhodes v. Whitehead, supra*; *Perceval v. Perceval* (1870), L. R. 9 Eq. 386; *Re Eddel's Trusts* (1871), L. R. 11 Eq. 559; *Pearks v. Moseley, supra*, at p. 730; *Ferguson v. Ferguson* (1886), 17 L. R. Ir. 552, 559, 560; and compare *Berry v. Berry* (1878), 7 Ch. D. 657; *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43). The case of *Browne v. Browne* (1856), 3 Sm. & G. 568 (better reported, 26 L. J. (CH.) 635; see *Best v. Donmall* (1871), 40 L. J. (CH.) 160, 162, 163), *contra*, is disapproved in *Holmes v. Prescott, supra*, and is said not to be law in *Re Williams, Spencer v. Brighthouse* (1886), 54 L. T. 831, per CHITTY, J., at p. 833. Compare the cases as to personal estate, for example, *Bull v. Pritchard* (1826), 1 Russ. 213; *Webster v. Boddington* (1858), 26 Beav. 128.

(*f*) *Snow v. Poulden* (1836), 1 Keen, 186; *Jackson v. Marjoribanks* (1841), 12 Sim. 93, 98.

(*g*) *Parker v. Sowerby* (1853), 1 Drew. 488, 496; 4 De G. M. & G. 321; and see *Re Raw, Morris v. Griffiths* (1884), 26 Ch. D. 601, 602. As to the effect of trusts for sale void for remoteness, see title PERPETUITIES, Vol. XXII., p. 318; as to the rules applicable to bequests of the proceeds of sale of real estate, see p. 811, *post*.



estate, including leaseholds (*h*) and the proceeds of real estate held on trust for sale (*i*), and to general legacies so far as charged on such personal estate. Where freeholds are given together with leaseholds or other personal estate, under a single description in terms such that according to the canons above stated there is a vested estate conferred in the freeholds, the interests in the leaseholds or other personal estate may also be considered as vested, although, according to the canons stated below, they would be regarded as contingent (*k*), but the rules of law as to contingent remainders in real estate do not prevent effect being given to the intention as to the personal estate (*l*).

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Conditional  
Gifts.

**1462.** In all cases of legacies given on any future event, whether certain to happen or not, the question of vesting is whether the gift is wholly dependent on that event (*m*), so that it must have happened before any part of the testator's bounty can attach to the legatee (*n*), or whether the time of payment only is postponed to that event; the legatee may take a vested interest at once subject to such postponed payment (*o*).

Distinction  
between  
vesting and  
payment.

**1463.** Where the gift is a simple gift at a future event, or from and after a future event, or is contained wholly in a direction to pay, or to divide or to transfer, at or from and after a future event, so that there is no gift except in the direction to pay or transfer, the vesting is *primâ facie* postponed until that event happens; and consequently if the legatee dies before that event his representatives are *primâ facie* not entitled to payment (*p*). Thus, a legacy to a named person at a certain definite future

Gift contained  
wholly in  
direction  
to pay.

(*h*) *Ingram v. Suckling* (1859), 7 W. R. 386; *Re Hudsons* (1843), Drury temp. Sug. 6.

(*i*) *Re Hart's Trusts, Ex parte Block* (1858), 3 De G. & J. 195; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510, 514.

(*k*) *Farmer v. Francis* (1826), 2 Sim. & St. 505 (residue); *Tapscott v. Newcomb* (1842), 6 Jur. 755; *Riley v. Garnett* (1849), 3 De G. & Sm. 629; *James v. Wynford (Lord)* (1852), 1 Sm. & G. 40, 59, 60.

(*l*) *Holmes v. Prescott* (1864), 10 Jur. (N. S.) 507; *White v. Summers*, [1908] 2 Ch. 256, 264.

(*m*) In such cases "the time is annexed to the substance of the gift" (*Monkhouse v. Holme* (1783), 1 Bro. C. C. 298, 300).

(*n*) *May v. Wood* (1792), 3 Bro. C. C. 471, 473; *Leeming v. Sherratt* (1842), 2 Hare, 14, 19.

(*o*) The court adopts the view of the civil law that such a legacy is *debitum in presenti, solvendum in futuro* (*Maddison v. Andrew* (1747), 1 Ves. Sen. 58, 59; *Monkhouse v. Holme*, *supra*, at p. 300; *Crickett v. Dolby* (1795), 3 Ves. 10, 13). Accordingly, if the legatee has a vested interest, but he dies before the date of payment, his representatives are entitled (*Bateman v. Roach* (1726), 9 Mod. Rep. 104).

(*p*) *Stapleton v. Cheales* (1711), Prec. Ch. 317 (the second rule in this case); *Leake v. Robinson* (1817), 2 Mer. 363, *per* GRANT, M.R., at p. 387; *Webber v. Webber* (1823), 1 Sim. & St. 311 (marriage); *Murray v. Tancred* (1840), 10 Sim. 465; *Leeming v. Sherratt* (1842), 2 Hare, 14, 18; *Bruce v. Charlton* (1842), 13 Sim. 65; *Chevaux v. Aislabie* (1842), 13 Sim. 71; *Lang v. Pugh* (1842), 1 Y. & C. Ch. Cas. 718; *Beck v. Burn* (1844), 7 Beav. 492 (which case, however, should have been decided otherwise because of the intervening life estate; see *Adams v. Robarts* (1858), 25 Beav. 658, 661); *Morgan v. Morgan* (1850), 4 De G. & Sm. 164 (marriage); *Gardiner v. Slater* (1858), 25 Beav. 509; *Chance v. Chance* (1853), 16 Beav. 572; *Re Wrangham's Trust* (1860), 1 Drew. & Sm. 358; *Locke v. Lamb* (1867), L. R. 4 Eq. 372; *Johnston v. O'Neill* (1879), 3 L. R. Ir. 476, 482.

SECT. 7.  
Conditional  
Gifts.

Express  
distinction  
between gift  
and time of  
payment.

time, without more, is *primâ facie* contingent, and he or his representatives take no interest if he dies before that time (*q*).

A gift, however, to a class upon a contingency does not *primâ facie* render the contingency applicable to the description of the class (*r*).

**1464.** If the words of the gift express a distinction between the gift itself and the event denoting the time of payment, division, or transfer (*s*), and this time is the attainment by the donee of the age of twenty-one years (*t*) or other age (*a*), or is any other event which, assuming the requisite duration of life, must necessarily happen at a determinable time (*b*), then the gift is *primâ facie* (*c*) not contingent in respect of that event (*d*). The personal representative of the donee is then entitled to the gift, even if the donee dies before attaining the specified age or before the named event but is *primâ facie* not entitled to payment before the donee himself would have

(*q*) *Smell v. Dee* (1708), 2 Salk. 415 (criticised on other grounds in *King v. Withers* (1735), Cas. temp. Talb. 117, 124); *Bruce v. Charlton* (1842), 13 Sim. 65, 68; *Re Eve, Belton v. Thompson* (1905), 93 L. T. 235. For cases of context to the contrary, see note (*b*), *infra* (distinction between gift and direction to pay). As to a direction for payment within a certain time, see *Edmunds v. Waugh* (1858), 4 Drew. 275; S. C. (1863), 2 New Rep. 408, C. A.

(*r*) See p. 715, *ante*.

(*s*) As to what is a sufficient distinction between the gift and the direction to pay, see *Re Bartholomew* (1849), 1 Mac. & G. 354, commented on in *Locke v. Lamb* (1867), L. R. 4 Eq. 372, 380; *Williams v. Clark* (1851), 4 De G. & Sm. 472, where a distinction was considered to exist; *Shum v. Hobbs* (1855), 3 Drew. 93; *Merry v. Hill* (1869), L. R. 8 Eq. 619, where no distinction existed; and see *Cooney v. Nicholls* (1881), 7 L. R. Ir. 107, C. A.

(*t*) *Chambers v. Jeoffrey* (1710), 2 Eq. Cas. Abr. 541, pl. 9; *Skey v. Barnes* (1816), 3 Mer. 335; *Vivian v. Mills* (1839), 1 Beav. 319; *Lister v. Bradley* (1841), 1 Hare, 10, 12 ("to my four children, to be paid them when or if they attain twenty-one"); *Williams v. Clark*, *supra*; *Shrimpton v. Shrimpton* (1862), 31 Beav. 425.

(*a*) *Farmer v. Francis* (1826), 2 Sim. & St. 505; *Blease v. Burgh* (1840), 2 Beav. 221; *Saumarez v. Saumarez* (1865), 34 Beav. 432. Such postponement of enjoyment after his majority may be voidable by the donee; see p. 588, *ante*.

(*b*) *Sidney v. Vaughan* (1721), 2 Bro. Parl. Cas. 254 (six months after serving apprenticeship); *Chaffers v. Abel* (1839), 3 Jur. 578 (when youngest attained twenty-one); and see the cases of a gift with a direction to pay at a certain fixed time after the testator's death (*Sheldon v. Sheldon* (1739), 9 Mod. Rep. 211; *Jackson v. Jackson* (1749), 1 Ves. Sen. 217; *Leeming v. Sherratt* (1842), 2 Hare, 14, 19, 20; *Bromley v. Wright* (1849), 7 Hare, 334, 344; *Oppenheim v. Henry* (1853), 10 Hare, 441; *Lucas v. Carline* (1840), 2 Beav. 367).

(*c*) For instances where the context displaced the presumption, see *Oseland v. Oseland* (1796), 3 Anst. 628; *Heath v. Perry* (1744), 3 Atk. 102; *Knight v. Cameron* (1807), 14 Ves. 389, where the gift was also contingent on the donee being then living.

(*d*) This is the first rule in *Stapleton v. Cheales* (1711), Prec. Ch. 317; Tudor, L. C. Real Prop., 4th ed., pp. 438, 459; see accordingly *Jackson v. Jackson* (1748), 1 Ves. Sen. 217 (gifts to R., "to be paid" at various times); *Wadley v. North* (1797), 3 Ves. 364 (gift to children of A., "each receiving" his share at twenty-one); *Bolger v. Mackell* (1800), 5 Ves. 509 ("to be paid" at twenty-one or marriage); *Clutterbuck v. Edwards* (1831), 2 Russ. & M. 577. The rule arose in the ecclesiastical courts, and was adopted by courts of law and of equity as to personal legacies, but not as to real estate or legacies charged on real estate (*Maddison v. Andrew* (1747), 1 Ves. Sen. 58, 59; *Mackell v. Winter* (1797), 3 Ves. 536, *per* Lord LOUGHBOROUGH, L.C., at p. 543); and see p. 821, *post*.

been so entitled (*e*). This presumption as to vesting does not arise where the gift is on an event, such as the marriage of the donee, which will not necessarily happen at all, however long the donee or other person concerned lives (*f*); in such a case, however, other indications as mentioned below may be present to show that the vesting is independent of the named event (*g*).

Even where the gift and direction to pay are distinct, the context may show that the gift is contingent (*h*). A mere direction for accumulation until payment, however, is not sufficient (*i*), and even an express contingency attached to payment may not be sufficient to make the vesting contingent (*k*).

**1465.** The context may also show that the gift is vested, even where there is no express distinction between the gift and a direction as to the time of payment. Thus, it may appear that the reason for the postponement of the gift is on account of prior interests given in the meantime, or on account of the nature of the property and the convenience of administration (*l*); in such a case the gift *prima facie* vests independently of the postponement of enjoyment (*a*).

SECT. 7.  
Conditional  
Gifts.

Implied  
distinction  
between gift  
and time of  
payment.

(*e*) *Chester v. Painter* (1725), 2 P. Wms. 335, 337; *Roden v. Smith* (1744), Amb. 588; *Maher v. Maher* (1877), 1 L. R. Ir. 22. A direction, however, for payment of the whole interest of the legacy to the donee in the meantime will entitle the personal representative to immediate payment on the death of the donee, even before the donee himself would have been entitled to payment (*Cloberry and Lampen's Case* (1677), 2 Eq. Cas. Abr. 24; *Anon.* (1690), 2 Vern. 199; *Fonnereau v. Fonnereau* (1748), 1 Ves. Sen. 119; *May v. Wood* (1792), 3 Bro. C. C. 472, 474; *Hanson v. Graham* (1801), 6 Ves. 239; as to such gifts, see p. 814, *post*); but a mere direction to allow maintenance, not amounting to a gift of the interest, has not this effect (*Harrison v. Buckle* (1720), 1 Stra. 238).

(*f*) *Atkins v. Hiccocks* (1737), 1 Atk. 500; *Ellis v. Ellis* (1802), 1 Sch. & Lef. 1; *Morgan v. Morgan* (1850), 4 De G. & Sm. 164, 167; *Re Cantillons* (1864), 16 I. Ch. R. 301, 308. In *Maher v. Maher*, *supra*, the principle was applied to a gift where payment was directed at twenty-one or marriage with consent.

(*g*) *Booth v. Booth* (1799), 4 Ves. 399 (residue and whole interest given in the meantime); *Vize v. Stoney* (1841), 1 Dr. & War. 337, 349, 350; *Re Wrey*, *Stuart v. Wrey* (1885), 30 Ch. D. 507; *M'Cutcheon v. Allen* (1880), 5 L. R. Ir. 268; and compare *Corr v. Corr* (1873), 7 I. R. Eq. 397.

(*h*) *Knight v. Cameron* (1807), 14 Ves. 389; *Judd v. Judd* (1830), 3 Sim. 525, reconsidered in *Hunter v. Judd* (1833), 4 Sim. 455; *Chevaux v. Aislable* (1842), 13 Sim. 71; *Merry v. Hill* (1869), L. R. 8 Eq. 619; and see *Heath v. Perry* (1744), 3 Atk. 101.

(*i*) *Stretch v. Watkins* (1816), 1 Madd. 253; *Bull v. Johns* (1830), Tambl. 513; *Josselyn v. Josselyn* (1837), 9 Sim. 63; *Blease v. Burgh* (1840), 2 Beav. 221, 226; *Saunders v. Vautier* (1841), Cr. & Ph. 240; and see *Oppenheim v. Henry* (1853), 10 Hare, 441; *Re Bragger*, *Bragger v. Bragger* (1887), 56 L. T. 521; *Re Thompson*, *Griffith v. Thompson* (1896), 44 W. R. 582; *Re Couturier*, *Couturier v. Shea*, [1907] 1 Ch. 470. A donee having a vested interest, subject to postponement by such accumulation, may put an end to such accumulation and claim payment or transfer the moment he has attained majority and is by law entitled to give a receipt (*ibid.*).

(*le*) *Massey v. Hudson* (1817), 2 Mer. 130 ("twelve months from death of B. in case B. shall happen to survive my wife"); *Clutterbuck v. Edwards* (1831), 2 Russ. & M. 577 ("on decease of wife, if he shall then have attained twenty-one"); *Wright v. Wright* (1852), 21 L. J. (Ch.) 775 (if donees were of competent understanding).

(*l*) See the rule, applicable generally to the vesting of any gift, p. 799. *ante*.

(*a*) *Packham v. Gregory* (1843), 4 Hare, 396, 398; *Bromley v. Wright*



## SECT. 7.

Conditional  
Gifts.

Postpone-  
ment to a life  
estate.

Postpone-  
ment until  
youngest  
attains  
specified age.

Gift of interim  
interest.

Accordingly, *primâ facie* no contingency is imported by the fact that the legacy is given after a life estate in the property given (b). Where a legacy is given to a donee contingently on attaining a specified age, the fact that the legacy is also postponed to a life estate *primâ facie* does not render it contingent on the donee surviving the tenant for life (c); while the fact that the interest is given to another person pending his attaining that age may be an indication of a vested gift (d).

A gift to a class of children when the youngest attains a specified age confers a vested interest on all who attain that age, whether they are living or dead at the time of payment (e), and *primâ facie* those who do not attain that age do not take vested interests (f), unless there are other matters in the will from which a contrary inference may be drawn (g). In the case of a similar gift to individuals, and not to a class, *primâ facie* they take vested interests although dying before the specified age (h).

**1466.** Where a postponed gift is accompanied by a gift of the

(1849), 7 Hare, 334, 342; *Re Bennett's Trusts* (1857), 3 K. & J. 280, 283; *Adams v. Robarts* (1858), 25 Beav. 658, 661; *Re Couturier, Couturier v. Shea*, [1907] 1 Ch. 470, 472.

(b) *Corbett v. Palmer* (1735), 2 Eq. Cas. Abr. 548, pl. 24; *Hatch v. Mills* (1759), 1 Eden, 342; *Medlicott v. Bowes* (1748), 1 Ves. Sen. 207; *Barnes v. Allen* (1782), 1 Bro. C. C. 181; *Monkhouse v. Holme* (1783), 1 Bro. C. C. 298; *A.-G. v. Crispin* (1784), 1 Bro. C. C. 386; *Benyon v. Maddison* (1786), 2 Bro. C. C. 75; *Roebuck v. Dean* (1793), 4 Bro. C. C. 402; *Molesworth v. Molesworth* (1798), 4 Bro. C. C. 408; *Bayley v. Bishop* (1803), 9 Ves. 6; *Hallifax v. Wilson* (1809), 16 Ves. 168, 171; *Blamire v. Geldart* (1809), 16 Ves. 314; *Burton v. Hodson* (1827), 2 Sim. 24; *Cousins v. Schroder* (1830), 4 Sim. 23; *Cochrane v. Wiltshire* (1847), 16 L. J. (CH.) 366; *Re Bright's Trust* (1855), 21 Beav. 67; *Re Bennett's Trusts, supra*; *Strother v. Dutton* (1857), 1 De G. & J. 675; *Adams v. Robarts, supra*; *Hickling v. Fair*, [1899] A. C. 15. For an instance of contexts to the contrary, see *Willis v. Plaskett* (1841), 4 Beav. 208.

(c) *Hallifax v. Wilson, supra*; *Walker v. Main* (1815), 1 Jac. & W. 1; *Cousins v. Schroder, supra*; *Jones v. Jones* (1843), 13 Sim. 561; *Mendham v. Williams* (1866), L. R. 2 Eq. 396. For an example of a context to the contrary, see *Billingsley v. Wills* (1745), 3 Atk. 219.

(d) *Lane v. Goudge* (1803), 9 Ves. 225.

(e) *Leeming v. Sherratt* (1842), 2 Hare, 14; *Re Smith's Will* (1855), 20 Beav. 197; *Brocklebank v. Johnson* (1855), 20 Beav. 205; *Kennedy v. Sedgwick* (1857), 3 K. & J. 540. For cases where the children expressly were required to survive distribution, see *Castle v. Eate* (1844), 7 Beav. 296; *Re Hunter's Trusts* (1865), L. R. 1 Eq. 295; and for special cases as to the time of payment, see *Beckton v. Barton* (1859), 5 Jur. (N. S.) 349; *Evans v. Pilkington* (1839), 10 Sim. 412. See also *Re Nicholson, Stace v. Nicholson* (1904), 24 New Zealand Law Reports, 633; *Re Osmund, Cummings v. Galloway* (1910), 29 New Zealand Law Reports, 65.

(f) *Ford v. Rawlins* (1823), 1 Sim. & St. 328; *Leeming v. Sherratt, supra*, at p. 23; *Parker v. Sowerby* (1853), 1 Drew. 488, 496; S. C., on appeal, 4 De G. M. & G. 321; *Lloyd v. Lloyd* (1856), 3 K. & J. 20, 25.

(g) As, for instance, by a gift of intermediate income generally or by way of maintenance to each member of the class (*Re Grove's Trusts* (1862), 3 Giff. 575; *Boulton v. Pilcher* (1861), 29 Beav. 633), or by a distinction made between the gift and the direction as to the time of payment (*Knox v. Wells* (1864), 2 Hem. & M. 674); but a gift of maintenance during minority to each is insufficient (*Lloyd v. Lloyd, supra*; *Coldecott v. Best*, [1881] W. N. 150); as is a gift for maintenance of the whole class as a common fund (*Re Hunter's Trusts* (1865), L. R. 1 Eq. 295).

(h) *Cooper v. Cooper* (1861), 29 Beav. 229.

whole interim interest of the fund to the donee (*i*) it is presumed, unless the context is to the contrary (*k*), that the testator meant a single immediate vested gift (*l*). In order to raise this inference the gift of interim income must be free from contingency (*m*), except in cases where the gift would be vested in every event but the named contingency causing postponement (*n*); and therefore it does not arise where the capital and income of the legacy are given in a single gift (*o*) so that the same contingency applies to them both.

SECT. 7.  
Conditional  
Gifts.

The fact that the income and capital of the subject-matter are given

What kind of  
interim gift  
sufficient.

(*i*) A postponed legacy may in certain cases carry interest from the death of the testator, but this may be independent of the question whether the legacy is vested or not; see, for example, *Wynch v. Wynch* (1778), 1 Cox, Eq. Cas. 433; *Re Rouse's Estate* (1852), 9 Hare, 649. As to the question of interest on legacies, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 273 *et seq.*; *Re Palfreeman, Public Trustee v. Palfreeman*, [1914] 1 Ch. 877, criticising *Pickwick v. Gibbes* (1839), 1 Beav. 271, and *Coventry v. Higgins* (1844), 14 Sim. 30, and holding that legacies payable to a legatee on attaining a specific age carried interest at expiration of one year from testator's death if legatee had attained the age in testator's lifetime.

(*k*) For cases where on the context the gift of capital was nevertheless held contingent, see *Vawdry v. Geddes* (1830), 1 Russ. & M. 203, 208 (gift over in case of death of legatee before particular period; but the case has been criticised in this respect; as to the effect of a gift over, see p. 820, *post*); *Mills v. Roberts* (1830), Tambl. 476; *Re Bulley's Estate* (1865), 11 Jur. (N. S.) 837 (class of donees clearly contingent).

(*l*) *Cloberry and Lampen's Case (Cloberry's Case)* (1677), 2 Eq. Cas. Abr. 539; *Green v. Pigot* (1871), 1 Bro. C. C. 103; *Keily v. Monck* (1785), 3 Ridg. Parl. Rep. 205, 256; *Hanson v. Graham* (1801), 6 Ves. 239; *Gardiner v. But* (1818), 3 Madd. 425; *Rose v. Sowerby* (1830), Tambl. 376; *Vawdry v. Geddes*, *supra*, per LEACH, M.R., at p. 208 (putting the matter on the ground that for the purpose of interest the legacy must be immediately separated from the testator's estate); *Saunders v. Vautier* (1841), Cr. & Ph. 240, 248; *Re Jacob's Will* (1861), 29 Beav. 402; *Dundas v. Wolfe Murray* (1863), 1 Hem. & M. 425; *Re Bunn, Isaacson v. Webster* (1880), 16 Ch. D. 47, 48; *Re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507, 510, 512; *Scotney v. Lomer* (1886), 31 Ch. D. 380, C. A. In so far as *Batsford v. Kebbell* (1797), 3 Ves. 363, and *Spencer v. Wilson* (1873), L. R. 16 Eq. 501, 514, depend on treating the gifts of capital and of income of the property as separate gifts, they are not followed; see, for instance, *Re Holt's Estate, Bolding v. Stringell* (1876), 45 L. J. (CH.) 208, 209; and note (*g*), p. 816, *post*. The intention may be shown, however, to make such separate gifts; see *Re Peek's Trusts* (1873), L. R. 16 Eq. 221 (gift over as to capital only, if not attaining specified age). "Perhaps the true principle of the cases is that where there is one gift of corpus and income as parts of a whole, a gift otherwise contingent will be vested, but that where there are separate gifts, one of capital and one of income, not necessarily going together, the gift will not be deemed vested" (*Brennan v. Brennan*, [1894] 1 L. R. 69, per CHATTERTON, V.-C., at p. 73).

(*m*) *Re Thruston's Trusts* (1849), 17 Sim. 21; and see *Hubert v. Parsons* (1751), 2 Ves. Sen. 261, 263.

(*n*) *Hammond v. Maule* (1844), 1 Coll. 281 (trust for A. for life, and at her death for her daughter B. in case she should then have attained twenty-one; but in case B. should not have attained twenty-one at the decease of A., for payment of interest for maintenance of B. until twenty-one etc.).

(*o*) *Knight v. Knight* (1826), 2 Sim. & St. 490; *Morgan v. Morgan* (1850), 4 De G. & Sm. 164, 167; compare *Locke v. Lamb* (1867), L. R. 4 Eq. 372, where the interest was directed to be accumulated; *Breedon v. Tugman* (1834), 3 My. & K. 289, where the construction making the same contingency apply to both was avoided; see, *contra*, *Collins v. Metcalfe* (1687), 1 Vern. 462.

SECT. 7.  
Conditional  
Gifts.

subject to annuities or life interests is immaterial; howsoever the capital given may be charged, if the income of that capital less the charges is given the rule is satisfied (*p*); but it is not sufficient that the dividends on property equal in amount to that which is the subject of gift should be directed to be paid to the legatee, where the severance of the property given is only to take place at the future time of payment (*q*); or that an annuity of amount equal to the interest on the sum given should be given to the donee pending the event, but not as interest on the capital (*r*).

To what  
contingent  
legacies  
applicable.

This presumption of vesting derivable from gifts of income fails if the context is to the contrary (*s*), but applies whatever the nature of the contingent event denoting the time of payment of the capital of the legacy (*t*).

Gift of  
interim main-  
tenance.

**1467.** When provision is made for the maintenance of the legatee in the meantime, the question arises whether it is a distinct gift from the legacy in question, or is merely a direction as to the mode of application of the interest (*a*). If merely maintenance is given as a distinct gift, it has no effect in making the legacy vested (*b*).

Gifts to  
individuals.

Where, therefore, the donee is an individual, or one of a group of persons taking as individuals and not as a class, the fact that the gift is to carry interest, and that the whole interest or income of the gift is directed to be applied for the maintenance, or in some other manner for the benefit, of the donee until the contingent event on which the legacy itself is given, is an indication (*c*) that vesting is independent of the contingency (*d*). The inference in favour of

(*p*) *Potts v. Atherton* (1859), 28 L. J. (CH.) 486 (life annuity); and see *Jones v. MacKilwain* (1826), 1 Russ. 220; *Lane v. Goudge* (1803), 9 Ves. 225.

(*q*) *Batsford v. Kebbel* (1797), 3 Ves. 363 (on the ground that the gifts of dividends and of capital were distinct), explained and commented on in *Re Hart's Trusts, Ex parte Block* (1858), 3 De G. & J. 195, 202, C. A., and *Re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507, 510.

(*r*) *Watson v. Hayes* (1839), 5 My. & Cr. 125, 134; *Merlin v. Blaggrave* (1858), 25 Beav. 125.

(*s*) See note (*k*), p. 815, *ante*.

(*t*) *Booth v. Booth* (1799), 4 Ves. 399; *Vize v. Stoney* (1841), 1 Dr. & War. 337, 350; *Re Wrey, Stuart v. Wrey, supra* (marriage).

(*a*) *Watson v. Hayes, supra*, per Lord COTTENHAM, L.C., at p. 133.

(*b*) *Pulsford v. Hunter* (1792), 3 Bro. C. C. 416, 419; *Leake v. Robinson* (1817), 2 Mer. 363, 386. As, for instance, a gift of a fixed annual sum for maintenance, even when payable out of the interest of the legacy (*Livesey v. Livesey* (1829), 3 Russ. 542; *Watson v. Hayes, supra*; *Broughton v. Broughton* (1848), 1 H. L. Cas. 406, 434); or a gift of a "handsome allowance" (*Tawney v. Ward* (1839), 1 Beav. 563); or a gift of a yearly sum not to exceed the interest on the legacy (*Rudge v. Winnall* (1849), 12 Beav. 357). The doubt thrown on the passage cited from *Pulsford v. Hunter, supra*, in *Fox v. Fox* (1875), L. R. 19 Eq. 286, per JESSEL, M.R., at p. 289, does not appear to be well founded: the suggestion made by him as to the possible meaning is the proper construction of the words; see *Wilson v. Knox* (1884), 13 L. R. Ir. 349, per PORTER, M.R., at p. 356.

(*c*) A gift of interim maintenance does not make vested a gift which is clearly contingent on the whole context (*Butcher v. Leach* (1843), 5 Beav. 392; *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443, C. A.).

(*d*) *Hoath v. Hoath* (1785), 2 Bro. C. C. 3; *Walcott v. Hall* (1788), 2 Bro. C. C. 305; *Hanson v. Graham* (1801), 6 Ves. 239; *Branstrom v. Wilkinson* (1802), 7 Ves. 421 (father appointed trustee during minority); *Lane v. Goudge*



vesting is not necessarily excluded by the fact that the mode of application of the interest may come to an end before the specified event (*e*); in general, however, if there necessarily occurs an interval or gap which separates the gift of income from the capital, the latter gift is not vested (*f*) unless there are other indications to that effect (*g*).

SECT. 7.  
Conditional  
Gifts.

**1468.** In the case of a gift to a class at a specified age, with a direction to apply each share of the whole interest for the maintenance or benefit of the corresponding member of the class, the whole of the class in general take vested interests irrespective of their attaining the age (*h*) even if trustees have a discretion as to the mode of application of such share of the interest (*i*); but this rule does not hold good where the gift for maintenance is not out of each share of the fund for the benefit of the corresponding member of the class, but is a general gift for maintenance of the whole class out of the whole undivided interest of the fund (*k*).

Gift to  
classes.

**1469.** Where the donee is a single person, the legacy becomes vested none the less because in the direction to pay the whole interest in the meantime there is a superadded direction that the

Discretionary  
trust or a  
power to  
make interim  
payments of  
income.

(1803), 9 Ves. 225; *Rose v. Sowerby* (1830), Taml. 376; *Lister v. Bradley* (1841), 1 Hare, 10, 13 (interest payable to mother of legatees for their support and education); *Brocklebank v. Johnson* (1855), 20 Beav. 205, 211; *Re Hart's Trusts, Ex parte Block* (1858), 3 De G. & J. 195, C. A.; *Shrimpton v. Shrimpton* (1862), 31 Beav. 425, 427; *Re Holt's Estate, Bolding v. Strugnell* (1876), 45 L. J. (CH.) 208; *Re Bunn, Isaacson v. Webster* (1880), 16 Ch. D. 47; *Re Byrne, Byrne v. Kenny* (1889), 23 L. R. Ir. 260 (gift to each of a group); *Brennan v. Brennan*, [1894] 1 I. R. 69, 73; *Re Williams, Williams v. Williams*, [1907] 1 Ch. 180, 183.

(*e*) As, for instance, where interest is for education alone (*Dodson v. Hay* (1791), 3 Bro. C. C. 404, 409, 410), or where interest is payable only during minority, in the ordinary sense of the word, while payment of capital is at some age greater than twenty-one (*Davies v. Fisher* (1842), 5 Beav. 201; *Harrison v. Grimwood* (1849), 12 Beav. 192; *Tatham v. Vernon* (1861), 29 Beav. 604, in which cases, however, other indications were relied on); "minority" may, however, mean the conventional minority up to the time of payment of capital (*Milroy v. Milroy* (1844), 14 Sim. 48, 55); see p. 658, *ante*).

(*f*) *Hanson v. Graham* (1801), 6 Ves. 239, 250; *Tawney v. Ward* (1839), 1 Beav. 563; *Thomas v. Wilberforce* (1862), 31 Beav. 299, *per* Lord ROMILLY, M.R., at p. 302; *Pearson v. Dolman* (1866), L. R. 3 Eq. 315, *per* WOOD, V.-C., at p. 321 (gift defeasible on alienation).

(*g*) *Pearman v. Pearman* (1864), 33 Beav. 394, 396.

(*h*) *Dodson v. Hay* (1791), 3 Bro. C. C. 404; *Bell v. Cade* (1861), 2 John. & H. 122.

(*i*) *Perrott v. Davies* (1877), 38 L. T. 52 (direction to apply income for the respective maintenance of the children, as trustees should think proper, construed as referring to respective shares). As to a discretion as to the amount applied, see the text, *infra*.

(*k*) *Taylor v. Bacon* (1836), 8 Sim. 100; *Southern v. Wollaston* (1852), 16 Beav. 166; *Tracy v. Butcher* (1857), 24 Beav. 438; *Lloyd v. Lloyd* (1857), 3 K. & J. 20; *Re Hunter's Trusts* (1865), L. R. 1 Eq. 295, 298; *Re Ashmore's Trusts* (1869), L. R. 9 Eq. 99, not affected on this point by *Fox v. Fox* (1873), L. R. 19 Eq. 286; *Re Parker, Barker v. Barker* (1880), 16 Ch. D. 44, 46; *Re Grimshaw's Trusts* (1879), 11 Ch. D. 406; *Re Morris, Salter v. A.-G.* (1885), 52 L. T. 840; *Re Martin, Tuke v. Gilbert* (1887), 57 L. T. 471; *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197, 201, 202; *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693, *per* PARKER, J., at p. 699. *Jones v. Mackilwain* (1826), 1 Russ. 220, is explained in a manner which makes it consistent with the above cases in *Lloyd v. Lloyd*, *supra*, at p. 24; *contra*, *Parker v. Golding* (1843), 13 Sim. 418.

SECT. 7.  
Conditional  
Gifts.

Class gift.

trustees shall pay the whole or such part of that interest as they think fit for maintenance of the donee (*l*). A similar rule prevails as to gifts to a number of persons as a group, and not as a class, if the direction applies to their respective shares or interests (*n*).

Even in a case where a gift to a class at a specified age is accompanied by a trust or direction to apply the income of the presumptive share of each member or so much of such income as the trustees think proper for his maintenance until payment, it is possible (*n*) to draw the inference that the members take vested interests independently of attaining that age (*o*), at all events if the context not only does not show the contrary (*p*) but assists the inference (*q*).

(*l*) *Re Parker, Barker v. Barker* (1886), 16 Ch. D. 44, *per* JESSEL, M.R., at p. 46, followed in *Re Williams, Williams v. Williams*, [1907] 1 Ch. 180. In *Re Sanderson's Trust* (1857), 3 K. & J. 497, 507, a direction to apply the "whole or any part" of the income in maintenance was considered not discretionary, and therefore as coming within the ordinary rule (see p. 816, *ante*); and see *Re Rouse's Estate* (1852), 9 Hare, 649.

(*m*) *Re Gosling, Gosling v. Elcock*, [1903] 1 Ch. 448, C. A.; and see *Re Livingston* (1907), 14 Ontario Law Reports, 161; but compare *Re Barnshaw's Trusts* (1867), 15 W. R. 378.

(*n*) *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693, *per* PARKER, J., at p. 699.

(*o*) *Fox v. Fox* (1873), L. R. 19 Eq. 286, 290, dissenting in this respect from *Re Ashmore's Trusts* (1869), L. R. 9 Eq. 99, and following *Harrison v. Grimwood* (1849), 12 Beav. 192; see S. C., 18 L. J. (CH.) 485. The decision in *Fox v. Fox*, *supra*, has been the subject of much discussion. The rule as enunciated in *Fox v. Fox*, *supra*, *per* JESSEL, M.R., at pp. 290, 291, is as follows: "I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose." It is pointed out in *Wilson v. Knox* (1884), 13 L. R. Ir. 349, that no such question arose for decision in *Fox v. Fox*, *supra*, since the gift of income was by reference to the presumptive shares of the donees. Though doubted in *Dewar v. Brooke* (1880), 14 Ch. D. 529, 532, *Re Winlle, Tucker v. Winlle*, [1896] 2 Ch. 711, 715, 719, and *Re Martin, Tuke v. Gilbert* (1887), 57 L. T. 471, 474 (see also *Brennan v. Brennan*, [1894] 1 I. R. 69, 73), the decision in *Fox v. Fox*, *supra*, was considered by LINDLEY, M.R., and JEUNE, P., in *Re Turney, Turney v. Turney*, [1899] 2 Ch. 739, C. A., at pp. 747, 748, to be good sense and good law; and was followed, as laying down the rule in the text, *supra*, in *Re Eichardt, Brebner v. O'Meara* (1905), 25 New Zealand Law Reports, 374, and *Re Levy, Cohen v. Cohen* (1907), 7 New South Wales State Reports, 885; see, however, note (*q*), p. 819, *post*. A trust that at the discretion of the trustees a sufficient part of the income of the presumptive shares should be applied in maintenance was considered insufficient to render the gift of capital a vested gift in *Vawdry v. Geddes* (1830), 1 Russ. & M. 203, 207, where also there was an alternative trust for accumulation; *Boreham v. Bignall* (1850), 8 Hare, 131, where also the will contained an advancement clause relating to presumptive shares; *Hardeastle v. Hardeastle* (1862), 1 Hem. & M. 405, *per* WOOD, V.-C., at p. 410. It appears that the difference in this respect between gifts to classes and gifts to named individuals lies in the ascertainment of the persons composing the class; the question seems to be whether the direction as to interest can be read as dividing the fund into as many shares as there are children born of their parents (as in *Fox v. Fox*, *supra*; see *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197, 201) as distinct from as many shares as there are children attaining the specified age (*Bowyer v. West* (1871), 24 L. T. 414); this determines the class.

(*p*) Thus, the inference is excluded where the class is clearly a contingent

(*q*) For note (*q*) see p. 819, *post*.



**1470.** A mere discretionary power in like terms is not sufficient (*r*) for this purpose, whether the donee is a class (*s*), an individual (*t*), or a group of persons taking not as a class (*u*), and whether there is (*a*) or is not (*b*) a direction to accumulate the income not so applied for the benefit of persons who ultimately attain a vested interest; and where the gift is a specific or general legacy, and interest is given for maintenance pending the donee arriving at a specified age, but under the other provisions of the will there is no possibility of the separation of the subject-matter of the gift from the rest of the testator's estate, the inference is that the gift remains contingent (*c*).

**1471.** The circumstance that the testator has expressly or impliedly directed the legacy fund immediately or on any intermediate event to be severed for the purpose of the gift from his general estate is also *primâ facie* sufficient to show that the further postponement of enjoyment is not for the purpose of making the gift contingent (*d*). It is a sufficient separation, for this purpose, that the trustees must properly, as a matter of book-keeping or physically, set apart the property as being property to which no

SECT. 7.  
Conditional  
Gifts.

Where gift  
remains con-  
tingent.

Direction for  
severance  
from testator's  
estate.

class, with the specified age forming part of the description of the class (*Re Ricketts, Ricketts v. Ricketts* (1910), 103 L. T. 278; *Re Hume, Public Trustee v. Mabey*, [1912] 1 Ch. 693).

(*q*) In *Fox v. Fox* (1873), L. R. 19 Eq. 286, the construction in favour of vesting was also indicated by a gift over; see p. 820, *post*.

(*r*) In *Re Turney, Turney v. Turney*, [1899] 2 Ch. 739, C. A., however, LINDLEY, M.R., at p. 749, considered that a power of maintenance out of the income of the expectant share of a member of the class, pointed in the direction of vesting; and in *Fox v. Fox, supra*, JESSEL, M.R., at p. 290, treated the trust in that case as a power.

(*s*) *Leake v. Robinson* (1817), 2 Mer. 363; *Bute (Marquis) v. Harman* (1846), 9 Beav. 320 (corrected in *Southern v. Wollaston* (1852), 16 Beav. 166, 168, n.); *Re Thatcher's Trusts* (1859), 26 Beav. 365, 369; *Dewar v. Brooke* (1880), 14 Ch. D. 529; *Re Wintle, Tucker v. Wintle*, [1896] 2 Ch. 711; *Re Ricketts, Ricketts v. Ricketts, supra*; *Re Hume, Public Trustee v. Mabey, supra*, at p. 699.

(*t*) *Russell v. Russell*, [1903] 1 I. R. 168; see, *contra*, *Eccles v. Birkett* (1850), 4 De G. & Sm. 105, where no reasons are given, explained on the ground of the gift being a gift of interest in *Locke v. Lamb* (1867), L. R. 4 Eq. 372, 379; compare *Re Jobson, Jobson v. Richardson* (1889), 44 Ch. D. 154, 157, as to the effect of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43.

(*u*) *Wilson v. Knox* (1884), 13 L. R. Ir. 349.

(*a*) See *Pickford v. Brown, Brown v. Brown* (1856), 2 K. & J. 426; *Merry v. Hill* (1869), L. R. 8 Eq. 619; *Re Hume, Public Trustee v. Mabey, supra*.

(*b*) *Re Wintle, Tucker v. Wintle, supra*.

(*c*) *Re Nunburnholme (Lord), Wilson v. Nunburnholme*, [1912] 1 Ch. 489, C. A.; and see *Cromek v. Lumb* (1839), 3 Y. & C. (EX.) 565, 576, approving 1 Roper on Legacies, 3rd ed., p. 500, where *Batsford v. Kebbell* (1797), 3 Ves. 363 (see note (*q*), p. 816, *ante*), is explained.

(*d*) *Saunders v. Vautier* (1841), Cr. & Ph. 240, 248; *Lister v. Bradley* (1841), 1 Hare, 10, 13; *Greet v. Greet* (1842), 5 Beav. 123; *Braunstrom v. Wilkinson* (1802), 7 Ves. 421 (appointment of separate trustee); *Strother v. Dutton* (1857), 1 De G. & J. 675, 676; *Dundas v. Wolfe Murray* (1863), 1 Hem. & M. 425, *per* Wood, V.-C., at pp. 431, 432: "the mere fact of the fund being severed is not the essential point. It must be a severance connected with the legacy itself"; *Parsons v. Peters* (1864), 13 W. R. 214; *Re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507, 509; *Re Bevan's Trusts* (1887), 34 Ch. D. 716, 718; *Brennan v. Brennan*, [1894] 1 I. R. 69, 72.



SECT. 7.  
Conditional  
Gifts.

Gifts over.

Failure  
to attain  
specified age.

one but the donee has any right to look, subject if necessary to the right to resort to such property to satisfy the testator's debts (e).

**1472.** The mere circumstance of a gift of property being given over to another donee on a certain contingency does not, of itself and without more, prevent the first gift vesting in the meantime, although it may be called in aid of other circumstances for that purpose (f); nor, *primâ facie*, does it vest the property in the first donee on the failure of that contingency irrespective of other contingencies attached to the original gift (g).

**1473.** If a gift is made to an individual donee in terms which *primâ facie* make it contingent on the donee attaining a specified age, and a gift over is made in the event of the donee failing to attain that age, the gift over is an additional reason for considering the original gift as contingent (h); but where there are indications in favour of the original gift being vested independently of the specified age, a mere gift over in similar terms does not of itself prevent the vesting (i); and if the original gift is to a class, and the gift over refers to the shares of those dying under that age, the inference is that the original gift is vested (k).

In the case of a gift to a class, the gift over may show that a person not attaining the specified age is nevertheless to take, or to be treated as taking, a share as a member of the class, and that such share is given over in the specified events; accordingly the

(e) *Re Nunburnholme* (Lord), *Wilson v. Nunburnholme*, [1912] 1 Ch. 489, C. A., per BUCKLEY, L.J., at p. 497.

(f) *Shepherd v. Ingram* (1764), Amb. 448; *Skey v. Barnes* (1816), 3 Mer. 335, per GRANT, M.R., at p. 340, criticising *Scott v. Bargeman* (1722), 2 P. Wms. 69; *Davies v. Fisher* (1842), 5 Beav. 201, 214; *Harcastle v. Harcastle* (1862), 1 Hem. & M. 405, 412; and see *Re M'Garrity, Ballance v. M'Garrity* (1912), 46 I. L. T. 175.

(g) *Malcolm v. O'Callaghan* (1817), 2 Madd. 349, 354; S. C. (1833), Coop. temp. Brough. 73 (to daughters on their marriage with consent; gift over on death under twenty-five or (read "and") before marriage without consent: held, not vested at twenty-five); but see *Re Thomson's Trusts* (1870), L. R. 11 Eq. 146 (trust for T. for life, and at her death for D. should he survive T.; should he not survive her nor attain his twenty-first year, to L.: held, vested at twenty-one); *Re Gunning's Estate* (1884), 13 L. R. Ir. 203 (to A. when he attained twenty-five; gift over if he died before attaining twenty-one: held, vested at twenty-one).

(h) *Vawdry v. Geddes* (1830), 1 Russ. & M. 203, per LEACH, M.R., at p. 208; *Bland v. Williams* (1834), 3 My. & K. 411, per LEACH, M.R., at p. 417; and see *Festing v. Allen* (1851), 5 Hare, 575, per WOOD, V.-C., at p. 577.

(i) *Davies v. Fisher* (1842), 5 Beav. 201, 214; *Harcastle v. Harcastle*, *supra*, at p. 412; *Re Baxter's Trusts* (1864), 4 New Rep. 131, not following the dicta of LEACH, M.R., cited in note (h), *supra*. In *Ridgway v. Ridgway* (1851), 4 De G. & Sm. 271, the question was not the vesting of the gift, but the application of the intermediate income. A gift over on death under the specified age without issue may similarly not prevent vesting (*Bland v. Williams*, *supra*; *Harrison v. Grimwood* (1849), 12 Beav. 192; see p. 806, *ante*).

(k) If the gift over is to a stranger and not to the other members of the class, the inference is that the person not attaining the specified age is nevertheless to take a share as a member of the class (see the text, *infra*); and if the gift over is an accruer clause in favour of the other members of the class, the inference is the same, in order that the accruer clause may not be useless (*Re Edmondson's Estate* (1868), L. R. 5 Eq. 389; *Re Gunning's Estate*, *supra*).

attainment of the specified age is not then a condition precedent to vesting (*l*).

**1474.** Where a gift is made to the children generally of a named person at a specified age (and therefore *prima facie* contingently on attaining that age), a gift over on the parent dying without issue does not of itself render the gift vested without regard to the attainment of that age (*m*); but in cases of gifts to a class of children surviving their parent at such an age, a similar gift over has in some cases given rise to the inference that the attainment of that age was not a condition precedent (*n*).

(iv.) *Canons Applicable to Legacies Charged on Real Estate.*

**1475.** Legacies, so far as they are charged on real estate, *prima facie* (*o*) do not vest until the time fixed for payment (*p*), and fail if the donee dies before that time, even though interest is given in the meantime (*q*), unless the payment is clearly postponed not for reasons personal to the donee, but for the benefit of the estate (*r*),

SECT. 7.  
Conditional  
Gifts.

Gift over  
on parent's  
death with-  
out issue.

Legacies  
charged on  
real estate.

(*l*) *Berkeley v. Swinburne* (1848), 16 Sim. 275, 284; *Taylor v. Frobisher* (1852), 5 De G. & Sm. 191, 199; *Fox v. Fox* (1873), L. R. 19 Eq. 286, 291; *Re Turney, Turney v. Turney*, [1899] 2 Ch. 739, 746, 748, C. A.

(*m*) *Walker v. Mower* (1852), 16 Beav. 365; *Re Wrangham's Trust* (1860), 1 Drew. & Sm. 358; *Kidman v. Kidman* (1871), 40 L. J. (CH.) 359; *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570, 573, C. A.; and see *Re Ricketts, Ricketts v. Ricketts* (1910), 103 L. T. 278 (to children attaining twenty-five, with gift over on parent dying without leaving issue attaining twenty-one).

(*n*) *Bree v. Perfect* (1844), 1 Coll. 128, followed in *Ingram v. Suckling* (1859), 7 W. R. 386, and in *Re Bevan's Trusts* (1887), 34 Ch. D. 716, 719; although *Bree v. Perfect*, *supra*, has not always been accepted as correct (*Re Edwards, Jones v. Jones, supra*, per ROMER, L.J., at p. 572).

(*o*) For cases where the context showed a contrary intention, excluding this presumption, see *Watkins v. Cheek* (1829), 1 Sim. & St. 199; *Brown v. Wooler* (1843), 2 Y. & C. Ch. Cas. 134; *Hudson v. Forster* (1841), 2 Mont. D. & De G. 177.

(*p*) *Poulett (Lady) v. Poulett (Lord)* (1685), 1 Vern. 204, 321, H. L.; *Tudor, L. C. Real Prop.*, 4th ed., p. 434; *Smith v. Smith* (1688), 2 Vern. 92; *Yates v. Phetiplace* (1700), 2 Vern. 416; *Carter v. Bletsoe* (1708), 2 Vern. 617; *Langley v. Oates* (1709), 2 Eq. Cas. Abr. 541, pl. 7; *Jennings v. Looks* (1725), 2 P. Wms. 276; *Rich v. Wilson* (1728), Mos. 68; *Chandos (Duke) v. Talbot* (1731), 2 P. Wms. 600, 610; *Hall v. Terry* (1738), 1 Atk. 502; *Re Hudsons* (1843), *Drury temp. Sug.* 6; *Davidson v. Proctor* (1849), 19 L. J. (CH.) 395; *Bolton v. Bolton* (1861), 12 I. Ch. R. 233; *Taylor v. Lambert* (1876), 2 Ch. D. 177 (portions to younger sons on eldest son coming into possession of an estate; the contingency failed); compare *Gordon v. Raynes* (1732), 3 P. Wms. 134.

(*q*) *Gawler v. Standerwick* (1788), 2 Cox, Eq. Cas. 15; *Harrison v. Naylor* (1790), 2 Cox, Eq. Cas. 247; *Pearce v. Loman, Pearce v. Taylor* (1796), 3 Ves. 135; *Parker v. Hodgson* (1861), 1 Drew. & Sm. 568; *Smith v. Smith, supra*; *Boycot v. Cotton* (1738), 1 Atk. 552, per Lord HARDWICKE, L.C., at p. 555; and compare *Phipps v. Mulgrave (Lord)* (1798), 3 Ves. 613.

(*r*) *Lowther v. Condon* (1740), 2 Atk. 127, 128; *Manning v. Herbert* (1769), Amb. 575, 576; *Clark v. Ross* (1773), 2 Dick. 529; *Kemp v. Davy* (1774), 1 Bro. C. C. 120, n.; *Murkin v. Phillipson* (1834), 3 My. & K. 257, 261; *Goulbourn v. Brooks* (1837), 2 Y. & C. (EX.) 539, 543; *Goodman v. Drury* (1852), 21 L. J. (CH.) 680, where, however, the context excluded the presumption arising from the prior life estate; *Remnant v. Hood* (1860), 2 De G. F. & J. 396, 410, 411; and see *Evans v. Scott* (1847), 1 H. L. Cas. 43, 57; *Havesty v. Curtis*, [1895] 1 I. R. 23, 34 (cases of settlements).

SECT. 7.  
Conditional  
Gifts.

or merely in order to let in a prior life or other limited interest (s); in the latter cases the legacies vest at once. This rule applies generally, whether the land is the primary or auxiliary fund, and whether the gift is for a portion or is merely a general legacy, and whether the donee is a child or a stranger (t).

(v.) *Canons Applicable to Legacies Charged on Mixed Fund.*

Legacies  
charged on  
mixed fund.

**1476.** Where legacies are charged both on real and on personal estate, then *primâ facie*, according to the ordinary rule in administration of estates (a), the personal estate is applied first towards payment, and the real estate only in aid of it. The vesting, then, of the legacies, so far as the personal estate is applied towards payment, is governed by the ordinary rules (b) applying to bequests of pure personal estate alone (c); and so far as it is necessary to resort to the real estate, the vesting is governed by the rules (d) applying to legacies charged on real estate alone (e). Even where the legatee dies before the time of payment, therefore, his representatives are entitled, provided that there is a vested interest so far as the personal estate is concerned, and that the personal estate is sufficient (f).

SUB-SECT. 3.—*Divesting.*

Divesting in  
general.

**1477.** The court in a doubtful case (g) leans against the divesting of vested interests (h), and favours that construction which leads to the vesting indefeasibly of the property as early as possible (i). In general, therefore, subject to the intention shown by the will as a whole (k), divesting conditions are construed

(s) *King v. Withers* (1735), Cas. temp. Talb. 117 (on tenant in tail dying without issue); *Tunstall v. Brachen* (1753), Amb. 167; *Embrey v. Martin* (1754), Amb. 230; *Jeale v. Titchener* (1771), Amb. 703; *Dawson v. Killet* (1781), 1 Bro. C. C. 119; *Godwin v. Munday* (1783), 1 Bro. C. C. 191; *Bayley v. Bishop* (1803), 9 Ves. 6; *Poole v. Terry* (1831), 4 Sim. 294.

(t) *Chandos (Duke) v. Talbot* (1731), 2 P. Wms. 600, 612 (Cox's note), citing cases mentioned in the notes (g), (r), p. 821, *ante*, note (s), *supra*. As to portions generally, and who are entitled to them, see title SETTLEMENTS, Vol. XXV., pp. 587 *et seq.*

(a) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 274.

(b) See p. 810, *ante*.

(c) *Re Hudsons* (1843), Drury temp. Sug. 6.

(d) See p. 821, *ante*.

(e) *Chandos (Duke) v. Talbot*, *supra*, at p. 612; *Prowse v. Abingdon* (1738), 1 Atk. 482; *Van v. Clark* (1739), 1 Atk. 510; *Parker v. Hodgson* (1849), 1 Drew. & Sm. 568.

(f) *Anon.* (1744), 2 Eq. Cas. Abr. 551, pl. 33; *Richardson v. Greese* (1743), 3 Atk. 65, 69. *Van v. Clark*, *supra*, is to this extent not to be followed.

(g) The rule is inapplicable where the intention as to divesting is plainly shown (*Re Ball, Slattery v. Ball* (1888), 40 Ch. D. 11, 13, C. A.; see note (b), p. 824, *post*).

(h) *Maddison v. Chapman* (1858), 4 K. & J. 709, 721, 723; *Re Wood, Moore v. Bailey* (1881), 43 L. T. 730, 732; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200, 204.

(i) *Minors v. Battison* (1875), 1 App. Cas. 428; *Re Teale, Teale v. Teale* (1885), 53 L. T. 936, 937.

(k) *Langdale (Lady) v. Briggs* (1853), 8 De G. M. & G. 391, 429, 430. "Shifting clauses, if not to be construed strictly, are at all events not to receive such a construction as shall carry them beyond the purpose for which they were designed" (*ibid.*, per TURNER, L.J., at p. 429). As to name and arms clauses, and other shifting clauses, see title SETTLEMENTS, Vol. XXV., pp. 693, 697 *et seq.*



strictly (*l*); and where there is a prior vested gift, and then a clause divesting the gift in an express contingency, the court does not hold the gift divested unless the precise contingency referred to occurs, and does not introduce other contingencies unless the context requires that course (*m*).

**1478.** Where there is a gift to a named person for life, and after his death to his children either generally or on attaining any age, or other event (*n*) in terms which give the children a vested absolute interest independently of whether the children survive their parent or not (*o*), followed by a gift over if the parent dies “without leaving children,” these words are construed so as not to destroy any prior vested interest (*p*), and read as “without having children” (*q*), or “without having had children” (*r*), or

SECT. 7.  
Conditional  
Gifts.

Gift over on death “without leaving children.”

(*l*) *Fraunces's Case* (1610), 8 Co. Rep. 89 b, 90 b; *Kiallmark v. Kiallmark* (1856), 26 L. J. (CH.) 1, 4; *Blagrove v. Bradshaw* (1858), 4 Drew. 230, 235. The principle applies to the divesting not only of vested estates, but of contingent estates (*ibid.*). Accordingly, in cases of gifts to children of a named parent, followed by a gift over if all the children die in the lifetime of their parent, where some but not all survive their parent, nevertheless all take (*Bromhead v. Hunt* (1821), 2 Jac. & W. 459; *Gordon v. Hope* (1849), 3 De G. & Sm. 351 (settlement); *Templeman v. Warrington* (1842), 13 Sim. 267, 270 (gift over, if but one child at parent's decease, to that one); *Re Firth, Loveridge v. Firth* (1914), 49 L. J. 355).

(*m*) *Tarbut v. Tarbut* (1835), 4 L. J. (CH.) 129; *Cox v. Parker* (1856), 22 Beav. 168; *Potts v. Atherton* (1859), 28 L. J. (CH.) 486, 488; *Re Kirkbride's Trusts* (1866), L. R. 2 Eq. 400, 402; *Re Pickworth, Snaith v. Parkinson*, [1899] 1 Ch. 642; *Re Searle, Searle v. Searle*, [1905] W.N. 86. As to the change of conjunctions in particular cases, see p. 824, *post*.

(*n*) As in cases where the interest of the children is to vest at birth (*Treharne v. Layton* (1875), L. R. 10 Q. B. 459, Ex. Ch.; *Re Bradbury, Wing v. Bradbury* (1904), 73 L. J. (CH.) 591; *Re Goldney, Re Dighton, Clarke v. Dighton* (1911), 130 L. T. Jo. 484), or at the age of twenty-one years (*Maitland v. Chalie* (1822), Madd. & G. 243; *Re Thompson's Trust* (1852), 5 De G. & Sm. 667), or at that age or marriage (*Casamajor v. Strode* (1843), 8 Jur. 14), or when the youngest attains twenty-one years (*Kennedy v. Sedgwick* (1857), 3 K. & J. 540), or any similar event, if only the vesting is without reference to the surviving of the parent (*Barkworth v. Barkworth* (1906), 75 L. J. (CH.) 754, *per* JOYCE, J., at p. 756).

(*o*) The rule is inapplicable, therefore, where the interests of the children are contingent on their surviving their parents (*Bythessea v. Bythessea* (1854), 23 L. J. (CH.) 1004, C. A.; *Sheffield v. Kennett* (1859), 4 De G. & J. 593, C. A.; *Re Watson's Trusts* (1870), L. R. 10 Eq. 36, where *Bryden v. Willett* (1869), L. R. 7 Eq. 472, is criticised; and see *Pride v. Fooks* (1858), 3 De G. & J. 252; *Re Heath's Settlement* (1856), 23 Beav. 193; *Chadwick v. Greenall* (1861), 7 Jur. (N. S.) 959; *Young v. Turner* (1861), 1 B. & S. 550; *Jeyes v. Savage* (1875), 10 Ch. App. 555 (a case of a settlement)). A non-exclusive power of appointment by the parent, however, does not exclude the rule (*Re Jackson's Will* (1879), 13 Ch. D. 189; *Barkworth v. Barkworth, supra*); and see *Re Simmons, Dennison v. Orman* (1903), 87 L. T. 594 (gift over held not intended to displace appointment under a power).

(*p*) *Re Cobbold, Cobbold v. Lawton*, [1903] 2 Ch. 299, C. A.

(*q*) *Re Tookey's Trusts, Re Bucks Rail. Co.* (1852), 21 L. J. (CH.) 402; *Ex parte Hooper* (1852), 1 Drew. 264; *Kennedy v. Sedgwick* (1857), 3 K. & J. 540; *White v. Hill* (1867), L. R. 4 Eq. 265; *Re Brown's Trust* (1873), L. R. 16 Eq. 239; *Re Jackson's Will* (1879), 13 Ch. D. 189, *per* JESSEL, M.R., at p. 194.

(*r*) *Marshall v. Hill* (1814), 2 M. & S. 608, 615; *Bryden v. Willett, supra*, at p. 476; *Treharne v. Layton* (1875), L. R. 10 Q. B. 459, 461, Ex. Ch.

SECT. 7.  
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Gifts.

“without leaving children who have attained vested interests” (s), according to the context. The rule is not confined to a case in which the tenant for life stands *in loco parentis* to the donee in remainder, but extends to a case in which the tenant for life is a complete stranger (t), and, it seems, to a case in which the children mentioned in the gift over take no interest, but there is an interest in their parent (u), or in anyone else (w), independent of the children surviving their parent, and where the result of reading the words in their ordinary sense would be to divest interests which, it is inferred, the testator intended to remain vested. This rule is not affected by the circumstances that the testator knew of the existence of a child of the named person, and that such knowledge appears on the face of the will itself (a); but it is inapplicable where the context shows that the prior vested interests were intended to be destroyed in accordance with the plain meaning of the words (b), or where the subject-matter of the gift is an annuity bequeathed so as to involve the notion of personal enjoyment by each of the successive donees (c).

Change of  
“or” into  
“and.”

**1479.** If there is a devise to a named person in fee simple (d) or a bequest to a named person absolutely (e), with a gift over in either case if he die without children or under the age of twenty-one years to other donees, the word “or” is read “and,” and the gift over does not take effect unless both events happen. This rule of construction depends on a presumed intention of the testator to

(s) *Re Cobbold, Cobbold v. Lawton*, [1903] 2 Ch. 299, C. A.

(t) *Casamajor v. Strode* (1843), 8 Jur. 14.

(u) *Re Bogle, Bogle v. Yorstoun* (1898), 78 L. T. 457, where the gift was to the parent for life and afterwards to his executors and administrators contingently on the parent having two or more children attaining twenty-one.

(w) *Re Jackson's Will* (1879), 13 Ch. D. 189, *per* JESSEL, M.R., at p. 194; but see *Armstrong v. Armstrong* (1888), 21 L. R. Ir. 114, 120, C. A.

(a) *Re Cobbold, Cobbold v. Lawton*, *supra*.

(b) *Re Ball, Slattery v. Ball* (1888), 40 Ch. D. 11, 13, C. A.; see, however, *Barkworth v. Barkworth* (1906), 75 L. J. (CH.) 754, 756, where it is suggested that this sentence properly should not appear in the report of *Re Ball, Slattery v. Ball*, *supra*; compare *Hedges v. Harpur, Hedges v. Blick* (1858), 3 De G. & J. 129, 141; *Clay v. Coles* (1887), 57 L. T. 682, *per* STIRLING, J., at pp. 683, 684; *Re Hamlet, Stephen v. Cunningham* (1888), 39 Ch. D. 426, C. A. Thus, the rule does not generally apply to a gift to a person absolutely followed by a gift over on his death without leaving issue (*Armstrong v. Armstrong* (1888), 21 L. R. Ir. 114, C. A.; *Re Ball, Slattery v. Ball*, *supra*, disapproving *White v. Hight* (1879), 12 Ch. D. 751; and see *Re Hambleton, Hamilton v. Hambleton*, [1884] W. N. 157; but compare *Re Bogle, Bogle v. Yorstoun*, *supra*).

(c) *Re Hemingway, James v. Dawson* (1890), 45 Ch. D. 453, 456.

(d) *Price v. Hunt* (1684), Poll. 645; *Fairfield v. Morgan* (1805), 2 Bos. & P. (N. R.) 38; *Eastman v. Baker* (1808), 1 Taunt. 174, 182; *Right d. Day v. Day* (1812), 16 East, 67; *Doe d. Herbert v. Selby* (1824), 2 B. & C. 926; *Morris v. Morris* (1853), 17 Beav. 198; *Mahaffy v. Rooney* (1853), 5 Ir. Jur. 245; *Imray v. Imeson* (1872), 26 L. T. 93. *Sowell v. Garret* (1595), Moore (K. B.), 422 (accepted as an authority on this point in *Wright d. Burrell v. Kemp* (1789), 3 Term Rep. 470, *per* BULLER, J., at p. 474, and in *Denn d. Wilkins v. Kemays* (1808), 9 East, 366, *per* LE BLANC, J., at p. 376), is referable to other grounds; see the decision as reported *sub nom. Soule v. Gerard* (1595), Cro. Eliz. 525; and note (o), p. 825, *post*.

(e) The rule applies both to real and to personal estate (*Wright v. Marsom*, [1895] W. N. 148; *Weddell v. Mundy* (1801), 6 Ves. 341; *Mytton v. Boodle* (1834), 6 Sim. 457).

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benefit the children of the devisee directly or indirectly, an intention which would be defeated if the devisee died under twenty-one leaving children, and the word “or” was construed disjunctively (*f*). The alteration is made although the sentence as altered contains a condition repugnant to the character of the estate given (*g*). A similar rule holds good as to gifts over if the donee in question dies before a life tenant under a previous gift or without issue (*h*).

This canon of construction is also applicable where the prior devise or bequest is contingent on the donee leaving issue (*i*) or on his attaining majority (*k*), if he takes absolutely.

Where, however, a prior donee takes for life only, and his issue are unprovided for or take express absolute interests, and there is a similar gift over, this alteration cannot be adopted so as to defeat the interests of subsequent takers (*l*). Where a prior donee takes in tail (*m*), or takes for life only with remainder to his issue as purchasers in tail (*n*), a gift over on his death under age or on the failure of his issue may be read without alteration of the “or” into “and”; but even in this case a death under the specified age does not in general carry the estate over, unless there is also a failure of issue, since the gift over would not be read so as to defeat any issue in tail (*o*); while a death without issue, although after attaining

After interests  
for life or  
in tail.

(*f*) *Re Crutchley, Kidson v. Marsden*, [1912] 2 Ch. 335, per PARKER, J., at p. 337. See, however, the doubts expressed in *Grey v. Pearson* (1857), 6 H. L. Cas. 61, 80, by Lord CRANWORTH, L.C., who, however, approved of the rule as being an established rule. According to the structure of the sentence, if the word “without” is used, the gift over on a composite event may be accurately expressed in the form containing the word “or” (*Stretton v. Fitzgerald* (1889), 23 L. R. Ir. 466, per FITZGIBBON, L.J., at pp. 472, 473); in such a case it is not necessary to alter the words, *i.e.*, the gift over in the text may be accurately expressed as on death “without having any issue attaining twenty-one.”

(*g*) As, for instance, gifts over on the donee dying without issue or intestate (*Incorporated Society v. Richards* (1841), 1 Dr. & War. 258, 283; *Green v. Harvey* (1842), 1 Hare, 428; *Greated v. Greated* (1859), 26 Beav. 621, 627 (gift over in event of “any of them dying before having heirs of their body or making a particular disposition of his or her property”); *Re Crutchley, Kidson v. Marsden*, *supra*; compare *Beachcroft v. Broome* (1791), 4 Term Rep. 441; *Outhbert v. Purrier* (1822), Jac. 415; *Stretton v. Fitzgerald*, *supra*.

(*h*) *Denn d. Wilkins v. Kemeys* (1808), 9 East, 366; *Wright d. Burrell v. Kemp* (1789), 3 Term Rep. 470 (in surrender of copyholds).

(*i*) *Johnson v. Simcock* (1861), 7 H. & N. 344, Ex. Ch.

(*k*) *Mytton v. Boodle* (1834), 6 Sim. 457; *Wright v. Marsom*, [1895] W. N. 148.

(*l*) *Cooke v. Mirehouse* (1864), 34 Beav. 27.

(*m*) *Woodward v. Glasbrook* (1700), 2 Vern. 388; *Brownsword v. Edwards* (1750), 2 Ves. Sen. 243, per Lord HARDWICKE, L.C., at p. 249; *Mortimer v. Hartley* (1851), 6 Exch. 47; S. C. (1851), 3 De G. & Sm. 316 (see, *contra*, S. C. (1848), 6 C. B. 819); *Grey v. Pearson*, *supra*, per Lord ST. LEONARDS, at p. 93.

(*n*) *Hasker v. Sutton* (1824), 9 Moore (C. P.), 2.

(*o*) *Soulle v. Gerard* (1595), Cro. Eliz. 525 (where the estate tail was implied from the gift over, and the subsequent limitation could not then have taken effect by way of executory devise; the case would now be decided otherwise); *Grey v. Pearson*, *supra*. The effect, so far as death under age is concerned, is therefore the same as if “or” were read “and”; compare *Monkhouse v. Monkhouse* (1829), 3 Sim. 119, 126 (gift over on death or want of issue construed as on death and want of issue).



SECT. 7.  
Conditional  
Gifts.

Gift over on  
death before  
twenty-one  
or marriage.

Gift over on  
death before  
a life tenant  
or under age.

Change of  
"and" into  
"or."

When made.

that age, may carry the estate over by way of remainder (*p*) or otherwise.

On the same principle (*q*), or to avoid inconsistency (*r*), where a prior gift is absolute, or contingent on attaining a specified age, or on marriage, or on a specified age or marriage as alternative events, a gift over in any of these cases on the death of the donee before attaining that age or marriage is read as if "or" were "and."

In cases where the interest of a donee is postponed to a life interest, but is contingent only on his attaining a certain age, and not on his surviving the life tenant, a gift over on his death before the life tenant or under the specified age is construed as if "or" were "and" (*s*).

**1480.** In general, the court is unwilling to change the conjunction "and" into "or" in a gift over on several events connected by "and," where the words may have their ordinary sense, since the effect would be to divest the prior gift in events other than the compound event which the testator has provided for (*t*). Thus, after a gift to a donee absolutely (*u*), or in tail (*a*), or for life with remainder to the children of the tenant for life (*b*), a gift over on the donee dying under twenty-one and without issue is read in its ordinary sense, and is not read as if "and" were "or" merely for the possible benefit of the issue.

"And" may, however, be construed "or" where one member of the sentence includes the other, so that by construing the words literally one member of the sentence would be rendered unnecessary, and the change is made in order to give effect to each member

(*p*) *Brownsword v. Edwards* (1750), 2 Ves. Sen. 243; *Hasker v. Sutton* (1824), 9 Moore (C.P.), 2, where the remainder was held to be contingent; this appears to be the case also referred to in *Grey v. Pearson* (1857), 6 H. L. Cas. 61, *per* Lord ST. LEONARDS, at p. 93, but there described as the case of death "under age leaving issue."

(*q*) This was the ground for the rule stated in *Re Clegg's Estate, Ex parte Evans* (1862), 14 L. Ch. R. 70, C. A.; *Re Cantillons Minors* (1865), 16 L. Ch. R. 301, 311 (contingent on marriage); *Butler v. Trustees, Executors and Agency Co., Ltd.* (1906), 3 Commonwealth Law Reports, 435, 443 (gift over on death before twenty-one unmarried and without issue).

(*r*) This was the ground for the rule stated in *Grant v. Dyer* (1813), 2 Dow, 73, 87, H. L.; *Malcolm v. O'Callaghan* (1833), Coop. temp. Brough. 73, 76 (contingent on marriage with consent); and see *Thackeray v. Hampson* (1825), 2 Sim. & St. 214; *Grimshaw v. Pickup* (1839), 9 Sim. 591; *Thompson v. Teulon*, *Teulon v. Teulon* (1852), 22 L. J. (CH.) 243 (alternative events); *Collett v. Collett* (1865), 35 Beav. 312.

(*s*) *Miles v. Dyer* (1832), 5 Sim. 435; (1837), 8 Sim. 330, followed, as laying down an established rule of construction, in *Bentley v. Meech* (1858), 25 Beav. 197.

(*t*) *Doe d. Usher v. Jessop* (1810), 12 East, 288, 293; *Key v. Key* (1855), 1 Jur. (N. S.) 372, where *Brown v. Walker* (1823), 2 L. J. (O. S.) 82, is commented upon on this ground; see, accordingly, *Reed v. Braithwaite* (1871), L. R. 11 Eq. 514; *Lillie v. Willis* (1899), 31 Ontario Reports, 198; *Re Metcalfe, Metcalfe v. Metcalfe* (1900), 32 Ontario Reports, 103.

(*u*) *Coates v. Hart*, *Borrett v. Hart* (1863), 3 De G. J. & Sm. 504.

(*a*) *Doe d. Usher v. Jessop*, *supra*, approved in *Grey v. Pearson*, *supra*, where *Brownsword v. Edwards*, *supra*, is explained, and the construction there adopted by Lord HARDWICKE, L.C., which was similar to that where "or" is used (see p. 825, *ante*), was disapproved.

(*b*) *Malcolm v. Malcolm* (1856), 21 Beav. 225.

of the sentence (c). The alteration is not, however, made if by giving to that member of the sentence some less usual meaning effect can be given to every word (d). Thus, if after a gift to a person absolutely or for life and afterwards to his children there is a gift over on his death “unmarried and without issue,” it can be read as if “and” were “or” in cases where “unmarried” is necessarily given its ordinary meaning of “never having been married” (e); but as a rule, if in such a gift over “unmarried” can be given the meaning “without leaving a spouse” (f), so as to give effect to all the words without altering the conjunctions, this construction is adopted rather than that the words should be altered (g).

SECT. 7.  
Conditional  
Gifts.

It is an additional objection to the change of “and” into “or” that any part of the sentence becomes inoperative (h).

**1481.** If there is a gift after a life estate to a number of persons in equal shares or alternatively to such of them as survive the life tenant, the survivorship clause is *primâ facie* a divesting clause only, and if none of the donees survive the life tenant, their representatives take in equal shares (i). A similar rule applies in other cases where after a gift to a number of persons a gift in any contingency to the survivor of them is construed as conditional on his surviving the tenant for life or some specified event (k). On the other hand,

Survivorship  
clauses.

(c) *Day v. Day* (1854), Kay, 703, *per* WOOD, V.-C., at p. 708.

(d) As to the general rule to this effect, see p. 659, *ante*.

(e) *Wilson v. Bayly* (1760), 3 Bro. Parl. Cas. 195; *Hepworth v. Taylor* (1784), 1 Cox, Eq. Cas. 112; *Maberley v. Strobe* (1797), 3 Ves. 450, 454; *Bell v. Phyn* (1802), 7 Ves. 453, *per* GRANT, M.R., at p. 459; *Long v. Lane* (1885), 17 L. R. Ir. 11; *Carolin v. Carolin* (1881), 17 L. R. Ir. 25, n.; *Roberts v. Kilmore (Bishop)*, [1902] 1 I. R. 333 (“unmarried” held to be used in this sense throughout the will); compare *Mackenzie v. King* (1848), 12 Jur. 787 (“nor” read “or not”).

(f) As to this meaning, see note (n), p. 659, *ante*.

(g) *Re Sander's Trusts* (1866), L. R. 1 Eq. 675; *Re King, Salisbury v. Ridley* (1890), 62 L. T. 789; *Re Chant, Chant v. Lemon*, [1900] 2 Ch. 345, 348; compare *Dillon v. Harris* (1830), 4 Bli. (N. S.) 321, 365, 369, H. L., where marriage with consent was intended. After a gift of realty in fee simple or absolute gift of personalty, or a gift for life, followed by a gift to the donee's children, a gift over on a prior donee dying an infant unmarried and without issue *primâ facie* is construed as given on one contingency, and the words are not to be read disjunctively, unless the context requires: for this purpose, the word “unmarried” is taken to mean “without leaving a spouse” (*Doe d. Everett v. Cooke* (1806), 7 East, 269, 272); compare *Framlingham v. Brand* (1746), 3 Atk. 390 (on death in minority and unmarried or without issue). Such a word as “unmarried” in such a context cannot be struck out or left inoperative (*Doe d. Baldwin v. Rawding* (1819), 2 B. & Ald. 441).

(h) *Key v. Key* (1855), 1 Jur. (N. S.) 372; *Re Kirkbride's Trusts* (1866), L. R. 2 Eq. 400, 403.

(i) *Browne v. Kenyon (Lord)* (1818), 3 Madd. 410; *Sturgess v. Pearson* (1819), 4 Madd. 411 (to A. for life, and then to be equally divided amongst her three children, or such of them as should be living at her death); *Belk v. Slack* (1836), 1 Keen, 238; *Wagstaff v. Crosby* (1846), 2 Coll. 746; *Page v. May* (1857), 24 Beav. 323; *Wiley v. Chanteperdrix*, [1894] 1 I. R. 209; *Re Pickworth, Snaith v. Parkinson*, [1899] 1 Ch. 642, C. A.; *Penny v. Commissioner for Railways*, [1900] A. C. 628, 634, P. C.

(k) *Harrison v. Foreman* (1800), 5 Ves. 207; *Peters v. Dipple* (1841), 12 Sim. 101; *Clarke v. Lubbock* (1842), 1 Y. & C. Ch. Cas. 492 (surviving testator); *Eaton v. Barker* (1845), 2 Coll. 124; *Littlejohns v. Household* (1855), 21 Beav. 29; *Cambridge v. Rous* (1858), 25 Beav. 492; *Maddison*

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Conditional  
Gifts.

this rule is not adopted where in the context of the will a gift to the survivor of a number of persons is construed as referring to survivorship *inter se* and not as conditional on his surviving the life tenant; in such a case the longest liver takes the gift, although all die in the lifetime of the life tenant(l); nor does the rule operate where the condition as to surviving the life tenant applies to the original gift(m).

Time of  
operation.

The time of operation of a divesting provision may be limited by the context(n), for example, by a direction for payment, transfer or conveyance to the donee, or for the doing of any such act on any specified event; the court considers that the trustees or executors could not conveniently obey such a direction if divesting were intended to take place after that event(o).

SUB-SECT. 4.—*Particular Conditions.*

(i.) *In case of Death, simply, as a Contingency.*

Gift over in  
the event of  
death.

**1482.** A gift over of property, given to a person absolutely, in the event of his death is construed as a gift over in the event of his death before the period of distribution or vesting, unless some other period is indicated by the context(p).

If, therefore, the gift is immediate, and there is a gift over in case of the donee's death, as a contingency, the gift over *primâ facie* takes effect only in the case of the donee dying in the lifetime of the testator, as an alternative gift(q), and if the gift is postponed

v. *Chapman* (1860), 1 John. & H. 470; *Marriott v. Abell* (1869), L. R. 7 Eq. 478; *Re Deacon's Trusts*, *Deacon v. Deacon*, *Hagger v. Hagger* (1906), 95 L. T. 235; and see *Benn v. Dixon*, *Dixon v. Nicholson*, *Dixon v. Priestley* (1847), 16 Sim. 21; *Re Sander's Trusts* (1866), L. R. 1 Eq. 675, 683, 684; *Re Clark's Trusts* (1870), L. R. 9 Eq. 378; *Jones v. Davies* (1880), 28 W. R. 455.

(l) *Scurfield v. Howes* (1790), 1 Bro. C. C. 90; *White v. Baker* (1860), 2 De G. F. & J. 55, C. A., commented on, though accepted as correct, in *Re Pickworth*, *Snaith v. Parkinson*, [1899] 1 Ch. 642, C. A.

(m) *Willis v. Plaskett* (1841), 4 Beav. 208.

(n) *Vulliamy v. Huskisson* (1838), 3 Y. & C. (EX.) 80 (vested interest at twenty-one: clause settling gift on donee's marriage held confined to marriage under twenty-one); *Doe d. Lloyd v. Davies* (1854), 23 L. J. (C. P.) 169. Subject to such a context, the operation of a divesting clause operates whenever the contingency happens on which it is to take effect; see, for example, *Witham v. Witham* (1861), 3 De G. F. & J. 758. As to particular gifts over, see the text, *infra*.

(o) *Woodburne v. Woodburne* (1850), 3 De G. & Sm. 643; *Glyn v. Glyn* (1857), 26 L. J. (CH.) 409; *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 388, 403, 406; *Re Luddy*, *Peard v. Morton* (1883), 25 Ch. D. 394, 397; and see *Re Kerr's Estate*, [1913] 1 I. R. 214. This indication of intention may be overborne; see *Martineau v. Rogers* (1856), 8 De G. M. & G. 328, 333.

(p) *Penny v. Commissioner for Railways*, [1900] A. C. 628, P. C., per Lord LINDLEY, at p. 634; *Hodgson v. Smithson* (1856), 8 De G. M. & G. 604, C. A.; *O'Mahoney v. Burdett*, *supra*, per Lord CAIRNS, L.C., at p. 395. The rule is based on the ground that the event of death is so inevitable that it cannot be deemed a contingency, and therefore the testator could not have intended merely to provide for the case of the donee dying at any time. It is also based on the presumption in favour of vesting (*Home v. Pillans* (1833), 2 My. & Cr. 15, 20, 21).

(q) *Bindon (Lord) v. Suffolk (Earl)* (1707), 1 P. Wms. 96; *Hinckley v. Simmons* (1797), 4 Ves. 160; *King v. Taylor* (1801), 5 Ves. 806; *Turner v. Moor* (1801), 6 Ves. 557; *Cambridge v. Rous* (1802), 8 Ves. 12, 20; *Webster v. Hale* (1803), 8 Ves. 410; *Ommaney v. Beavan* (1811), 18 Ves. 291; *Slade v. Milner* (1819), 4 Madd. 144; *Crigan v. Baines* (1834), 7 Sim. 40;



to a life estate, the gift over *primâ facie* takes effect only on a death before the tenant for life, as an alternative gift (*r*); or, if the context requires, the gift over may be construed as referring to death before vesting (*s*).

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Gifts.

It may be, however, that the context of the will shows that the first donee takes not an absolute interest, but a life interest only, or that the gift in case of death is to take effect not as a contingent gift, but by way of succession in any event; the second donee then takes on the death of the first donee at any time (*t*).

When life  
interest only  
created.

Generally, death is regarded as a contingent event only from necessity, and if the words import no other contingency (*u*).

**1483.** In a gift to one donee indefinitely followed by a gift "at the death," or "after the death" of that donee, the gift over *primâ facie* takes effect at death, not as on a contingent event, but by way of succession, and the first donee takes a life estate only (*v*).

Gift at the  
death of prior  
donee.

(ii.) *On Death with Other Contingencies.*

**1484.** In cases where the gift over is on death coupled with some other contingency, for example, on the death of the donee without leaving issue, or without leaving issue living at the time of his death, then *primâ facie* the gift over takes effect on the death of the donee at any time (*a*), and not merely on his death before the time of distribution, if the rest of the contingency is fulfilled at his death (*b*).

Gift over on  
death in any  
contingency.

*Clarke v. Lubbock* (1842), 1 Y. & C. Ch. Cas. 492; *Howard v. Howard* (1856), 21 Beav. 550; *Taylor v. Stainton* (1856), 2 Jur. (N. S.) 634; *Schenk v. Agnew* (1858), 4 K. & J. 405; *Re Neary's Estate* (1881), 7 L. R. Ir. 311; *Elliott v. Smith* (1882), 22 Ch. D. 236; *Re Valdez's Trusts* (1888), 40 Ch. D. 159, 162; *Re Reeves, Edwards v. Reeves* (1907), 51 Sol. Jo. 325.

(*r*) *Hervey v. M'Laughlin* (1815), 1 Price, 264; *Edwards v. Edwards* (1852), 15 Beav. 357, 363, 364 (the third rule there stated is not affected on this point by *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 388; see note (*e*), p. 830, *post*); *Green v. Barrow* (1853), 10 Hare, 459, 461; *Bolitho v. Hillyar* (1865), 11 Jur. (N. S.) 556; and see *Le Jeune v. Le Jeune* (1847), 2 Keen, 701; *Galland v. Leonard* (1818), 1 Swan. 161.

(*s*) *Penny v. Commissioner for Railways*, [1900] A. C. 628, P. C.; *Re Kerr's Estate*, [1913] 1 I. R. 214.

(*t*) *Billings v. Sandom* (1784), 1 Bro. C. C. 393; *Douglas (Lord) v. Chalmer* (1795), 2 Ves. 500; *Nowlan v. Nelligan* (1785), 1 Bro. C. C. 489; *Smart v. Clark* (1827), 3 Russ. 365; *Tilson v. Jones, Tilson v. Thornton* (1830), 1 Russ. & M. 553; compare *Wilkins v. Jodrell* (1879), 13 Ch. D. 564, 569; *Watson v. Watson* (1881), 7 P. D. 10; and as to the weight to be given to various circumstances, see *Taylor v. Stainton* (1856), 2 Jur. (N. S.) 634. A gift to one person in the event of death of another is only treated as a gift in remainder or succession where the first taker takes for life only (*Penny v. Commissioner for Railways, supra*, per Lord LINDLEY, at p. 635). There is no general rule, however, that a prior gift is always cut down to a life interest by a gift over "after the death" of the first legatee (*Re Monck (Lady), Monck v. Croker*, [1900] 1 I. R. 56, 66).

(*u*) *Woodroffe v. Woodroffe*, [1894] 1 I. R. 299, 302; *Gawler v. Cadby* (1831), Jac. 346, 348. As to gifts upon death coupled with a contingency, see the text, *infra*.

(*v*) *Joslin v. Hammond* (1834), 3 My. & K. 110; *Constable v. Bull* (1849), 3 De G. & Sm. 411; *Re Adam's Trusts* (1865), 14 W. R. 18, followed in *Bibbns v. Potter* (1879), 10 Ch. D. 733; *Waters v. Waters* (1857), 3 Jur. (N. S.) 654; *Re Russell* (1885), 52 L. T. 559.

(*a*) As to death in the life of the testator, see p. 796, *ante*.

(*b*) *Ingram v. Soutten* (1874), L. R. 7 H. L. 408 (dying without issue

SECT. 7.  
Conditional  
Gifts.

Exclusion  
by context.

No difference is made by the fact that the donees under the gift over are the children of the first taker (*c*), and the rule is the same as to real and as to personal estate (*d*), and whether there is a previous life estate (*e*) or not (*f*).

On the context of the will, however, the contingency may be confined to a death during the lifetime of a tenant for life (*g*), or during the life of the testator (*h*), or before distribution or some other event (*i*). In particular, it may appear that the gift over is not an executory limitation defeating the prior gift at any time, but a substitutional gift, and the death with a contingency is confined to the period within which substitution takes place (*k*), or there may be alternative gifts over, whether the death takes place with or without a failure of issue or other contingent event (*l*).

living at her death); *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 388 (dying unmarried or without children); *Woodrooffe v. Woodrooffe*, [1894] 1 I. R. 299, 302; *Re Richardson's Trusts*, [1896] 1 I. R. 295, C. A.; *Re Schnadhorst, Sandkuhl v. Schnadhorst*, [1902] 2 Ch. 234, C. A.; *Duffill v. Duffill*, [1903] A. C. 491; see also *Smith v. Stewart* (1851), 15 Jur. 834; *Smith v. Spencer* (1856), 6 De G. M. & G. 631 (where the original donee took at twenty-one; gift over not restricted to a death under that age); *Drake v. Collins* (1869), 20 L. T. 970; *Re Parry and Daggs* (1885), 31 Ch. D. 130, C. A.

(*c*) *Home v. Pillans* (1833), 2 My. & K. 15, 22; *Re Schnadhorst, Sandkuhl v. Schnadhorst*, [1901] 2 Ch. 338, 343, affirmed, [1902] 2 Ch. 234, C. A.

(*d*) *Slaney v. Slaney* (1864), 33 Beav. 631.

(*e*) The fourth rule in *Edwards v. Edwards* (1852), 15 Beav. 357, enunciated by ROMILLY, M.R., at pp. 364 *et seq.*, to the effect that where such a gift is postponed the gift over *primâ facie* refers to a death without issue before the period of distribution, is disapproved in *O'Mahoney v. Burdett*, *supra*. The following cases where the fourth rule in *Edwards v. Edwards*, *supra*, was followed may perhaps be supported on the contexts of the wills in question: *Barker v. Cocks* (1843), 6 Beav. 82; *Beckton v. Barton* (1859), 27 Beav. 99; *Slaney v. Slaney* (1864), 33 Beav. 631; *Wood v. Wood* (1866), 35 Beav. 587.

(*f*) *Child v. Giblett* (1834), 3 My. & K. 71; *Smith v. Stewart* (1851), 4 De G. & Sm. 253; *Edwards v. Edwards*, *supra*, at p. 363; *Cotton v. Cotton* (1854), 23 L. J. (CH.) 489; *Randfield v. Randfield* (1860), 8 H. L. Cas. 225; *Bowers v. Bowers* (1870), 5 Ch. App. 244.

(*g*) *Besant v. Cox* (1877), 6 Ch. D. 604 (gift over to survivors of a class leaving issue), following *Olivant v. Wright* (1875), 1 Ch. D. 346, C. A., and distinguishing *O'Mahoney v. Burdett*, *supra*; *McCormick v. Simpson*, [1907] A. C. 494, P. C.; *Re Mitchell, Mitchell v. Mitchell* (1913), 108 L. T. 180. *Besant v. Cox*, *supra*, and *Re Smaling, Johnson v. Smaling* (1878), 26 W. R. 231, however, having regard to the rule previously laid down in *O'Mahoney v. Burdett*, *supra*, are of doubtful authority; see *Woodrooffe v. Woodrooffe*, *supra*.

(*h*) *Re Luddy, Peard v. Morton* (1883), 25 Ch. D. 394.

(*i*) *Clark v. Henry* (1871), 6 Ch. App. 588; *Brotherton v. Bury* (1854), 18 Beav. 65 (before attaining twenty-one); *Hordern v. Hordern*, [1909] A. C. 210, 216. Thus, where on a particular event the fund is directed to be divided, or the receipt of the donee is directed to be a good discharge, the death without issue is confined to the period prior to division or payment, else the direction could not be carried out (*Galland v. Leonard* (1818), 1 Swan. 161; *Barker v. Cocks* (1843), 6 Beav. 82; *Wheble v. Withers* (1849), 16 Sim. 505; *Johnston v. Antrobus* (1856), 21 Beav. 556; *Re Anstice* (1858), 23 Beav. 135; *O'Mahoney v. Burdett*, *supra*, at pp. 403, 406; *Lewin v. Killey* (1888), 13 App. Cas. 783, P. C.; *Re MacKinlay, Scrimgeour v. MacKinlay* (1911), 56 Sol. Jo. 142; *Re Mitchell, Mitchell v. Mitchell*, *supra*).

(*k*) *Re Hayward, Creery v. Lingwood* (1882), 19 Ch. D. 470. As to substitutional gifts, see p. 729, *ante*.

(*l*) *Clayton v. Lowe* (1822), 5 B. & Ald. 636 (gifts over both on death



**1485.** A gift over can be well made, as a rule, on the donee dying before he actually receives his legacy or on his becoming disentitled to receive it before actual payment; such a gift may be expressed so as to be not void for uncertainty (*m*), at all events in the case of non-residuary gifts (*a*), or in the case of any gift where the gift over is of the part of the property which has not been received (*b*).

Such a gift over, or a gift over before execution of all or any of the trusts of the will (*c*), in the case of a residuary gift, and applying to the whole fund, whether paid over to the donee or not, may as it stands in a particular will be void for uncertainty (*d*).

The court, however, inclines to construe such gifts over, so that the period over which the operation of the gift over is to extend should not continue beyond the time at which the legacy is by law receivable (*e*), that is, in general, where the gift is not otherwise

SECT. 7.  
Conditional  
Gifts.

Gift over on  
death before  
payment.

without children and on death leaving children); *Gee v. Manchester Corporation* (1852), 17 Q. B. 737, 745 ("the dying of A. with or without issue is as certain and inevitable an event as the dying of A. simply," per Lord CAMPBELL, C.J., at p. 745, citing the rule on p. 828, *ante*, as to death treated as a contingency). The *ratio decidendi* of these cases, as being an addition of all the contingencies so as to make a certainty, was dissented from in *Cooper v. Cooper* (1855), 1 K. & J. 658, 662; *Bowers v. Bowers* (1870), 5 Ch. App. 244, 248; *Gosling v. Townshend* (1854), 2 W. R. 23; but it appears to be approved in *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 388, per Lord CAIRNS, L.C., at p. 397, explaining *Da Costa v. Keir* (1827), 3 Russ. 360, as decided on this and other grounds. See also *Galland v. Leonard* (1818), 1 Swan. 161; *Woodburne v. Woodburne* (1853), 23 L. J. (CH.) 336.

(*m*) *Johnson v. Crook* (1879), 12 Ch. D. 639, approved in *Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218; *Re Wilkins, Spencer v. Duckworth* (1881), 18 Ch. D. 634; *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100, disapproving *Martin v. Martin* (1866), L. R. 2 Eq. 404. *Bubb v. Padwick* (1880), 13 Ch. D. 517, and the *dicta* in *Minors v. Battison* (1876), 1 App. Cas. 428, 452 (see note (*d*), *infra*), are not followed. See also *Faulkner v. Hollingsworth* (1784), cited in *Elwin v. Elwin* (1803), 8 Ves. 547, per GRANT, M.R., at p. 558 (gift over if legatee died before real estate was sold and the money was received), explained as involving an inquiry on an ascertainable matter in *Re Chaston, Chaston v. Seago, supra*.

(*a*) *Whitman v. Aitken* (1866), L. R. 2 Eq. 414.

(*b*) *Re Chaston, Chaston v. Seago, supra*; *Re Goulder, Goulder v. Goulder, supra*.

(*c*) A gift over on death during the continuance of the trusts was held valid in case of a specific gift in *Re Teale, Teale v. Teale* (1886), 53 L. T. 936.

(*d*) *Hutchin v. Mannington* (1791), 1 Ves. 366 (although, as explained by JESSEL, M.R., in *Johnson v. Crook, supra*, on the construction adopted, the gift over was on death before the gift was receivable); *Martin v. Martin, supra*; *Bubb v. Padwick, supra*; *Minors v. Battison, supra*, where *Martin v. Martin, supra*, and *Bubb v. Padwick, supra*, were accepted as authorities to this effect by Lord SELBORNE; *Roberts v. Youle* (1880), 49 L. J. (CH.) 744, 745; and see *Re Hudson*, [1912] Victorian Law Reports, 140. There is no objection, however, to postponement of vesting of a residuary gift until actual receipt (*Gaskell v. Harman* (1803), 6 Ves. 159; (1805), 11 Ves. 489, per Lord ELDON, L.C., at p. 497, explaining *Hutchin v. Mannington, supra*), and there appears to be no sufficient reason for a different rule in the case of the postponement of divesting if the intention is clearly shown; notwithstanding the inconvenience of such intention, effect may be given to it; see p. 669, *ante*; and compare *Ditmas v. Robertson* (1840), 4 Jur. 957.

(*e*) *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630, 635. "The courts in such cases favour early [*quære*, indefeasible] vesting, regarding it as undesirable that rights and interests should depend on the degree



SECT. 7.  
Conditional  
Gifts.

Gift over on  
death before  
legacy is  
payable.

postponed, at a year from the death of the testator (*f*), and in other cases at the death of the tenant for life or other period of distribution (*g*).

**1486.** A gift over on the death of a donee before the gift becomes due or payable is valid, and may take effect on the death of the donee in the life of the testator (*h*). The time referred to depends in general upon the period of distribution contemplated by the will (*i*), but is susceptible of a variety of interpretations according to the context (*k*). In a gift to children, where the time for payment is after a life estate on their attaining majority or other qualification, their shares *primâ facie* become vested when they are wanted (for example, in the case of sons at the age of twenty-one, and in the case of daughters at twenty-one or marriage), and the gift is not read as making the provision for a child contingent on surviving both or either of its parents unless the intention is clearly so expressed (*l*); a gift over on death before the gift becomes payable is confined to a death before attaining the majority or other qualification (*m*).

of diligence with which trustees perform their duties" (*Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630, *per* STIRLING, J., at pp. 635, 636); see, accordingly, *Whiting v. Force* (1840), 2 Beav. 571 ("receiving" construed with its correlative "pay" in original gift); *Rammell v. Gillow* (1845), 15 L. J. (CH.) 35, 39; and see the cases in notes (*f*), (*g*), *infra*. In particular cases an inquiry may be directed as to when the property could have been got in (*Law v. Thompson* (1827), 4 Russ. 92; *Re Arrowsmith's Trust* (1860), 29 L. J. (CH.) 774); although in *Hutchin v. Mannington* (1791), 1 Ves. 366, Lord THURLOW, at p. 367, considered such inquiry as impracticable and the gift over void for uncertainty.

(*f*) *Re Arrowsmith's Trust*, *supra*; S. C. (1860), 2 De G. F. & J. 474, C. A.; *Re Collison, Collison v. Barber* (1879), 12 Ch. D. 834; *Re Wilkins, Spencer v. Duckworth* (1881), 18 Ch. D. 634 (residue: gift over before final division of testator's estate); *Barnes v. Whittaker* (1893), 14 New South Wales Reports (Equity), 148; *Hunt v. Hunt*, [1902] 2 State Reports, New South Wales (Equity), 7.

(*g*) *Re Dodgson's Trusts* (1853), 1 Drew. 440; *Minors v. Battison* (1876), 1 App. Cas. 428; *Re Chaston, Chaston v. Seago* (1881), 18 Ch. D. 218; *Wilks v. Bannister* (1885), 30 Ch. D. 512.

(*h*) *Willing v. Baine* (1731), 3 P. Wms. 113; *Humberstone v. Stanton* (1813), 1 Ves. & B. 385; *Walker v. Main* (1819), 1 Jac. & W. 1; *Humphreys v. Howes* (1830), 1 Russ. & M. 639; and see *Miller v. Warren* (1690), 2 Vern. 207; *Darrel v. Molesworth* (1700), 2 Vern. 378, accepted as an authority on this point in *Ive v. King* (1852), 16 Beav. 46, 54; but see the notes to those cases.

(*i*) As, for instance, the death of the tenant for life, in cases where the legacy is given after a life interest (*Crowder v. Stone* (1828), 3 Russ. 217, 222; and see *Creswick v. Gaskell* (1853), 16 Beav. 577). In the case of immediate legacies, the death of the testator was considered to be denoted in *Collins v. Macpherson* (1827), 2 Sim. 87; *Cort v. Winder* (1844), 1 Coll. 320; *Whitman v. Aitken* (1866), L. R. 2 Eq. 414, 417; or the expiration of a year from the death of the testator may be adopted in particular cases where the context does not otherwise provide: compare the cases in note (*f*), *supra*.

(*k*) *Cort v. Winder*, *supra*, *per* KNIGHT BRUCE, V.-C., at p. 322.

(*l*) See p. 671, *ante*.

(*m*) "Payable" is construed "vested" in such a case; accordingly the share of a child who attains majority and dies in the lifetime of his parent is not divested (*Emperor v. Rolfe* (1750), 1 Ves. Sen. 208; *Cholmondeley v. Meyrick* (1758), 1 Eden, 77; *Salisbury (Earl) v. Lambe* (1759), 1 Eden, 465; *Hope v. Clifden (Lord)* (1801), 6 Ves. 498; *Willis v. Willis* (1796), 3 Ves. 5; *Schenk v. Legh* (1804), 9 Ves. 300; *Powis v. Burdett* (1804), 9 Ves. 428

**1487.** In the case of a gift over on death of the donee before becoming entitled, the last word has no defined legal meaning, and may mean either entitled in interest (*n*) or entitled in possession (*a*), according to the context.

SECT. 7.

## Conditional Gifts.

Death before becoming entitled.

Death before vesting.

**1488.** A gift over on the prior donee's death before attaining a vested interest *primâ facie* refers to death before vesting in the technical sense (*b*), but if the context requires may refer to death before taking possession (*c*), or before having the right to possession (*d*).

## (iii.) Limitations on Failure of Issue.

**1489.** By statute (*e*), in any gift by a modern will, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words (*f*) which may import either a want or

Limitations on failure of issue in modern wills.

(in spite of expressions referring to "leaving" children); *Hallifax v. Wilson* (1809), 16 Ves. 168; *Walker v. Main* (1819), 1 Jac. & W. 1 (death before legacy "due and payable"); *Hayward v. James* (1860), 28 Beav. 523; *Haydon v. Rose* (1870), L. R. 10 Eq. 224; *Partridge v. Baylis* (1881), 17 Ch. D. 835; *Wakefield v. Maffett* (1885), 10 App. Cas. 422, 433, 435; but compare *Re Williams* (1849), 12 Beav. 317). The doctrine of these cases should not be extended (*Rammell v. Gillow* (1845), 15 L. J. (CH.) 35, *per WIGRAM*, V.-C., at p. 38, following *Whatford v. Moore* (1836), 3 My. & Cr. 270, 289).

(*n*) *Re Crosland, Craig v. Midgley* (1886), 54 L. T. 238; see p. 658, *ante*.

(*a*) *Re Maunder, Maunder v. Maunder*, [1902] 2 Ch. 875; [1903] 1 Ch. 451, C. A., following *Turner v. Gosset* (1865), 34 Beav. 593, 594; *Re Noyce, Brown v. Rigg* (1885), 31 Ch. D. 75; *Re Whiter, Windor v. Jones* (1911), 105 L. T. 749; and see *Jopp v. Wood* (1865), 2 De G. J. & Sm. 323 (settlement: prior donee unborn and entitled at birth). The case of *Commissioners of Charitable Donations and Bequests v. Cotter* (1841), 1 Dr. & War. 498, followed in *Henderson v. Kennicot* (1848), 2 De G. & Sm. 492, was said in *Re Maunder, Maunder v. Maunder, supra*, at p. 879, to be founded on *Doe d. Long v. Prigg* (1828), 8 B. & C. 321, which was disapproved on other grounds in *Wordsworth v. Wood* (1847), 1 H. L. Cas. 129, 154, H. L., and in *Re Gregson's Trust Estate* (1864), 2 De G. J. & Sm. 428, C. A. A gift over on death before being "entitled in possession" is, in a context requiring it, capable of being construed "entitled in interest" (*Re Yates's Trusts* (1851), 16 Jur. 78).

(*b*) *Parkin v. Hodgkinson* (1846), 15 Sim. 293; *Bull v. Jones* (1862), 31 L. J. (CH.) 858, 861; *Richardson v. Power* (1865), 19 C. B. (N. S.) 780, 802, Ex. Ch. (remainder in fee simple); and see *Re Arnold's Estate* (1863), 33 Beav. 163, 173, on the same will. The gift over took effect on a class of prior donees failing to come into existence in *Beardsley v. Beynon* (1865), 12 L. T. 698.

(*c*) *King v. Cullen* (1848), 2 De G. & Sm. 252, 254 (where the will showed that a death after vesting, in the technical sense, was within the testator's meaning); *Re Morris* (1857), 26 L. J. (CH.) 688; *Young v. Robertson* (1862), 4 Macq. 314, H. L. (gift over to survivors).

(*d*) *Sillick v. Booth* (1842), 1 Y. & C. Ch. Cas. 117, 121, 124.

(*e*) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 29. As to the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 237.

(*f*) The statutory provision has been applied to gifts on death "without leaving male issue" (*Re Edwards, Edwards v. Edwards*, [1894] 3 Ch. 644, following *Upton v. Hardman* (1874), 9 I. R. Eq. 157; and compare *Neville v. Thacker* (1888), 23 L. R. Ir. 344); but not to like gifts in terms of "heirs of the body" or "heirs," even though coupled with words of procreation (*Harris v. Davis* (1844), 1 Coll. 416, 424 ("in case of there being no heir"); *Re Sallery* (1861), 11 I. Ch. R. 236; *Dawson v. Small* (1874), 9 Ch. App. 651; *Leach v. Leach*, [1912] 2 Ch. 422, 428; *Re Brown and Campbell*



SECT. 7.  
Conditional  
Gifts.

When contrary intention is shown.

Reference to issue taking under prior gifts.

failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, are *prima facie* construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of issue (g).

**1490.** A contrary intention excluding the statutory rule may be shown by the fact that the person whose failure of issue is spoken of has a prior estate tail, or that a preceding gift is, without any implication arising from the words in question (*h*), a limitation of an estate tail to that person or issue (*i*); or otherwise, generally, by the context of the will (*k*).

**1491.** This statutory presumption, further, does not apply to cases where such words import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*l*).

(1898), 29 Ontario Reports, 402; *Re Ross* (1901), 1 State Reports, New South Wales (Equity), 1; see, however, *Dodds v. Dodds* (1860), 10 I. Ch. R. 476). It has been suggested (Hawkins, Wills, 1st ed., p. 177; 2nd ed., p. 256; *Shand v. Robinson* (1898), 19 New South Wales Reports (Equity), 85, 88) that the statutory provision has no application to words such as "in default of issue" or "on failure of issue," not containing, in themselves or by inference from the context, any reference to the death of the person failure of whose issue is spoken of; but for the contrary view see *Neville v. Thacker* (1888), 23 L. R. Ir. 344, 357; and see *Green v. Green* (1849), 3 De G. & Sm. 480, where the contrary appears to be assumed. The fact that the provision contemplates words which may import a failure of issue in the lifetime of the named person appears to be inconsistent with the suggestion. In *Morris v. Morris* (1853), 17 Beav. 198, ROMILLY, M.R., at p. 202, was of opinion that the provision also did not apply to cases where the words referring to dying without issue were combined with other words, such as "dying under twenty-one," which had been the subject of judicial decision.

(g) *O'Neill v. Montgomery* (1861), 12 I. Ch. R. 163; *Re Mid-Kent Rail. Co., Ex parte Bate* (1863), 11 W. R. 417; *Dowling v. Dowling* (1866), 1 Ch. App. 612, 616; *Gwynne v. Berry* (1875), 9 I. R. C. L. 494; *Re Chinnery* (1877), 1 L. R. Ir. 296.

(h) *Re O'Bierne* (1844), 1 Jo. & Lat. 352.

(i) Wills Act, 1837 (7 Will 4 & 1 Vict. c. 26), s. 29. As to possible constructions of these words as applied to real and personal estate respectively, see *Greenway v. Greenway* (1860), 2 De G. F. & J. 128, *per* Lord CAMPBELL, L.C., at p. 130; for an example of such a contrary intention, see *Fay v. Fay* (1880), 5 L. R. Ir. 274.

(k) *Green v. Green*, *supra*; *Green v. Giles* (1855), 5 I. Ch. R. 25; *Neville v. Thacker*, *supra*; *Weldon v. Weldon*, [1911] 1 I. R. 177, C. A.

(l) Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 29; *Re Bence, Smith v. Bence*, [1891] 3 Ch. 242, 249, C. A. Thus, where after gifts to particular descriptions of issue, the gift over is "in default of such issue," the word "such" cannot, as a general rule, be rejected (*Staines v. Maddock* (1728), 3 Bro. Parl. Cas. 108; *Denne d. Briddon v. Page* (1783), 11 East, 603, n.; *Hay v. Coventry (Earl)* (1789), 3 Term Rep. 83; *Doe d. Comberbach v. Perryn* (1789), 3 Term Rep. 484; *Goodtitle d. Sweet v. Herring* (1801), 1 East, 264; *R. v. Stafford (Marquis)* (1806), 7 East, 521; *Foster v. Romney (Lord)* (1809), 11 East, 594; *Ryan v. Cowley* (1835), 1 L. & G. temp. Sugd. 7; *Boydell v. Golightly*, *Boydell v. Stanton*, *Boydell v. Morland* (1844), 14 Sim. 327, 344; *Ashburner v. Wilson* (1850), 17 Sim. 204; *Bridger v. Ramsey* (1853), 10 Hare, 320); but where the particular descriptions of issue are to take in tail, especially if their estates are shown to be estates tail to each of them successively, the words "such issue" may be explained to mean their issue, so that the subsequent limitations take effect as remainders (*Lewis d. Ormond v. Waters* (1805), 6 East, 336; *Biddulph v.*



Thus, words referring to failure of issue of a person in a gift over following a devise to the children of such person, or other special class of his issue, not being a contingent class, either in fee simple or in fee tail, *primâ facie* (*m*) means in default of such children, or other special class of issue, and the gift takes effect only on failure of the previous gifts (*n*).

A similar rule holds good in cases of bequests of personalty or of a mixed fund, where the prior bequest is an absolute bequest to children or other special class of issue, not being a contingent class (*o*).

**1492.** It is more difficult, though not impossible (*p*), to refer the issue to those taking under the prior gifts where the prior limitation is on contingent events (*q*), or is to a contingent class, as to sons attaining twenty-one or surviving a life tenant, so that there may be issue who may not take under it (*r*), or where the

SECT. 7.  
Conditional  
Gifts.  
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Where prior  
gift con-  
tingent.

*Lees* (1858), E. B & E. 289, Ex. Ch.); further, on the will taken as a whole, the word "such" may have to be rejected (*Evans d. Brooks v. Astley* (1764), 3 Burr. 1569 (in order to give first son an estate tail; see p. 850, *post*); *Parker v. Tootal* (1865), 11 H. L. Cas. 143). Similarly, where the gift over is in default of issue "as aforesaid," in like cases (*Malcolm v. Taylor* (1831), 2 Russ. & M. 416; *Walker v. Petchell* (1845), 1 C. B. 652). As to cases of implied reference to previous gifts, see the text, *infra*.

(*m*) The rule is excluded, if the failure of issue, expressly or by inference from the will as a whole, is ascertained at a specified death (*Westwood v. Southey* (1852), 2 Sim. (N. S.) 192, 203; *Re Edwards, Jones v. Jones*, [1906] 1 Ch. 570, C. A., disapproving *Kidman v. Kidman* (1871), 40 L. J. (CH.) 359, 360), or is indefinite (*Bowen v. Lewis* (1884), 9 App. Cas. 890).

(*n*) *Bamfield v. Popham* (1702), 1 P. Wms. 54 (see the corrections in the report, 1 P. Wms. 760); *Blackborn v. Edgley* (1719), 1 P. Wms. 600; *Goodright d. Docking v. Dunham* (1779), 1 Doug. (K. B.) 264; *Baker v. Tucker* (1850), 3 H. L. Cas. 106; *Cormack v. Copous* (1853), 17 Beav. 397, 402; *Foster v. Hayes* (1855), 4 E. & B. 717, 734, Ex. Ch.; *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526, 547; *Smyth v. Power* (1876), 10 I. R. Eq. 192, 199.

(*o*) *Salkeld v. Vernon, Salkeld v. Salkeld* (1759), 1 Eden, 64; *Vandergucht v. Blake* (1795), 2 Ves. 534; *A.-G. v. Bayley* (1841), 4 Beav. 450; *Leeming v. Sherratt* (1841), 2 Hare, 14, 17; *Pride v. Fooks* (1858), 3 De G. & J. 252, *per* TURNER, L.J., at p. 280; *Re Wyndham's Trusts* (1865), L. R. 1 Eq. 290; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; *Re Mercer's Trusts, Davies v. Mercer* (1876), 4 Ch. D. 182; and see *In the Will of Carr (John)* (1902), 2 State Reports, New South Wales (Equity), 1; *Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127.

(*p*) *Bryan v. Mansion* (1852), 5 De G. & Sm. 737, 742, where, however, on the context, "issue" meant "children"; *Sanders v. Ashford* (1860), 28 Beav. 609, where the gift over was in default of issue attaining twenty-one; *Re Mercer's Trusts, Davies v. Mercer*, *supra* (children living at parent's death); *Hutchinson v. Tottenham*, [1898] 1 I. R. 403, affirmed, [1899] 1 I. R. 344, C. A. (children born in testatrix's lifetime). It appears that the fact that the issue take merely as objects of a power of appointment does not prevent the construction by reference to such issue, objects of the power, as are living at the death of the appointor (*Target v. Gaunt* (1719), 1 P. Wms. 432; *Hockley v. Mawbey* (1790), 3 Bro. C. C. 82; *Ryan v. Cowley* (1835), L. & G. temp. Sugd. 7; *Leeming v. Sherratt, supra*; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141).

(*q*) *Andree v. Ward* (1826), 1 Russ. 260 (if ancestor married a woman of specified fortune); and see *Campbell v. Harding* (1831), 2 Russ. & M. 390 (if ancestor married), affirmed, *sub nom. Candy v. Campbell* (1834), 2 Cl. & Fin. 421; *Franks v. Price* (1838), 5 Bing. (N. C.) 37; S. C. (1840), 3 Beav. 182.

(*r*) *Doe d. Rew v. Luerast* (1832), 1 Moo. & S. 573 (prior issue taking at twenty-one); *Pride v. Fooks, supra, per* TURNER, L.J., at pp. 280, 281.

SECT. 7.  
Conditional  
Gifts.

Where gift  
over on death  
of stranger.

Gifts over on  
failure of  
issue apart  
from statute.

prior limitation is to a definite number of the children (s), or if the issue taking under previous gifts take for life only (a).

**1493.** In cases where there is a third period (other than an indefinitely distant time or the death of the person) to which the failure of issue may refer (for example, the death of any other person), the statutory presumption does no more than exclude the construction which gives an indefinitely distant failure of issue (b).

**1494.** In cases not within the above statutory rule (c) the meaning of such words, with certain exceptions (d), whether the gift is of real estate (e) or personal estate (f), or both together (g), imports an indefinite failure of issue at any time however remote (h), unless the context of the will (i) or the nature of the gift shows

(s) *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, pl. 29 (first six sons only); *A.-G. v. Sutton* (1721), 1 P. Wms. 754, H. L. (first and second sons only); *Stanley v. Lennard* (1758), 1 Eden, 87 (eldest son only); *Key v. Key* (1853), 4 De G. M. & G. 73, 80 (eldest surviving son).

(a) *Parr v. Swindels* (1828), 4 Russ. 283.

(b) *Jarman v. Vye* (1866), L. R. 2 Eq. 784, 787.

(c) As in the case of wills prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), and wills within the proviso to *ibid.*, s. 29, stated p. 834, *ante* (*Re Bence, Smith v. Bence*, [1891] 3 Ch. 242, C. A.). For a discussion of cases prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), see Lewis, *Law of Perpetuity*, pp. 174—407, and Supplement, pp. 68—96; Prior on Issue; the early editions of Jarman on Wills; and Tudor, *L. C. Real Prop.*, 4th ed., pp. 374 *et seq.*

(d) See pp. 837 *et seq.*, *post*.

(e) *Newton v. Barnardine* (1583), Moore (K. B.), 127; *Lee's Case* (1584), 1 Leon. 387; *Lanesborough (Lady) v. Fox* (1733), Cas. temp. Talb. 262; *Cole v. Goble* (1853), 13 C. B. 445; and see the cases as to death "without leaving issue" in note (o), p. 837, *post*. As to the implication of an estate tail under the old law in such a case, see p. 850, *post*; and see the cases cited in notes (p), (q), *ibid.*

(f) *Beauclerk v. Dormer* (1742), 2 Atk. 308; *Gray v. Shawne* (1758), 1 Eden, 153; *Destouches v. Walker* (1764), 2 Eden, 261; *Houston v. Ives* (1764), 2 Eden, 217; *Grey v. Montagu* (1770), 3 Bro. Parl. Cas. 314; *Bigge v. Bensley* (1783), 1 Bro. C. C. 187; *Glover v. Strothoff* (1786), 2 Bro. C. C. 33; *Everest v. Gell* (1791), 1 Ves. 286; *Chandler v. Price* (1796), 3 Ves. 99, 101; *Rawlins v. Goldfrap* (1800), 5 Ves. 440; *Lepine v. Ferrard* (1831), 2 Russ. & M. 378; *Candy v. Campbell* (1834), 2 Cl. & Fin. 421, H. L.; *Doe d. Todd v. Duesbury* (1841), 8 M. & W. 514; *Burley v. Evelyn* (1848), 16 Sim. 290; *Falkiner v. Hornidge* (1857), 8 I. Ch. R. 184; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716, 720; *Fisher v. Webster* (1872), L. R. 14 Eq. 283.

(g) *Salkeld v. Vernon*, *Salkeld v. Salkeld* (1758), 1 Eden, 64; *Jeffery v. Sprigge* (1784), 1 Cox, 62; *Boehm v. Clarke* (1804), 9 Ves. 580; *Barlow v. Salter* (1810), 17 Ves. 479; *Donn v. Penny* (1815), 1 Mer. 20.

(h) As to the possible objection as regards remoteness in such cases, see title PERPETUITIES, Vol. XXII., p. 307, note (k).

(i) As, for instance, where the issue is referred to as surviving a living person (*Baker v. Lucas* (1828), 1 Moll. 481; *Gee v. Liddell* (1866), L. R. 2 Eq. 341), or where by the context "issue" means "children" (*Doe d. Lyde v. Lyde* (1787), 1 Term Rep. 593; *Carter v. Bentall* (1840), 2 Beav. 551; *Bryan v. Mansion* (1852), 5 De G. & Sm. 737). Similarly, if the gift over is directed to take effect "at the death" of the ancestor, a prior donee under the will, this is some indication, though not conclusive (*Waller v. Drew* (1722), Com. 373; *Doe d. Cock v. Cooper* (1801), 1 East, 229 (real estate); *Theebridge v. Kilburne* (1750), 2 Ves. Sen. 233, 236 (personal estate)), that the failure of issue is confined to the death of the prior donee (*Pinbury v. Elkin* (1719), 1 P. Wms. 563; *Trotter v. Oswald* (1787), 1 Cox, 317; *Wilkinson v. South* (1798), 7 Term Rep. 555;



an intention to the contrary (*k*). Thus, a reference to dying without issue in the lifetime of a named person extends to the event of death and failure of issue both happening in the lifetime of that person (*l*).

**1495.** The following are recognised exceptions or cases where rules have been adopted as to wills not subject to the statutory rule above stated:—

(1) A gift on a death “without leaving issue” is, where the subject-matter is personal estate, *primâ facie* confined to a failure of issue at death (*m*); but, where the subject-matter is real estate, the gift *primâ facie* (*n*) extends to an indefinite failure of issue (*o*);

SECT. 7.  
Conditional  
Gifts.

Rules applic-  
able.

(1) Gift of  
realty and  
personalty  
on death  
without  
leaving issue.

*Gawler v. Cadby* (1821), Jac. 346, 348; *Rackstraw v. Vile* (1823), 1 Sim. & St. 604, following *Doe d. King v. Frost* (1820), 3 B. & Ald. 546 (observed on, Lewis, Law of Perpetuity, pp. 234, 235); *Ex parte Davies* (1851), 2 Sim. (N. S.) 114. As to the use of the word “then,” see *Pye v. Linwood* (1842), 6 Jur. 618; *Campbell v. Harding* (1831), 2 Russ. & M. 390, 410. In general, if the gift over could not reasonably be meant to depend on a general failure of issue, the inference is that a failure at the death of the named ancestor is intended (*Re Rye's Settlement* (1852), 10 Hare, 106, 111).

(*k*) *King v. Withers* (1735), Cas. temp. Talb. 117, 121; *Campbell v. Harding* (1831), 2 Russ. & M. 390, 406 (“with reference either to the subject-matter of the gift, or the extent of interest given to the devisee or legatee over”). Thus, in cases where the property is a leasehold for lives, the failure must occur within the lives of the *cestuis que vie* (*Low v. Burron* (1734), 3 P. Wms. 262; *Campbell v. Harding*, *supra*, at p. 406); but where the leasehold is renewable for ever, the effect in a case under the law prior to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), is that the failure may be indefinitely remote; in such cases an estate in *quasi-entail* is created (*Croly v. Croly* (1825), Batt. 1; *Manning v. Moore* (1832), Alc. & N. 96; *Lee v. Flinn* (1833), Alc. & N. 418). The failure of issue is not restricted to any period, however, merely because the subject-matter of the gift is a copyhold in a manor in which there is no custom to entail, so that any intention inferred in favour of the issue cannot directly take effect (*Doe d. Blesard v. Simpson* (1842), 3 Scott (N. R.), 774, Ex. Ch., affirming *Doe d. Simpson v. Simpson* (1838), 5 Scott, 770).

(*l*) *Crowder v. Stone* (1827), 3 Russ. 217 (before shares become payable), followed in *Jarman v. Vye* (1866), L. R. 2 Eq. 784.

(*m*) *Forth v. Chapman* (1719), 1 P. Wms. 663; *Sabbarton v. Sabbarton* (1734), Cas. temp. Talb. 55, 245; *Atkinson v. Hutchison* (1734), 3 P. Wms. 258; *Sheffield v. Orrery* (Lord) (1745), 3 Atk. 282, 287; *Lampley v. Blower* (1746), 3 Atk. 396; *Sheppard v. Lessingham* (1751), Amb. 122; *Taylor v. Clarke* (1763), 2 Eden, 202; *Gordon v. Adolphus* (1769), 3 Bro. Parl. Cas. 306; *Goodtitle d. Peake v. Pegden* (1788), 2 Term Rep. 721; *Radford v. Radford* (1836), 1 Keen, 486; *Daniel v. Warren* (1843), 2 Y. & C. Ch. Cas. 290; *Mansell v. Grove* (1843), 2 Y. & C. Ch. Cas. 484; *Hawkins v. Hamerton* (1848), 16 Sim. 410; *Re Synge's Trusts* (1854), 3 I. Ch. R. 379; *Sealy v. Stawell* (1867), 2 I. R. Eq. 326, 353.

(*n*) For instances of a context to the contrary, see *Porter v. Bradley* (1789), 3 Term Rep. 143 (leaving . . . behind him); *Roe d. Sheers v. Jeffery* (1798), 7 Term Rep. 589 (gift over of life estates to living persons, following *Pells v. Brown* (1620), Cro. Jac. 590); although these cases have been much criticised (see note (*p*), p. 838, *post*), they do not appear to be overruled (*Van Tassel v. Frederick* (1896), 27 Ontario Reports, 646, 648; compare note (*t*), p. 838, *post*).

(*o*) *Walter v. Drew* (1722), Com. 373; *Denn d. Geering v. Shenton* (1776), 1 Cowp. 410; *Tenny d. Agar v. Agar* (1810), 12 East, 253; *Dansey v. Griffiths* (1815), 4 M. & S. 61; *Franklin v. Lay* (1820), Madd. & G. 258; *Wollen v. Andrews* (1824), 2 Bing. 126; *Heather v. Winder* (1835), 5 L. J. (CH.) 41; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Bamford v. Lord* (1854), 14 C. B. 708; *Feakes v. Standley* (1857), 24 Bear. 485; *Biss v. Smith* (1857), 2 H. & N. 105; *Richards v. Davies* (1863), 13 C. B. (N. S.) 69, 861, Ex. Ch. In such cases an implied estate tail may arise; see p. 850, *post*.



## SECT. 7.

## Conditional Gifts.

(2) Gift of property in possession on failure of testator's own issue.

(3) Gift of property in remainder on failure of issue taking under prior estates.

(4) Personal provisions on failure of issue.

where the real estate and personal estate are comprised in the same gift, the words are construed differently, according to the subject-matter (*p*).

(2) A gift of property to which the testator is entitled in possession, to take effect on failure of his own issue, not preceded by any other gift, is not a future gift, but is a gift in possession at the testator's death, in the event of there being at that time a failure of his issue (*q*).

(3) Where the testator under the limitations of another instrument is entitled in remainder or reversion on failure of the issue, or the issue male or female of any person, and the testator makes a gift of the property, not preceded by any other limitation, on failure of that issue these words do not make the gift a future gift, but are merely a description of the testator's interest (*r*). The question in such cases is whether the issue referred to in the will is the same as or is different from the issue inheritable under the other instrument (*s*).

(4) Where the court finds an intention that the persons entitled under the gift over are to enjoy the benefits of their gift as a personal provision during their lives, and are not merely to take interests which are not vested in possession though vested in right, this fact leads to the inference that the failure of issue is confined to the lives of those persons (*t*).

(*p*) *Forth v. Chapman* (1719), 1 P. Wms. 663; *Sheffield v. Orrery* (Lord) (1745), 3 Atk. 282, 287; *Radford v. Radford* (1836), 1 Keen, 486; *Greenway v. Greenway* (1860), 2 De G. F. & J. 128, 137. In *Porter v. Bradley* (1789), 3 Term Rep. 143, 146, and *Roe d. Sheers v. Jeffrey* (1798), 7 Term Rep. 589, Lord KENYON, C.J., criticised this rule, disapproving of the same word being taken in different senses according to the subject-matter in a single gift of a blended fund; see also *Daintry v. Daintry* (1794), 6 Term Rep. 307; but his criticisms have been disapproved (*Crooke v. De Vandes* (1802), 9 Ves. 197, *per* Lord ELDON, L.C., at p. 203; *Elton v. Eason* (1817), 19 Ves. 73, *per* GRANT, M.R., at p. 79; and see *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636, 655—660).

(*q*) *French v. Caddell* (1765), 3 Bro. Parl. Cas. 267; *Wellington v. Wellington* (1768), 4 Burr. 2165; *Lytton v. Lytton* (1793), 4 Bro. C. C. 441; *Sanford v. Irby* (1820), 3 B. & Ald. 654.

(*r*) *Badger v. Lloyd* (1700), 1 Ld. Raym. 523; *Lytton v. Lytton* (1793), 4 Bro. C. C. 441; *Egerton v. Jones* (1830), 3 Sim. 409.

(*s*) *Morse v. Ormonde* (Lord) (1826), 1 Russ. 382; *Sanford v. Irby*, *supra*; *Eno v. Eno* (1847), 6 Hare, 171; *Lewis v. Templer* (1864), 33 Beav. 623 (in these cases the issue was the same); *Lanesborough (Lady) v. Fox* (1733), Cas. temp. Talb. 262; *Jones v. Morgan* (1774), 3 Bro. Parl. Cas. 323; *Banks v. Holme* (1791), 1 Russ. 394, H. L. (in these cases the issue was different).

(*t*) As, for instance, where the gift over provides for a charge of a legacy, intended as a personal provision (*Nichols v. Hooper* (1712), 1 P. Wms. 198; *Doe d. Smith v. Webber* (1818), 1 B. & Ald. 713, 721; the mere fact of a legacy given on failure of issue is insufficient; see *Doe d. Todd v. Duesbury* (1841), 8 M. & W. 514), or where the gift over is to such of a number of named or described persons as are living at the time of failure (*Murray v. Addenbrook* (1830), 4 Russ. 407, 419; *Greenwood v. Verdan* (1853), 1 K. & J. 74, 81). The inference also arises where the gift over is to the survivors of the persons, failure of whose issue is spoken of, in cases where "survivors" is used in its ordinary sense, of surviving the failure of issue (*Hughes v. Sayer* (1718), 1 P. Wms. 534; *Ranelagh v. Ranelagh* (1834), 2 My. & K. 441, 448; *Turner v. Frampton* (1845), 2 Coll. 331; *Westwood v. Southey* (1852), 2 Sim. (N. S.) 192, 201; and see *Massey v. Hudson* (1817), 2 Mer. 130, where a substitutional gift to the executors etc. of the

(5) Where after a devise to a person and his heirs (*a*), or after a bequest to a person absolutely (*b*), there is a gift over on his dying under or over a certain age without issue, the compound event is restricted to his dying under or over that age without issue living at his death.

**1496.** A devise over on death without having or leaving an heir or male heir or heirs of the body (*c*) *primâ facie* (*d*) refers to a failure of such heirs at any time (*e*).

**1497.** A devise over of real estate on a death without children, either after a prior gift in fee or generally without words of limitation, may be construed, in order not to disappoint more remote generations of issue, as taking effect on death and failure of issue, either indefinitely (*f*) or within a limited time, for example, before the death of the named ancestor (*g*), according to the context.

A similar gift over of personal estate *primâ facie* refers to a failure of children (*h*) at the death of the named parent (*i*).

SECT. 7.  
Conditional  
Gifts.

(5) Personal events coupled with failure of issue.

Gift over on death without heir.

Gift over on death without children.

survivor excluded the presumption); but does not arise in a similar case, where "survivor" means longest liver (*Chadock v. Cowley* (1625), Cro. Jac. 695), or "surviving stirps," or "other"; see pp. 726, 727, *ante*. So, too, where the only interest taken under the gift over is an estate for life, or succession of estates for lives, it can be inferred that the failure of issue is confined to the lives of the donees under the gift over (*Trafford v. Boehm* (1746), 3 Atk. 440, 449; *Roe d. Sheers v. Jeffery* (1798), 7 Term Rep. 589, where the failure was said to be confined to the life of the prior donee; but see *Lepine v. Ferard* (1831), 2 Russ. & M. 378, *per* Lord BROUGHAM, at p. 388). This is not the case, however, where life interests are not the only interests arising under the gift over; the mere fact that the next interest under the gift over is for life is insufficient (*Boehm v. Clarke* (1804), 9 Ves. 580, 582; *Barlow v. Salter* (1810), 17 Ves. 479, 482; *Doe d. Jones v. Owens* (1830), 1 B. & Ad. 318, 320, 321; Lewis, Law of Perpetuity, pp. 212—217).

(*a*) *Toovey v. Basset* (1809), 10 East, 460; *Right v. Day* (1812), 16 East, 67; *Glover v. Monckton* (1825), 3 Bing. 13; *Doe d. Johnson v. Johnson* (1852), 8 Exch. 81; *Gwynne v. Berry* (1875), 9 I. R. C. L. 494.

(*b*) *Pawlet v. Dogget* (1688), 2 Vern. 86; *Martin v. Long* (1690), 2 Vern. 151 (leaseholds); and see *Morris v. Morris* (1853), 17 Beav. 198 (gift over if prior donee should die without issue or before twenty-one, where "or" was construed "and" as it would have been before the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26)); *Re Morgan* (1884), 24 Ch. D. 114).

(*c*) Such an expression is not subject to the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 29; see note (*f*), p. 833, *ante*.

(*d*) For examples where the context showed an intention to the contrary, see *Polley v. Polley* (1861), 29 Beav. 134; *Coltsmann v. Coltsmann* (1868), L. R. 3 H. L. 121; *Re Leach, Leach v. Leach*, [1912] 2 Ch. 422.

(*e*) *Nottingham v. Jennings* (1700), 1 P. Wms. 23; *A.-G. v. Hird* (1782), 1 Bro. C. C. 170; *Crooke v. De Vandes* (1803), 9 Ves. 197.

(*f*) *Bifield's Case* (1600), cited by Lord HALE in *King v. Melling* (1672), 1 Vent. 225, 231, and apparently reported *sub nom.* *Milliner v. Robinson*, Moore (K. B.), 682 (see note (*a*), p. 851, *post*) (to A. and if he dies not having a son, over); *Doe d. Blesard v. Simpson* (1842), 3 Man. & G. 929, 954, Ex. Ch.; *Bacon v. Cosby* (1851), 4 De G. & Sm. 261.

(*g*) *Doe d. Smith v. Webber* (1818), 2 B. & Ald. 713; *Parker v. Birks* (1854), 1 K. & J. 156; and see *Richards v. Davies* (1862), 13 C. B. (N. S.) 69, *per* BYLES, J., at p. 87, affirmed (1863), 13 C. B. (N. S.) 861.

(*h*) The words are not construed to mean a failure of issue indefinitely if the effect is to defeat the intention of the testator, and especially in cases of bequests of personal estate, the ordinary meaning of "children" is adhered to (*Studholme v. Hodgson* (1734), 3 P. Wms. 300, 304; *Stone v. Maule* (1829), 2 Sim. 490; *Mathews v. Gardiner* (1853), 17 Beav. 254;

(*i*) For note (*i*) see p. 840, *post*.



SECT. 7.  
Conditional  
Gifts.

A gift over on death "without having children" is construed as if on death "without having had children," and fails to take effect if the parent has any child, though no such child survives him (*k*).

(iv.) *Forfeiture on Alienation.*

Object of  
forfeiture  
clauses.

**1498.** In the case of a life or other interest given subject to a forfeiture clause, on bankruptcy or alienation (*l*) or on similar events, such a clause is construed with reference to the known object of such clauses, namely, to preserve the life or other interest and nothing else (*m*); it may be, however, in some cases that words are used which compel the court to hold that in the circumstances a forfeiture has been incurred, though, apart from the forfeiture clause, the interest has been preserved (*n*).

Effect of such  
clauses.

**1499.** The burden of proof lies on those who insist that forfeiture has taken place (*o*). The effect of such a clause in general depends on the nature of the event on which forfeiture is to take place, for example, as regards the donee, whether a definite act on his part alone is required (*p*), or whether the clause goes further and

*Jeffreys v. Conner* (1860), 28 Beav. 328), but in the context of the wills considered in some cases a similar rule to that in case of real estate (see p. 839, *ante*) may be applied to personal estate (*Re Synge's Trusts* (1854), 3 I. Ch. R. 379).

(*i*) *Hughes v. Sayer* (1718), 1 P. Wms. 534; *Pleydell v. Pleydell* (1718), 1 P. Wms. 748; *Thicknesse v. Liege* (1775), 3 Bro. Parl. Cas. 365; *Re Booth, Pickard v. Booth*, [1900] 1 Ch. 768, where *Jeffreys v. Conner*, *supra*, is explained, followed in *Re Raphael, Permanent Trustee Co. of New South Wales, Ltd. v. Lee* (1903), 3 State Reports, New South Wales, 196.

(*k*) *Weakley d. Knight v. Rugg* (1797), 7 Term Rep. 322; *Bell v. Phyn* (1802), 7 Ves. 453; *Wall v. Tomlinson* (1810), 16 Ves. 413; *Jeffreys v. Conner*, *supra*; and see *Re Johnston and Smith* (1906), 12 Ontario Law Reports, 262; *M'Kay v. M'Allister* (1912), 46 I. L. T. 88, C. A. (cases of gifts over on death without having "issue").

(*l*) As to what interests can validly be made subject to such forfeiture clauses, see titles GIFTS, Vol. XIV., p. 422; PERSONAL PROPERTY, Vol. XXII., pp. 410 *et seq.* As to the construction of forfeiture clauses with respect to references to bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146, 148 *et seq.*; and as to the effect of such a clause with reference to a bankruptcy in the life of the testator, see *ibid.*, p. 92.

(*m*) *Re Mair, Williamson v. French*, [1909] 2 Ch. 280, 282 (charge withdrawn before dividends accrued); *Re Sheward, Sheward v. Brown*, [1893] 3 Ch. 502 (document on the face of it a charge, but not intended as such).

(*n*) *Hurst v. Hurst* (1882), 21 Ch. D. 278, C. A. (disclaimer by chargee); *Re Porter, Coulson v. Capper*, [1892] 3 Ch. 481; *Re Baker, Baker v. Baker*, [1904] 1 Ch. 157 (charges, even though cancelled by creditors before distribution).

(*o*) *Cox v. Bockett* (1865), 35 Beav. 48, 51.

(*p*) Thus, where there is a forfeiture on alienation by the donee, no forfeiture is caused by an act done by other persons against the will of the donee, such as a charging order (*Re Kelly, West v. Turner* (1888), 59 L. T. 492), or appointment of a receiver (*Campbell v. Campbell* (1895), 72 L. T. 294), or sale in proceedings against the donee by other persons (*R. v. Robinson* (1811), Wight. 386 (outlawry)), or, apart from any prohibition of the donee committing an act of bankruptcy, by any proceedings in bankruptcy commenced by creditors without his concurrence (see title SETTLEMENTS, Vol. XXV., p. 571; *Wilkinson v. Wilkinson* (1815), Coop. G. 259; *Whitfield v. Prickett* (1838), 2 Keen, 608; *Graham v. Lee* (1857), 23 Beav. 288); but as to cases where such a clause against alienation may take effect on bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 147, note (*h*); and compare *Doe d. Mitchinson v. Carter* (1798),



contemplates events where he is passive or unwilling (*q*); or as regards his rights in the property, whether so long as there is no loss of the beneficial right to enjoy that property (*r*) as the payments of income accrue due (*s*) and there is no prior vesting of the right in another person (*t*) there is no forfeiture, or whether any vesting of his rights in another person at any time (*a*) is included in the events causing forfeiture. Forfeiture clauses on alienation *primâ facie* refer to alienation by way of anticipation, and do not, unless so expressed (*b*), refer to dispositions of income already accrued due or already vested in the donee (*c*). If the donee gives

8 Term Rep. 57, 61. A clause of forfeiture on alienation only is not operative on a mere attempt to assign, or on an assignment which by reason of a restraint on anticipation is nugatory (*Re Wormald, Frank v. Muzeen* (1890), 43 Ch. D. 630; *Re Adamson, Public Trustee v. Billing* (1913), 108 L. T. 179). As regards conditions of forfeiture on an attempt to assign, see *Wilkinson v. Wilkinson* (1819), 3 Swan. 515 (authority to receive rents not sufficient; see note (*d*), p. 842, *post*); *Graham v. Lee* (1857), 23 Beav. 288 (mere negotiations: no forfeiture); *Re Porter, Coulson v. Capper*, [1892] 3 Ch. 481 (settlement, though invalid, caused forfeiture); *Re Sheward, Sheward v. Brown*, [1893] 3 Ch. 502 (document purporting but not intended to be an agreement: no forfeiture).

(*q*) For example, in cases of forfeiture on the donee doing or suffering any act by which the income becomes payable to another, with the use of the expressions such as “suffer” or “permit,” representing a passive attitude of the donee (*Roffey v. Bent* (1867), L. R. 3 Eq. 759 (charging order caused forfeiture); *Re Throckmorton, Ex parte Eyston* (1877), 7 Ch. D. 145, C. A. (hostile bankruptcy); *Re Moore* (1885), 17 L. R. Ir. 549 (registration in Ireland of a judgment); *Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585 (insolvency); *Re Sartoris, Sartoris v. Sartoris*, [1892] 1 Ch. 11 (receiving order), followed in *Re Laye, Turnbull v. Laye*, [1913] 1 Ch. 298. For cases where no forfeiture was caused under a similar clause, see *Re James, Clutterbuck v. James* (1890), 62 L. T. 454 (Scottish sequestration: no vesting in another, and no forfeiture); *Re Ryan* (1887), 19 L. R. Ir. 24 (*fi. fa.* on cattle; the event did not cause the land given “to become property of” a third person: no forfeiture).

(*r*) *Lockwood v. Sikes* (1884), 51 L. T. 562; *Re Selby, Church v. Tancred* [1903] 1 Ch. 715.

(*s*) *Re Sampson, Sampson v. Sampson*, [1896] 1 Ch. 630.

(*t*) *Re Brewer's Settlement, Morton v. Blackmore*, [1896] 2 Ch. 503 (loan of trust fund to tenant for life, who spent it: income payable to him did not become “vested in” another person); *Re Dash, Darley v. King, King v. Darley* (1887), 57 L. T. 219 (conviction; no administrator appointed: no forfeiture); *Re Beaumont, Woods v. Beaumont* (1910), 79 L. J. (CH.) 744 (appointment of receiver caused no vesting in another person). As to petition in bankruptcy not followed by adjudication, see title SETTLEMENTS, Vol. XXV., p. 571; compare *Re Broughton, Peat v. Broughton* (1887), 57 L. T. 8.

(*a*) See *Craven v. Brady* (1869), 4 Ch. App. 296 (forfeiture on being deprived of control of rents: marriage under law before 1882 caused forfeiture); *Re Mordaunt, Mordaunt v. Mordaunt* (1914), 49 L. J. 225 (debt to be paid when in possession); compare *Bonfield v. Hassell* (1863), 32 L. J. (CH.) 475 (marriage there caused no forfeiture of annuity). As to a clause of forfeiture on the interest being taken in execution, see *Blackman v. Fysh*, [1892] 3 Ch. 209 (receiver).

(*b*) *Bates v. Bates*, [1884] W. N. 129, dissented from, however, in *Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887, 893.

(*c*) *Re Stulz's Trusts, Ex parte Kingsford* (1853), 4 De G. M. & G. 404, 409, C. A. (where the testator even provided for attempts “to anticipate or otherwise assign or incumber” the bequest; *Sutton, Carden & Co. v. Goodrich* (1899), 80 L. T. 765; *Re Greenwood, Sutcliffe v. Gledhill*, *supra* [garnishee order on income accrued due; held not an event which deprives

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Hotchpot  
of prior  
"advances."

a power of attorney or authority to receive the income, *bond fide* and not as a contrivance to evade the clause, no forfeiture is caused (*d*).

(v.) *Hotchpot etc.*

**1500.** A hotchpot clause (*e*) directing past advances or other sums or property to be brought into account is construed so as to give effect to the whole will (*f*), and, as in the case of other divesting provisions (*g*), is in general construed strictly (*h*). Such a clause is not, of itself, a release from the personal liability, if any, of the donees to repay such advances (*i*). The presumptions, in the absence of special context (*k*), are that the advances are to be brought into account at the time fixed by the will for distribution (*l*);

the donee of the right to receive the income). If a doubt arises whether a document of alienation is intended to deal with income already accrued due or to deal with future income, the court favours the construction which prevents it causing a forfeiture (*Cox v. Bockett* (1865), 35 Beav. 48 (security for debt which was not proved to exceed the arrears due to chargor); *Durran v. Durran* (1905), 91 L. T. 819, 820, C. A.).

(*d*) *Avison v. Holmes, Penny v. Avison* (1861), 1 John. & H. 530; *Croft v. Lumley* (1858), 6 H. L. Cas. 672 (covenant in lease); *Re Swannell, Morrice v. Swannell* (1909), 101 L. T. 76; *Smith v. Perpetual Trustee Co., Ltd.* (1910), 11 Commonwealth Law Reports, 148. A power of attorney given for value, as a colourable assignment, or for the express purpose of passing the property to a creditor, may cause forfeiture (*Doe d. Mitchinson v. Carter* (1799), 8 Term Rep. 300; *Doe d. Norfolk (Duke) v. Hawke* (1802), 2 East, 481; *Wilkinson v. Wilkinson* (1818), 2 Swan. 515; *Oldham v. Oldham* (1866), 3 Eq. 404).

(*e*) As to the construction of hotchpot clauses relating to future advances and interests appointed under a power of appointment, in cases of settlements made by wills, see title SETTLEMENTS, Vol. XXV., p. 574. The object of such a clause is, in general, to produce equality as between the donees, taking into consideration past gifts; as to the effect of such clauses generally, see *Fox v. Fox* (1870), L. R. 11 Eq. 142 (effect as notional increase of testator's estate); *Smith v. Crabtree* (1877), 6 Ch. D. 591 (exclusion of set-off of debt against specific legacy); *Wheeler v. Humphreys*, [1898] A. C. 506.

(*f*) *Brocklehurst v. Flint* (1852), 16 Beav. 100; *Stares v. Penton* (1867), L. R. 4 Eq. 40, where the clause ceased to operate after one member of the class became entitled to payment; *Stewart v. Stewart* (1880), 15 Ch. D. 539. A hotchpot clause may fail as conditional on a circumstance which has not come to pass (*Nugee v. Chapman* (No. 1) (1860), 29 Beav. 288).

(*g*) As to divesting provisions generally, see pp. 822 *et seq.*, *ante*.

(*h*) Thus, even where the person directed to account has obtained a benefit, the clause is not extended to advances to persons other than those contemplated by the clause (*M'Clure v. Evans* (1861), 29 Beav. 422 (husband of legatee); and as to advances to a married woman legatee during coverture, under the law before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), see *Poole v. Poole* (1871), 7 Ch. App. 17, 19; *Silverside v. Silverside* (1858), 25 Beav. 340 (children of legatee); *Douglas v. Willes* (1849), 7 Hare, 318 (assignees of legatee, under assignment before advance); *Hewitt v. Jardine* (1872), L. R. 14 Eq. 58), unless it is necessarily implied (*White v. Turner* (1858), 25 Beav. 505 (settled fund subject to hotchpot); and see *Re Haygarth, Wickham v. Haygarth*, [1913] 2 Ch. 9).

(*i*) *Re Warde, Warde v. Ridgway* (1914), 136 L. T. Jo. 511; *Re Young, Young v. Young*, [1914] 1 Ch. 581, 976, C. A.

(*k*) See *Re Willoughby, Willoughby v. Decies*, [1911] 2 Ch. 581, 594, 600, 602, C. A. (direction securing equality of portions, held to refer only to capital).

(*l*) Whether the death of the testator (*Hilton v. Hilton* (1872), L. R. 14 Eq.



that the interests of the donees in capital are, if possible, to be then ascertained (*m*), without interest up to the death of the testator (*n*), or the time fixed for distribution (*o*) but with interest from that time to the date of actual distribution (*p*), generally at 4 per cent. per annum (*q*); and that the interests of the donees in intermediate income until actual distribution is in proportion to their shares in capital as so ascertained (*r*), whenever it is possible thus to calculate the total value of the testator's estate (*a*) and the donees' interests in capital; and that for this purpose interest on the advances is not to be brought into account except where it is necessary to do so (*b*), for example where the above calculation cannot be made (*c*) or the will otherwise directs (*d*). It appears, however, that each donee bears a share of any annuities charged on the estate, according to his aliquot share as determined by the will apart from hotchpot (*e*).

The word "advances" primarily means advances of money, whether by way of loan or by payment at the request of the

468; *Field v. Seward* (1877), 5 Ch. D. 538, 539; *Re Lambert, Middleton v. Moore*, [1897] 2 Ch. 169; *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889, or other later period (*Andrewes v. George* (1830), 3 Sim. 393, 394; *Re Rees, Rees v. George* (1881), 17 Ch. D. 701; *Re Dallmeyer, Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372, C. A.). The effect of a charge on the fund, such as a life annuity secured by a part of the fund being set apart to meet it, does not alter the period for distribution for this purpose (*Re Whiteford, Inglis v. Whiteford, supra*; *Re Willoughby, Willoughby v. Decies*, [1911] 2 Ch. 581, 597, C. A.).

(*m*) Provided that the total value of the testator's estate can be ascertained (*Re Craven, Watson v. Craven*, [1914] 1 Ch. 358, 370), the interests of the donees are possible of ascertainment by increasing, notionally, the value of the estate by the total amount of the advances, dividing the result into the aliquot shares directed by the will, and then debiting each donee with his own advances (*Re Hargreaves, Hargreaves v. Hargreaves* (1903), 88 L. T. 100, C. A.; *Re Gilbert, Gilbert v. Gilbert*, [1908] W. N. 63).

(*n*) *Re Willoughby, Willoughby v. Decies, supra*; and see *Re Whiteford, Inglis v. Whiteford, supra*.

(*o*) *Re Dallmeyer, Dallmeyer v. Dallmeyer, supra*; *Re Willoughby, Willoughby v. Decies, supra*.

(*p*) *Re Dallmeyer, Dallmeyer v. Dallmeyer, supra*.

(*q*) *Re Davy, Hollingsworth v. Davy*, [1908] 1 Ch. 61, C. A., approving *Stewart v. Stewart* (1880), 15 Ch. D. 539, and *Re Rees, Rees v. George, supra*, *Re Hargreaves, Hargreaves v. Hargreaves* (1902), 86 L. T. 43, in this respect, and disapproving in this respect *Re Lambert, Middleton v. Moore, supra*, and *Re Whiteford, Inglis v. Whiteford, supra*.

(*r*) *Re Hargreaves, Hargreaves v. Hargreaves, supra*; *Re Gilbert, Gilbert v. Gilbert, supra*; *Re Hart, Hart v. Arnold* (1912), 107 L. T. 757.

(*a*) *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358.

(*b*) *Re Hargreaves, Hargreaves v. Hargreaves, supra*, per ROMER, L.J., at p. 101.

(*c*) *Re Craven, Watson v. Craven, supra*, where the total value of the testator's estate was not ascertainable.

(*d*) *Re Poyser, Landon v. Poyser*, [1908] 1 Ch. 828, 838, where the context was held to be inconsistent with the calculation in the text, *supra*. In these cases interest must be brought into account, generally at 4 per cent.

(*e*) *Re Hargreaves, Hargreaves v. Hargreaves, supra*. In *Re Poyser, Landon v. Poyser, supra*, as reported in 99 L. T. 50, WARRINGTON, J., at p. 53, thought there must have been some slip in drawing up the order or otherwise with regard to this point: the rule is, however, regarded as "undoubted" in *Re Hargreaves, Hargreaves v. Hargreaves, supra*, per ROMER, L.J., at p. 101.



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legatee (*f*), and ordinarily does not include payments made after death, even in discharge of liabilities undertaken during life on behalf of the legatee (*g*), or other kinds of property given during life (*h*); but it may include all gifts during life, and advances made by the trustees or executors of the testator after his death are included where such advances are contemplated in the will (*i*).

If the clause relates to advances made by any person in his lifetime, without more, a gift by the will of that person (*k*) or an interest taken under his intestacy (*l*) is not within the clause.

Advances  
recited.

**1501.** In cases where the testator states by recital in his will the sum advanced, a mistake in the amount is immaterial if the hotchpot clause clearly directs hotchpot of the sum recited to have been advanced (*m*); but if the clause directs hotchpot of that sum or so much thereof as remains unpaid, the intention is inferred that only the amount actually owing is to be brought into account, and the mistake may be corrected (*n*).

The testator may refer to non-testamentary documents, even made subsequent to the date of his will; such documents may be referred to as evidence of the advances made (*o*), but cannot be used for the purpose of varying the terms of the will (*p*).

Conditions  
creating  
priority and  
charges.

**1502.** The presumptions as to the order of payment of debts (*q*)

(*f*) *Re Jaques, Hodgson v. Braisby*, [1903] 1 Ch. 267, 274, C. A. The expression may thus include sums which as debts have become statute-barred (*Poole v. Poole* (1871), 7 Ch. App. 17), or the balance of a debt after deducting the dividends received by the testator in the legatee's bankruptcy (*Auster v. Powell* (1863), 1 De G. J. & Sm. 99). Where, however, the clause directs hotchpot, not of the sums advanced, but of the debts owing, the effect of a composition or bankruptcy (*Golds v. Greenfield* (1854), 2 Sm. & G. 476) or of the Statutes of Limitation (*Re Jolly, Gathercole v. Norfolk*, [1900] 2 Ch. 616, C. A.) is to render the clause inoperative as to those sums.

(*g*) *Auster v. Powell*, *supra*; *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D. 683.

(*h*) As, for instance, a gift of leaseholds (*Douglas v. Willes* (1849), 7 Hare, 318; *Re Jaques, Hodgson v. Braisby*, *supra*). As to advances in distribution on intestacy, see, further, title DESCENT AND DISTRIBUTION, Vol. XI., pp. 20 *et seq.*

(*i*) *Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889, where the report of *Hilton v. Hilton* (1872), L. R. 14 Eq. 468, is corrected.

(*k*) *Cooper v. Cooper* (1873), 8 Ch. App. 813. The cases of *Folkes v. Western* (1804), 9 Ves. 456, *Leake v. Leake* (1805), 10 Ves. 477, *Onslow v. Michel* (1812), 18 Ves. 490, *Golding v. Haverfield* (1824), 13 Price, 593, and *Fazakerley v. Gillibrand* (1834), 6 Sim. 591, are subject to some criticism; see *Cooper v. Cooper*, *supra*, at pp. 825—828.

(*l*) *Twisden v. Twisden* (1804), 9 Ves. 413, 427.

(*m*) *Re Wood, Ward v. Wood* (1886), 32 Ch. D. 517.

(*n*) *Re Taylor's Estate, Tomlin v. Underhay* (1882), 22 Ch. D. 495, 500, C. A.; *Re Kelsey, Woolley v. Kelsey, Kelsey v. Kelsey*, [1905] 2 Ch. 465, 470, not following *Re Aird's Estate, Aird v. Quick* (1879), 12 Ch. D. 291.

(*o*) *Whateley v. Spooner* (1857), 3 K. & J. 542. In *Smith v. Conder* (1878), 9 Ch. D. 170, and *Re Coyte, Coyte v. Coyte* (1887), 56 L. T. 510, it was said that subsequent unattested letters or entries in a book could not be referred to, on account of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26); it appears that it is so, however, only for the purpose of admitting them to probate. In *Quihampton v. Going* (1876), 24 W. R. 917, the entries were made previously to the date of the will. See also *Kirk v. Eddowes* (1844), 3 Hare, 509, 518 (testator's declarations at time of advance, made after date of will).

(*p*) *Smith v. Conder*, *supra*; *Whateley v. Spooner*, *supra*.

(*q*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 285 *et seq.*

and legacies (*r*), and the construction of expressions giving legacies priority (*s*), or charging debts (*a*) or legacies (*b*) on real estate or the whole property of the testator as a mixed fund (*c*), or charging annuities on capital or income (*d*), are dealt with elsewhere.

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Gifts.

#### SECT. 8.—*Gifts by Implication.*

**1503.** In certain cases limitations and gifts may be implied. The doctrine of implication of limitations is based, not on a necessity, but on so strong a probability of intention to benefit the persons in question that a contrary intention cannot be supposed (*e*); and this probability of intention to benefit must arise out of the words of the will (*f*). It arises in general from the presumption against intestacy (*g*), guiding the inferences which are to be made on the words of the whole will where the testator has made no express provision (*h*), and there is a chasm to be filled up in the dispositions (*i*). An interest cannot be implied in favour of any person or persons for whom it cannot be said that the testator intended to provide (*k*). Implication in general.

**1504.** The term is applied to the inference of gifts to persons not mentioned in the will at all (*l*), or of gifts to persons mentioned in the Nature of implication.

(*r*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 275 *et seq.*  
(*s*) *Ibid.*, p. 275; and see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 494.

(*a*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 285 *et seq.*

(*b*) *Ibid.*, p. 290 *et seq.*

(*c*) *Ibid.*, pp. 287, 291.

(*d*) See title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 491, 492.

(*e*) *Wilkinson v. Adam* (1812), 1 Ves. & B. 422, *per* Lord ELDON, L.C., at p. 466; *Roe d. Bendale v. Summerset* (1770), 5 Burr. 2608, 2609; *Upton v. Ferrers (Lord)* (1801), 5 Ves. 801, 806; *R. v. Ringstead (Inhabitants)* (1829), 9 B. & C. 218, 224; *Crook v. Hill* (1871), 6 Ch. App. 311, *per* JAMES, L.J., at p. 315.

(*f*) *Scalé v. Rawlins*, [1892] A. C. 342, 343; *Parker v. Tootal* (1865), 11 H. L. Cas. 143, *per* Lord WESTBURY, L.C., at p. 161: "Implication may be founded on two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded on the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction."

(*g*) See p. 665, *ante*.

(*h*) "If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to create, the court is to supply the defect by implication and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion the testator has on the whole will sufficiently declared" (*Townes v. Wentworth* (1858), 11 Moo. P. C. C. 526, *per* Lord KINGS-  
DOWN, at p. 543, followed in *Sweeting v. Prideaux* (1876), 2 Ch. D. 413, 416; *Re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133; *Mellor v. Daintree* (1886), 33 Ch. D. 198, 206).

(*i*) *Watkins v. Frederick* (1865), 11 H. L. Cas. 358, 374. See, for example, *Saunders v. Lowe* (1775), 2 Wm. Bl. 1014 (gift to trustees during lives of four daughters and the survivor, upon trust for the survivor and the child or children of such daughters who should first die).

(*k*) *Monypenny v. Dering* (1852), 2 De G. M. & G. 145, 174; *Re Rising, Rising v. Rising*, [1904] 1 Ch. 533; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

(*l*) Thus, from a declared intention to provide for posthumous children,

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will but not as objects of the testator's bounty (*m*), or of the extension or modification of the interests of persons who are mentioned as objects of bounty, so as to give them interests which the words of the gifts to them in any sense, taken alone, would not create (*a*).

The term "implication" is not applied to the construction of gifts where the only question is the manner in which the words are to be read, and no interest is inferred which the words of the gift taken in some sense or other would not create (*b*), or even to cases where words are altered or supplied as being erroneously written or omitted, so long as the quantum of interest conferred on the donees under the will is unchanged (*c*); nor can there be any estate raised by implication in a gift of another man's property under the doctrine of election (*d*), or, in general, by a mere erroneous recital of a right which the testator considers to belong to the person claiming the implied estate (*e*).

Implication  
 of life estate  
 from gift over  
 on death.

**1505.** Thus, in certain cases a life estate has been held to be impliedly conferred on a person where the will contains a gift after the death of that person, and the court has from the context of the will inferred an intention on the part of the testator that that person should not be interfered with in the enjoyment of the property in the meantime (*f*). Except in such cases and in the cases

it may in some contexts be inferred that the testator intended to provide for children born in his lifetime after the date of his will (*White v. Barber* (1771), 5 Burr. 2703; S. C., Amb. 701; *Goodfellow v. Goodfellow* (1854), 18 Beav. 356, where the effect of a subsequent codicil was not relied on; *Re Lindsay* (1852), 5 Ir. Jur. 97); but this is not a conclusion to be drawn in all cases (*Doe d. Blakiston v. Hazlewood* (1851), 10 C. B. 544, where *White v. Barber*, *supra*, was emphatically dissented from; but see *Re Lindsay*, *supra*). As to the implication of gifts to children or issue from gifts in default of children or issue, see p. 849, *post*. Words of exclusion, as where certain of the next of kin are expressly declared not to take any benefit in the testator's estate, may be a sufficient gift to other persons, such as the rest of the next of kin; see note (*w*), p. 518, *ante*. A mere exclusion from benefits under the will is not sufficient, since such persons claim outside the will (*Re Holmes, Holmes v. Holmes* (1890), 62 L. T. 383).

(*m*) See the text, *infra*; as to the effect of recitals that a certain person is entitled to a certain interest, as constituting a gift to that person of that interest, or otherwise, see p. 683, *ante*.

(*a*) As from gifts on failure of issue; see p. 850, *post*.

(*b*) *Tunaley v. Roch* (1857), 3 Drew. 720, 725; *Crumpe v. Crumpe*, [1900] A. C. 127, 132, 133. Thus, a gift to A. upon trust for his children after his death, or to A. to be distributed or disposed of by his will in a certain manner, may give A. a life estate expressly and not by implication (*Ramsden v. Hassard* (1794), 3 Bro. C. C. 236; *Acheson v. Fair* (1843), 3 Dr. & War. 512, 527; *Greenwood v. Greenwood* (1877), 5 Ch. D. 954, C. A., *per* BAGGALLAY, L.J., at p. 958: "the words may be broken up into separate paragraphs . . . the trust for the children being a separate paragraph").

(*c*) As to alteration of words, see p. 675, *ante*; for examples where whole limitations were so inserted, see *Mellor v. Daintree* (1886), 33 Ch. D. 198; *Phillips v. Rail* (1906), 54 W. R. 517.

(*d*) *Dashwood v. Peyton* (1811), 18 Ves. 27, 48. As to election, see title EQUIT, Vol. XIII., pp. 116 *et seq.*

(*e*) *Dashwood v. Peyton*, *supra*, at pp. 41, 48, discussing *Tilly v. Tilly* (1743), cited *ibid.*, at p. 43, which is to the contrary. As to recitals showing an intended gift, see p. 683, *ante*.

(*f*) *Roe d. Bendall v. Summerset* (1770), 2 Wm. Bl. 692; *Bird v. Hunsdon* (1818), 3 Swan. 342; *Townley v. Bolton* (1832), 1 My. & K. 148; *Re Smith's*



mentioned below, a gift after the death of any person does not by implication confer on him any interest (*g*).

**1506.** A devise of real estate after the death of a named person to the presumptive heir-at-law of the testator, where the will contains no express disposition of the property during the whole of the life of the first-named person, impliedly gives the latter a life estate in the property (*h*). Similarly, a bequest of personal estate after the death of a named person to the person or persons presumptively, at the date of the will (*i*), entitled in case of intestacy of the testator, where the will contains no express disposition of the property during the life of the first-named person, gives the latter a life interest (*k*).

**1507.** The rule does not apply where the donee under the gift is a stranger and not the heir (*l*), or is only one of several co-heirs, in the case of a gift of realty (*m*), or is a stranger or not necessarily all the rest of the persons presumptively entitled under the Statutes of Distribution (*n*), in the case of a gift of personalty (*o*); nor where a donee (although the sole heir or next of kin respectively) has

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Implication.

Gift over on  
death to  
testator's  
successor on  
intestacy.

When not  
implied.

(*Betty*) *Trusts* (1865), L. R. 1 Eq. 79; *Re Blake's Trust* (1867), L. R. 3 Eq. 799; *Blackwell v. Bull* (1836), 1 Keen, 176; *Cockshott v. Cockshott* (1846), 2 Coll. 432; and see *Tunstall v. Trappes* (1829), 3 Sim. 286, 312; *Allin v. Crawshaw* (1851), 9 Hare 382 (cases of settlements, where no disposition made during life of wife surviving). These cases rest on the contexts of the instruments in question (see *Barnet v. Barnet* (1861), 29 Beav. 239, 244), and are regarded as special in character; see *Ralph v. Carrick* (1877), 5 Ch. D. 984, 995, affirmed on this point (1879), 11 Ch. D. 873, C. A.

(*g*) *Dyer v. Dyer* (1816), 1 Mer. 414; *Re Drakeley's Estate* (1854), 19 Beav. 395; *Swan v. Holmes* (1854), 19 Beav. 471; *Cranley v. Dixon* (1857), 23 Beav. 512 (annuities from annuity fund to be postponed to death of wife); *Barnet v. Barnet*, *supra* (to E. for life, with remainders over, but no division to be made till death of E. and her husband); *Isaacson v. Van Goor* (1873), 42 L. J. (CH.) 193; *Rownd v. Pickett* (1878), 47 L. J. (CH.) 631; *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A.

(*h*) *Anon.* (1498), Y. B. 13 Hen. 7, fo. 17, pl. 22; *Horton v. Horton* (1606), Cro. Jac. 74, 75; *London (City) v. Garway* (1706), 2 Vern. 571, *per* WRIGHT, Lord Keeper; *Dashwood v. Peyton* (1811), 18 Ves. 27, *per* ELDON, L.C., at pp. 40, 48; *Gardner v. Sheldon* (1674), Vaugh. 259, *per* Lord VAUGHAN, C.J., at p. 263; Tudor, L. C. Real Prop., 4th ed., p. 388; *Denn d. Franklin v. Trout* (1812), 15 East, 394; *Doe d. Driver v. Bowling* (1822), 5 B. & Ald. 722, 727.

(*i*) *Stevens v. Hale* (1862), 2 Drew. & Sm. 22, 28.

(*k*) *Blackwell v. Bull*, *supra*, at p. 182; *Stevens v. Hale*, *supra*, at p. 27. It appears that if the named person is one of the persons presumptively entitled on an intestacy, and the gift is to the rest of such persons, the implication arises (*Cock v. Cock* (1873), 21 W. R. 807 (to children after death of mother)).

(*l*) *Rayman v. Gold* (1592), Moore (K. B.), 635, adversely commented on in *Roe d. Bendall v. Summerset* (1770), 2 Wm. Bl. 692, as reported 5 Burr. 2608; *Gardner v. Sheldon*, *supra*, overruling Bro. Abr., tit. Devise, pl. 48; *Fawlner v. Fawlner* (1681), 1 Vern. 21, 22; *London (City) v. Garway*, *supra*; *Aspinall v. Petvin* (1824), 1 Sim. & St. 544; *R. v. Ringstead (Inhabitants)* (1829), 9 B. & C. 218, 224, 225; *Cranley v. Dixon* (1857), 23 Beav. 512, 516.

(*m*) *Barnet v. Barnet*, *supra*; *Re Willatts*, *Willatts v. Artley*, [1905] 1 Ch. 378, reversed on another point, [1905] 2 Ch. 135, C. A.

(*n*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*o*) *Re Springfield*, *Chamberlin v. Springfield*, [1894] 3 Ch. 603; *Stevens v. Hale*, *supra*, at p. 28 (contingent class); *Woodhouse v. Spurgeon* (1883), 49 L. T. 97; *Greene v. Flood* (1885), 15 L. R. Ir. 450. In *Cockshott v. Cockshott*, *supra*, the point was not raised.

## SECT. 8.

Gifts by  
Implication.

Cases of  
contrary  
intention  
taken from  
context or cir-  
cumstances.

Gift over after  
death of  
survivor of  
life tenants.

someone else taking with him (*p*). The title of the heir is not necessarily excluded by the fact that he is expressly given a partial interest (*q*).

There is no implied estate under this canon of construction where the person in whose favour the implication would arise takes an express beneficial estate in the property or any part of it (*r*); nor where there is an immediate residuary clause (*s*); nor where the property is subject to a covenant against alienation which is not infringed as the will stands but which would be infringed if the doctrine were applied (*t*). Where the heir expressly takes an estate during his life in certain property, and other property is given to strangers after the death of certain persons, including the heir, the last-mentioned persons take no estate by implication in the latter property (*a*).

**1508.** Where property is given to named persons for their respective lives, either generally or expressly as tenants in common, and is given over only after the death of the survivor, the survivors and survivor are held to take estates for life (*b*), subject to any contrary intention shown by the context (*c*).

(*p*) *Ralph v. Carrick* (1879), 11 Ch. D. 873, C. A., disapproving *Humphreys v. Humphreys* (1867), L. R. 4 Eq. 475, where the gift was to a contingent class living at the death of the wife.

(*q*) *Camfield v. Gilbert* (1803), 3 East, 516. In *Willis v. Lucas* (1718), 1 P. Wms. 472, PARKER, L.C., strongly inclined to the contrary view.

(*r*) *Higham v. Baker* (1583), Cro. Eliz. 15, where the wife took express estates (i.) beneficially in part of the first property, and (ii.) for payment of debts in the second property, in which alone she was held entitled to an estate by implication; *Boon v. Cornforth* (1751), 2 Ves. Sen. 277; *Aspinall v. Petvin* (1824), 1 Sim. & St. 544 (express estate in a moiety).

(*s*) *Stevens v. Hale* (1862), 2 Drew. & Sm. 22, 28.

(*t*) *Horton v. Horton* (1606), Cro. Jac. 74.

(*a*) *Dyer v. Dyer* (1816), 1 Mer. 414.

(*b*) The rule is founded either on the ground that the gift over modifies the prior words, showing that a joint tenancy was intended, or on the ground of implication in order to effectuate the intention (*Tuckerman v. Jefferies* (1708), 11 Mod. Rep. 108; *Armstrong v. Eldridge* (1791), 3 Bro. C. C. 214; *Doe d. Borwell v. Abey* (1813), 1 M. & S. 428; *Pearce v. Edmeades* (1838), 3 Y. & C. (EX.) 246; *Smyth v. Smyth* (1855), 3 W. R. 189; *Begley v. Cooke* (1856), 3 Drew. 662, 666; *Cranswick v. Pearson*, *Pearson v. Cranswick* (1862), 31 Beav. 624; *Re Richerson*, *Seales v. Heyhoe* (No. 2), [1893] 3 Ch. 146, 150; *Re Buller*, *Buller v. Giberne* (1896), 74 L. T. 406, 408; *Jennings v. Hanna*, [1904] 1 I. R. 540; *Re Telfair*, *Garrioch v. Barclay* (1902), 86 L. T. 496; *Re Hobson*, *Barwick v. Holt*, [1912] 1 Ch. 626, 631; *Re Tate*, *Williamson v. Gilpin*, [1914] 2 Ch. 182, where the rule was applied notwithstanding that there was a clause substituting issue for their deceased parents; as to gifts "at their death," see, further, *Malcolm v. Martin* (1790), 3 Bro. C. C. 50; *Alt v. Gregory* (1856), 8 De G. M. & G. 221, C. A.; *Townley v. Bolton* (1832), 1 My. & K. 148; compare *Moffat v. Burnie* (1853), 18 Beav. 211 ("with remainder to"). As to interests in annuities limited for the lives of two or more persons, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 487, 488. As to the distributive construction where different properties are given and the gift over is on the death of all, see p. 854, *post*; as to gifts of shares in the same property, see, especially, *Rownd v. Pickett* (1878), 47 L. J. (CH.) 631. There is no such implication from a gift, on the death of a tenant for life, to two persons, with a gift over if neither of them is then living (*Baxter v. Losh* (1851), 14 Beav. 612).

(*c*) *Hawkins v. Hamerton* (1848), 16 Sim. 410 (express gift in one con-



**1509.** Implication of an absolute interest often arises from a gift over, where after a prior gift (*d*) the property given is directed to go over in one of several specified particular events, and it is taken to have been intended that it never was to go over in any other event (*e*). Thus, an absolute interest subject to an executory gift over has been implied from a gift to the donee until he attains a certain age, followed by a gift over to other persons on his failure to attain that age (*f*). It is not implied in a case where the gift over and the period for which the property is held in suspense do not correspond (*g*). Although a gift to trustees for a person until he attains a certain age, without any gift over, does not always give that person the absolute interest, it may do so if there are other indications that such is the intention (*h*) and that the trust is only to point out the mode of taking (*i*).

**1510.** From the fact that some person is appointed trustee for another person simply, in circumstances such that the trustee takes an absolute interest or estate in fee simple, it is inferred that the second person is intended to have the like interest (*k*). The implication in favour of the objects of a power of appointment, where there is no gift to them or gift in default of appointment, is dealt with elsewhere (*l*).

**1511.** In cases where there is a bequest to a parent, either indefinitely or for life, followed by a bequest over if he die without having or leaving children, or by a like bequest over in terms of

SECT. 8.  
Gifts by  
Implication.

Implication of absolute interests from gifts over.

Implication of absolute interests by other means.

No implication in bequests, from gift over on failure of children.

tingency to survivors and their issue); *Doe d. Patrick v. Royle* (1849), 13 Q. B. 100 (after the death of either of them); *Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626 (provision for some of ultimate takers during lives of first takers).

(*d*) There is no such implication where there is no prior gift (*James v. Shannon* (1868), 2 I. R. Eq. 118).

(*e*) See *Re Harrison's Estate* (1870), 5 Ch. App. 408, *per* GIFFARD, L.J., at p. 411 (devises of land); *Re Thomson's Trusts* (1870), L. R. 11 Eq. 146.

(*f*) *Tomkins v. Tomkins* (1754), cited in *Goodtitle d. Hayward v. Whitby* (1757), 1 Burr. 228, 234; *Wainwright v. Wainwright* (1797), 3 Ves. 558; *Goodright d. Hoskins v. Hoskins* (1808), 9 East, 306; *Doe d. Wight v. Cundall* (1808), 9 East, 400; *Gardiner v. Stevens* (1860), 7 Jur. (N. S.) 307; *Cropton v. Davies* (1869), L. R. 4 C. P. 159; and see *Paylor v. Pegg* (1857), 24 Beav. 105, where the donee took as heir-at-law; *Crowder v. Clowes* (1794), 2 Ves. 449, explained in *Wainwright v. Wainwright*, *supra* (gifts in terms of marriage).

(*g*) *Savage v. Tyers* (1872), 7 Ch. App. 356, 364 (first gift a life estate); *FitzHenry v. Bonner* (1853), 2 Drew. 36 (first gift to wife for her and her son's support until he attained twenty-one).

(*h*) Such a gift was held to give the absolute interest in *Newland v. Shepherd* (1723), 2 P. Wms. 194, where no gift over occurred (disapproved in *Fonnereau v. Fonnereau* (1745), 3 Atk. 314, *per* Lord HARDWICKE, L.C., at p. 315), and *Peat v. Powell* (1760), Amb. 387, where on majority attained the trust was to cease; but see 1 Jarman on Wills, 6th ed., p. 678; *Cropton v. Davies* (1869), L. R. 4 C. P. 159, 167; *Wilks v. Williams* (1861), 2 John. & H. 125, *per* WOOD, V.-C., at p. 128. In *Re Hedley's Trusts* (1877), 25 W. R. 529, the gift was held not to pass the absolute interest; but see *In the Will of Vickers*, [1912] Victorian Law Reports, 385.

(*i*) *Hale v. Beck* (1764), 2 Eden, 229; *Atkinson v. Paice* (1781), 1 Bro. C. C. 91.

(*k*) *Peat v. Powell*, *supra*; *Davis v. Davis* (1830), 1 Russ. & M. 645; *Wilks v. Williams*, *supra*.

(*l*) See title POWERS, Vol. XXIII., pp. 70, 71.



SECT. 8.  
Gifts by  
Implication.

Implication  
in devises  
from gift  
over on failure  
of issue  
indefinitely.

issue, the court does not imply, on the parent's death leaving children, any gift to those children(*m*), unless there are other matters in the will raising an inference in their favour(*n*).

**1512.** An estate tail is inferred from a devise of real estate capable of being entailed(*o*) to a person and his heirs(*p*), or to a person without words of limitation or to him for life(*q*), where in each case this devise is followed by a devise over on his death without heirs of his body, or in any other words importing a general failure of his issue(*r*); in such cases the

(*m*) *Kinsella v. Caffrey* (1860), 11 I. Ch. R. 154, 160, approved in *Re Rawlins' Trusts* (1890), 45 Ch. D. 299, 304, 306, 308, C. A., affirmed, *sub nom. Scalé v. Rawlins*, [1892] A. C. 342; *Cooper v. Pitcher* (1845), 4 Hare, 485; *Ranelagh v. Ranelagh* (1849), 12 Beav. 200; *Lee v. Busk* (1852), 2 De G. M. & G. 810, C. A.; *Sparks v. Restall* (1857), 24 Beav. 218; *Neighbour v. Thurlow* (1860), 28 Beav. 33; *Re Hayton's Trusts* (1864), 4 New Rep. 55; *Dowling v. Dowling* (1866), 1 Ch. App. 612; *Seymour v. Kilbee* (1879), 3 L. R. Ir. 33; *Champ v. Champ* (1892), 30 L. R. Ir. 72, where the rule was applied to a deed. The contrary decision in *Ex parte Rogers* (1816), 2 Madd. 449, has been doubted; see *Lee v. Busk*, *supra*; *Neighbour v. Thurlow*, *supra*; *Webster v. Parr* (1858), 26 Beav. 236.

(*n*) *Kinsella v. Caffrey*, *supra*; *Wetherell v. Wetherell* (1862), 4 Giff. 51; *M'Clean v. Simpson* (1887), 19 L. R. Ir. 528.

(*o*) Where the property is not capable of being entailed, as in the case of copyholds in a manor in which there is no custom to entail, the effect is in general a fee simple conditional (*Doe d. Simpson v. Simpson* (1838), 4 Bing. (N. C.) 333, affirmed, *sub nom. Doe d. Blesard v. Simpson* (1842), 3 Man. & G. 929, Ex. Ch.).

(*p*) *Soulle v. Gerard* (1596), Cro. Eliz. 525; *Tuttesham v. Roberts* (1603), Cro. Jac. 22; *Brown v. Jervas* (1612), Cro. Jac. 290; *Webb v. Hearing* (1617), Cro. Jac. 415; *Chadock v. Cowley* (1625), Cro. Jac. 695; *Holmes v. Meynel* (1681), T. Raym. 452; *Brice v. Smith* (1737), Willes, 1; *Roe v. Scott* (1787), cited in *Fearnie, Contingent Remainders*, 9th ed., p. 473, note (s); *Denn d. Geering v. Shenton* (1776), 1 Cowp. 410; *Doe d. Ellis v. Ellis* (1808), 9 East, 382; *Tenny d. Agar v. Agar* (1810), 12 East, 253; *Dansey v. Griffiths* (1815), 4 M. & S. 61; *Doe d. Jones v. Owens* (1830), 1 B. & Ad. 318. To this extent, in cases where the prior limitation is to the grantee and his heirs, the rule seems to apply to limitations in deeds as well as wills (*Anon.* (1341), 35 Lib. Ass., pl. 14; *Y. B.* (1441) 19 Hen. 6, 74; and see *Bamfield v. Popham* (1702), 1 P. Wms. 54, 57, n.; *Fisher v. Wigg* (1700), 1 P. Wms. 14, 15; *Morgan v. Morgan* (1870), L. R. 10 Eq. 99, followed in *Arthur v. Walker*, [1897] 1 I. R. 68, where *Olivant v. Wright* (1878), 9 Ch. D. 646, is explained; and title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 245).

(*q*) *Sonday's Case* (1611), 9 Co. Rep. 127 b; *Langley v. Baldwin* (1707), 1 Eq. Cas. Abr. 185, pl. 29; *A.-G. v. Sutton* (1721), 1 P. Wms. 754; 3 Bro. Parl. Cas. 75, H. L.; *Allanson v. Clitheroe* (1747), 1 Ves. Sen. 24; *Stanley v. Lennard* (1758), 1 Eden, 87; *Daintry v. Daintry* (1794), 6 Term Rep. 307; *Wight v. Leigh* (1809), 15 Ves. 564; *Parr v. Swindels* (1828), 4 Russ. 283; *Briscoe v. Briscoe* (1830), Hayes, 34 (*quasi-entail in lease for lives*); *Macchell v. Wedding* (1836), 8 Sim. 4; *Simmons v. Simmons* (1836), 8 Sim. 22; *Franks v. Price* (1839), 3 Beav. 182; *Stankhouse v. Gaskell* (1852), 17 Jur. 157; *Key v. Key* (1853), 4 De G. M. & G. 73; *Butt v. Thomas* (1855), 11 Exch. 235; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141, where there was a contrary intention shown and the prior donee took for life only; *Re Waugh*, *Waugh v. Cripps*, [1903] 1 Ch. 744 (on death "without an heir"). In this case, where the prior limitation is expressly for life only, the rule of construction does not apply to deeds (*Seagood v. Hone* (1634), Cro. Car. 366, 367; *Lewis, Law of Perpetuity*, pp. 180, 181; 2 Preston, Estates, p. 484; *Olivant v. Wright*, *supra*, at p. 650; *Arthur v. Walker*, *supra*, at p. 76).

(*r*) The statutory presumption as to gifts on failure of issue must therefore be inapplicable or be excluded by the context; see p. 833, *ante*.

presumption arises that the issue were intended to be benefited (*s*), and the only way to give effect to that intention is to construe the first taker's interest as an estate tail. There may be express intermediate estates and interests limited to certain of the issue; in such cases the implied estate tail is in remainder after those estates (*t*). A devise over on the death of a prior donee without having or leaving a son may in the same way create an estate tail (*a*); and where between the interest of that donee and the devise over there is a devise to the eldest son of that donee, the effect may be to give an estate tail to that donee in remainder on the estate of his eldest son (*b*).

An estate tail may be implied from a devise on general failure of issue where no previous estate is limited to the person whose issue is spoken of and that person is the testator's heir (*c*), or where the testator's intention is shown to that effect in the context of the will, even where that person is not the heir (*d*).

**1513.** There is in general no enlargement of the estate of a person by a gift over on failure of his issue where the latter gift merely refers to issue taking under previous gifts (*e*), either by purchase or by descent of an estate tail, nor in general where the failure of issue is limited to a particular period (*f*).

SECT. 8.  
Gifts by  
Implication.

Other cases  
of implied  
estates tail.

Failure  
of issue  
restricted or  
construed as  
referring to  
previous gifts

(*s*) See the grounds of the rule stated in *Foster v. Hayes* (1855), 4 E. & B. 717, 734. The gift would also now be too remote under the rule against perpetuities, although the rule of construction was settled before that rule of law had been stated. The rule has also been said to be made "for the purpose of giving effect to the testator's general intention" (*Mathews v. Gardiner* (1853), 17 Beav. 254, *per* ROMILLY, M.R., at p. 257). As to general and particular intention, see pp. 672 *et seq.*, *ante*.

(*t*) *Doe d. Bean v. Halley* (1798), 8 Term Rep. 5; *Parr v. Swindels* (1828), 4 Russ. 283; *Doe d. Gallini v. Gallini* (1835), 3 Ad. & El. 340, Ex. Ch.; *Doe d. Burrin v. Charlton* (1840), 1 Man. & G. 429; *Key v. Key* (1853), 4 De G. M. & G. 73, 81, 82; *Parker v. Tootal* (1865), 11 H. L. Cas. 143, 169, 170; *Neville v. Thacker* (1888), 23 L. R. Ir. 344, 364.

(*a*) *Bifield's Case* (1600), cited in *King v. Melling* (1672), 1 Vent. 224, 231; *Milliner v. Robinson* (1600), Moore (K. B.), 682 (which appears to be the same case as *Bifield's Case*, *supra*; see *Beauchant v. Usticke*, [1880] W. N. 14, *per* JESSEL, M.R.); *Wyld v. Lewis* (1738), 1 Atk. 432; *Raggett v. Beatty* (1828), 5 Bing. 243; *Bacon v. Cosby* (1851), 4 De G. & Sm. 261; *Re Bird and Barnard's Contract* (1888), 59 L. T. 166.

(*b*) *Bell v. Bell* (1864), 15 I. Ch. R. 517; *Andrew v. Andrew* (1875), 1 Ch. D. 410, C. A.

(*c*) *Newton v. Barnardine* (1583), Moore (K. B.), 127; *Cosen's Case* (1587), Owen, 29; *Walter v. Drew* (1723), Com. 372; *Goodridge v. Goodridge* (1753), 7 Mod. Rep. 453; *Doe d. Cape v. Walker* (1840), 2 Man. & G. 113, *per* TINDAL, C.J., at pp. 127, 128, where the inference was excluded for want of any sufficient devise excluding the heir; Lewis, Law of Perpetuity, pp. 182, 183.

(*d*) *Parker v. Tootal*, *supra*, at pp. 143, 159, 169.

(*e*) For such cases see p. 834, *ante*; *Bamfield v. Popham* (1702), 1 P. Wms. 54; *Robinson v. Hunt* (1841), 4 Beav. 450; *Baker v. Tucker* (1850), 3 H. L. Cas. 106; *Hamilton v. West* (1846), 10 I. Eq. R. 75; *Bridger v. Ramsey* (1853), 10 Hare, 320; *Foster v. Hayes* (1855), 4 E. & B. 717, 734, Ex. Ch.; *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526; *Peyton v. Lambert* (1858), 8 I. C. R. 485, 504; *Sanders v. Ashford* (1860), 28 Beav. 609; *Smyth v. Power* (1876), 10 I. R. Eq. 192, 199; and see *Doe d. Harris v. Taylor* (1847), 10 Q. B. 718, dissenting from *Barnacle v. Nightingale* (1845), 14 Sim. 456, on the same will, but not followed in *Re Arnold's Estate* (1863), 33 Beav. 163.

(*f*) *Lethieullier v. Tracy* (1754), 3 Atk. 784; *Bradshaw v. Skilbeck* (1835),



## SECT. 8.

Gifts by  
Implication.Implication  
of cross-  
remainders.

**1514.** Cross-remainders between a number of donees (*g*) may be implied where they, or they and their issue in tail, take shares in the property and the testator intended that the whole estate should go over together and only on failure of all the donees taking under the previous gifts. This intention can only be carried out by not letting any part of the estate descend to the heir-at-law in the meantime and therefore by implying the cross-remainders (*h*). That the testator has himself provided for the mode in which the donees take after each other, such as by expressly giving them cross-remainders in particular events, is a circumstance to be weighed, as showing an intention negating implied remainders (*i*), but is not decisive upon it (*k*).

Thus, a gift to a number of persons as tenants in common in tail or to a number of persons for life with remainder as to each share to their respective issue in tail, with a gift over on failure of the issue generally of all the group of persons, may give rise to implied cross-remainders in tail (*l*), although a gift over on failure of the issue of each of them has no such effect, but takes

2 Bing. (N. C.) 182; *Jenkins v. Hughes* (1860), 8 H. L. Cas. 571, 593; but compare note (*n*), p. 853, *post*.

(*g*) The suggestion in some old cases (collected in Tudor, L. C. Real Prop., 4th ed., pp. 410, 411) that cross-remainders might be implied between two, but not so readily between three or more, is no longer tenable; see the cases cited in notes (*h*)—(*l*), *infra*. As to the different rule as to implication of cross-remainders in the case of settlements, see title SETTLEMENTS, Vol. XXV., p. 596.

(*h*) *Doe d. Gorges v. Webb* (1808), 1 Taunt. 234; *Atkinson v. Holtby* (1863), 10 H. L. Cas. 313; *Powell v. Howells* (1868), L. R. 3 Q. B. 654; *Hannaford v. Hannaford* (1871), L. R. 7 Q. B. 116; *Maden v. Taylor* (1876), 45 L. J. (CH.) 569, *per* JESSEL, M.R., at p. 573; *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658, 680; *Re Parker, Stephenson v. Parker*, [1901] 1 Ch. 408; as to implication in a similar way of life estates, see *Ashley v. Ashley* (1833), 6 Sim. 358 (to children of A. "as tenants in common . . . and for want of such issue" over); *Taaffe v. Conmee* (1862), 10 H. L. Cas. 64. The fact that the gift over is expressed to be "in remainder" does not defeat the implication (*Doe d. Burden v. Burville* (1801), 2 East, 47, n.); it was decided otherwise where the words were "in reversion" (*Pery v. White* (1778), 2 Cowp. 777); but the decision appears to have turned mainly on the supposition that the word "respectively" must be inserted in the previous limitations; compare *Doe d. Patrick v. Royle* (1849), 13 Q. B. 100, 114.

(*i*) *Clache's Case* (1574), Dyer, 330 b; *Rabbeth v. Squire* (No. 2) (1854), 19 Beav. 77; S. C., on appeal, 4 De G. J. & Sm. 406.

(*k*) *Atkinson v. Barton* (1861), 3 De G. F. & J. 339, C. A., *per* TURNER, L.J., at p. 349, reversed, *sub nom.* *Atkinson v. Holtby*, *supra*, but without relying on the application of *Clache's Case*, *supra*; *Vanderplank v. King* (1843), 3 Hare, 1, *per* WIGRAM, V.-C., at p. 20; *Re Clark's Trusts* (1863), 32 L. J. (CH.) 525, *per* WOOD, V.-C., at p. 528.

(*l*) *Anon.* (1573), Dyer, 303 b, pl. 49; *Anon.* (1590), 4 Leon. 14, pl. 51; *Holmes v. Meynel* (1681), T. Raym. 452; *Wright v. Cadogan* (*Earl*) (1764), 2 Eden, 239, 250, S. C., *sub nom.* *Wright v. Holford* (1774), 1 Cowp. 31; *Phipard v. Mansfield* (1778), 1 Doug. (K. B.) 53, n.; *Atherton v. Pye* (1794), 4 Term Rep. 710; *Watson v. Foxon* (1801), 2 East, 36; *Burnaby v. Griffin* (1796), 3 Ves. 266, 274; *Green v. Stephens* (1811), 17 Ves. 64; *Skey v. Barnes* (1816), 3 Mer. 335, *per* GRANT, M.R., at p. 343; *Doe d. Southouse v. Jenkins* (1829), 5 Bing. 469 ("issue males"); *Livesey v. Harding* (1830), 1 Russ. & M. 636; *Brooke v. Turner* (1835), 2 Bing. (N. C.) 422; *Taaffe v. Conmee*, *supra*; *Powell v. Howells*, *supra*, at p. 655; and see note (*h*), *supra*.



effect as to each share on failure of the issue concerned (*m*). The same inference in favour of cross-limitations has been made in a case where the property was subject as a whole to a gift over on failure of issue confined to the life of the ancestor (*n*).

SECT. 8.  
Gifts by  
Implication.

**1515.** Cross executory limitations (*o*) are similarly implied to fill up a hiatus in the limitations, which seems from the context to have been contrary to the intention of the testator (*p*); but they cannot be implied to divest an interest given by the will (*q*). Thus, in a gift to several persons contingently on satisfying a specified condition or description as tenants in common, with a gift over on all failing to satisfy that condition or description, cross-limitations are implied on the death of each of them failing to attain that description (*r*). According as the context requires, the persons between whom the cross-limitations are implied in such a case may

Implication  
of cross  
executory  
limitations.

(*m*) *Davenport v. Oldis* (1738), 1 Atk. 579; *Comber v. Hill* (1738), 2 Stra. 969; *Williams v. Browne* (1745), 2 Stra. 996 (in which cases a gift over in default of "such" issue was considered to mean such issue respectively: they are criticised in *Watson v. Foxon* (1801), 2 East, 36, and might now be decided otherwise); *Re Tharp's Estate* (1863), 1 De G. J. & Sm. 453, C. A.; *Dutton v. Crowdy* (1863), 33 Beav. 272; see also *Huntley's Case* (1574), Dyer, 326 a.

(*n*) *Maden v. Taylor* (1876), 45 L. J. (CH.) 569. It does not appear that the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 29, affects gifts of real estate on failure of issue in cases where, apart from that Act, cross-remainders would be implied, inasmuch as in all such cases there is a preceding gift in tail to the issue or the ancestor; see p. 834, *ante*.

(*o*) The rules are stated in a similar manner in *Re Hudson, Hudson v. Hudson* (1882), 20 Ch. D. 406, *per* KAY, J., at p. 415. As to implication of gifts for life to survivors, see p. 848, *ante*.

(*p*) *Re Ridge's Trusts* (1872), 7 Ch. App. 665 (gift of income to daughters for their respective lives, and of capital in corresponding shares to issue of daughters that should die leaving issue, equally, and if only one, to the issue of such one; but if all the daughters should die without issue, then the whole property was given over: held, cross-limitations should be implied between the daughters and their families); *Coates v. Hart, Borrett v. Hart* (1863), 3 De G. J. & Sm. 504, 516, 517 (issue were to take principal of share of which parent took income, and of the share of which the parent would have taken the income in case he or she had survived any other tenant for life dying without issue: from this provision and from a gift over, which was to take effect only in the event of all tenants for life dying without issue, it was inferred that surviving tenants for life were to take income of share to which any tenant for life dying without issue had been entitled). The case converse to *Coates v. Hart, Borrett v. Hart*, *supra*, namely, where there was an express gift of income and the question was whether a gift of capital could be implied to the issue of tenants for life leaving issue, was decided against implication in *Re Mears, Parker v. Mears*, [1914] 1 Ch. 694.

(*q*) "With regard to personal property, if a share once vests, though liable to be divested on a contingency, the question of reciprocal survivorship or succession can never arise" (*Skey v. Barnes* (1816), 3 Mer. 335, *per* GRANT, M.R., at p. 343; *Bromhead v. Hunt* (1821), 2 Jac. & W. 459; *Baxter v. Losh* (1851), 14 Beav. 612; *Beaver v. Nowell* (1858), 25 Beav. 551; *Re Clark's Trusts* (1863), 32 L. J. (CH.) 525).

(*r*) As, for instance, contingently on attaining twenty-one (*Scott v. Bargeman* (1722), 2 P. Wms. 68 (gift over on death before legacies payable); *Mackell v. Winter* (1797), 3 Ves. 236, 536), or twenty-one or marriage (*Re Clark's Trusts*, *supra*), or in the event of surviving a named person (*Graves v. Waters* (1847), 10 I. Eq. R. 234). *Scott v. Bargeman*, *supra*, is criticised in *Skey v. Barnes* (1816), 3 Mer. 335, on another ground by GRANT, M.R., who, however, said he considered the decision correct; and see *Vize v. Stoney* (1841), 1 Dr. & War. 337, 348.

SECT. 8.  
Gifts by  
Implication.

be the original stocks, or their respective issues taking under the will (s), or both (t).

Although the existence of other cross-limitations between different persons does not prevent the implication (a), yet where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property that circumstance is of weight in determining the intention (b).

Cases of  
distributive  
construction.

**1516.** Cases where particular property is given to one person for life, and after his death that property with other property is given to other persons, and the question is what happens to the latter property during that person's life, are to be distinguished from cases of implication. In these cases the question is rather whether the words alluding to the time of death are to be referred distributively to the property given and not to the time of the gift taking effect, in which event the ultimate donees will take an immediate estate in the property in question (c). Similarly, where several properties are given to various donees for life, and there is a general gift over of all the properties on the deaths of all the previously named donees, the gift over may take effect, on a distributive construction, as to each property on the death of the co-tenants for life of that property (d). If the words cannot be read distributively, the heir-at-law or persons entitled as on intestacy cannot be excluded (e).

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(s) *Atkinson v. Holtby* (1863), 10 H. L. Cas. 313, reversing S. C., *sub nom. Atkinson v. Barton* (1861), 3 De G. F. & J. 339, C. A.

(t) *Roe d. Wren v. Clayton* (1805), 6 East, 628; and see *Burnaby v. Griffin* (1797), 3 Ves. 266; *Horne v. Barton* (1815), 19 Ves. 398, where an express direction for cross-remainders was so construed.

(a) *Re Clark's Trusts* (1863), 32 L. J. (CH.), 525.

(b) *Rabbeth v. Squire* (1859), 4 De G. & J. 406, 413, 414, C. A.; compare *Sutton v. Sutton* (1892), 30 L. R. Ir. 251.

(c) *Doe d. Annandale v. Brazier* (1821), 5 B. & Ald. 64; *Cook v. Gerard* (1668), 1 Saund. 181; *Hutton v. Simpson* (1716), Gilb. 116, 120; *Simpson v. Hornsby* (1727), Prec. Ch. 439, 452; *Lill v. Lill* (1857), 23 Beav. 446, distinguished in *Jennings v. Hanna*, [1904] 1 I. R. 540; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192, 217.

(d) *Drew v. Killick* (1847), 1 De G. & Sm. 266; *Swan v. Holmes* (1854), 19 Beav. 471; *Sarel v. Sarel* (1856), 23 Beav. 87; *Re Motherwell, Keane v. Motherwell*, [1910] 1 I. R. 249.

(e) *R. v. Ringstead (Inhabitants)* (1829), 9 B. & C. 218, 233; *Attwater v. Attwater* (1853), 18 Beav. 330, 338; *Davenport v. Coltman* (1842), 12 Sim. 588; 9 M. & W. 481; *Stevens v. Pyle* (1860), 28 Beav. 388; as to cases regarding donees, see *Rownd v. Pickett* (1878), 47 L. J. (CH.) 631.

## WINDING UP.

See BANKRUPTCY AND INSOLVENCY; COMPANIES; PARTNERSHIP.

## WINDMILL.

*See* EASEMENTS AND PROFITS À PRENDRE.

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## WINDOWS.

*See* EASEMENTS AND PROFITS À PRENDRE ; METROPOLIS.

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## WINDWARD ISLANDS.

*See* DEPENDENCIES AND COLONIES.

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## WINES.

*See* INTOXICATING LIQUORS ; REVENUE.

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## WIRELESS TELEGRAPHY.

*See* TELEGRAPHS AND TELEPHONES.

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## WITNESSES.

*See* CRIMINAL LAW AND PROCEDURE; EVIDENCE.

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## WOMEN.

*See* CRIMINAL LAW AND PROCEDURE; FACTORIES AND SHOPS;  
HUSBAND AND WIFE; MASTER AND SERVANT; WORK AND  
LABOUR.

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## WOODS AND FORESTS.

*See* CONSTITUTIONAL LAW.

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# WORK AND LABOUR.

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## Part I.—Contracts for Work and Labour.

### SECT. 1.—*Nature of Contract.*

#### SUB-SECT. 1.—*In General.*

Valuable  
consideration.

**1517.** Work or labour (*a*), whether mental or manual (*b*), and however small in degree (*c*), is capable of supporting a contract as being valuable consideration (*d*).

Gratuitous  
undertaking.

An undertaking to do work for another gratuitously is not enforceable by action, for it is *nudum pactum* (*e*); but if such gratuitous work is actually entered upon, there is a duty in the person performing such work to exercise reasonable care, and though he is not liable for nonfeasance, an action lies against him for misfeasance (*f*).

(*a*) A well-defined class of contracts for work and labour is dealt with in title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 153 *et seq.* For various forms relating to building and engineering contracts, see Encyclopædia of Forms and Precedents, Vol. II., pp. 573 *et seq.*, Vol. XVI., pp. 99 *et seq.* As to the performance of work in connexion with a specified chattel, see title BAILMENT, Vol. I., pp. 556 *et seq.*

(*b*) *Grafton v. Armitage* (1845), 2 C. B. 336.

(*c*) *Sturlyn v. Albany* (1587), Cro. Eliz. 67; see *Wilkinson v. Oliveira* (1835), 1 Scott, 461.

(*d*) 1 Selwyn, Law of Nisi Prius, 13th ed., p. 55, cited with approval in *Laythoarp v. Bryant* (1836), 3 Scott, 238, *per* TINDAL, C.J., at p. 250, and in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., *per* BOWEN, L.J., at p. 271.

(*e*) See title CONTRACT, Vol. VII., p. 383. If the promise is by deed consideration is, of course, unnecessary; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 357.

(*f*) "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard* (1703), 2 Ld. Raym.

SUB-SECT. 2.—*As Distinguished from Kindred Contracts.*

## SECT. 1.

## Nature of Contract.

Distinguished from sale.

**1518.** Whether a contract is for work and labour or for goods sold and delivered depends on the terms of the individual contract (*g*); but when the substance of a contract is that a chattel shall be made and delivered when completed, it is one for the sale of goods rather than for work and labour (*h*). If the work and labour ends in nothing that can properly become the subject of a sale, the contract is for work and labour and not for goods sold and delivered (*i*); thus, where materials are used in the construction of a chattel or building, but not in the construction of a chattel to be delivered in a complete state, the contract is for work and labour (*k*). There may be a contract for the sale of goods when the value of the work and labour is far in excess of the value of the materials on which the work and labour is expended, for the true test for distinguishing the two contracts is not the value of the skill and labour as compared with the value of the materials (*l*). Where a person bestows his labour on materials supplied by himself the contract may still be one for work and labour rather than for the sale of goods (*m*).

**1519.** A person may agree to do work or labour in regard to a *Locatio operis faciendi*.

909 " (*Skelton v. London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631, *per* WILLES, J., at p. 636; and see *Elsee v. Gatward* (1793), 5 Term Rep. 143; *Harris v. Perry & Co.*, [1903] 2 K. B. 219, 226, C. A.; and see title NEGLIGENCE, Vol. XXI., p. 374).

(*g*) *Lee v. Griffin* (1861), 1 B. & S. 272, *per* CROMPTON, J., at p. 275, and *per* BLACKBURN, J., at p. 277.

(*h*) *Ibid.*, where it was held that a contract for the making of a set of artificial teeth for a particular person was a contract for the sale of goods; *Smith v. Surman* (1829), 9 B. & C. 561.

(*i*) *Lee v. Griffin*, *supra*, approving and distinguishing *Clay v. Yates* (1856), 1 H. & N. 73, where an agreement for the printing of an edition of a book was held to be a contract for work and labour.

(*k*) *Clark v. Bulmer* (1843), 11 M. & W. 243, where a contract to build a steam engine for pumping the defendant's colliery, to be completed and fixed for £2,500, the engine being forwarded in parts, and fixed piecemeal at the colliery, was held not to be one for the sale of goods, for the engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and there was no sale of it as an entire chattel; see *ibid.*, *per* PARKE, B., at pp. 249, 250, following *Cotterell v. Apsey* (1815), 6 Taunt. 322, and *Tripp v. Armitage* (1839), 4 M. & W. 687 (both cases deciding that materials used, or intended to be used, in the construction of a fixed building cannot be deemed goods sold and delivered); *Chanter v. Dickinson* (1843), 5 Man. & G. 253.

(*l*) *Lee v. Griffin*, *supra*, *per* CROMPTON, J., at p. 276, and *per* BLACKBURN, J., at p. 278; *Isaacs v. Hardy* (1884), Cab. & El. 287 (where it was held that a contract by an artist to paint a picture for an agreed price was a contract for the sale of a chattel). For various forms of contract relating to the sale of goods, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 575 *et seq.*, Vol. XVI., p. 558.

(*m*) *Grafton v. Armitage* (1845), 2 C. B. 336; *Lee v. Griffin*, *supra*; in both cases the proposition of BAYLEY, J., in *Atkinson v. Bell* (1828), 8 B. & C. 277, at pp. 283, 284, that where a person has bestowed work and labour on his own materials he cannot maintain an action for work and labour was rejected as a general principle; see, further, title SALE OF GOODS, Vol. XXV., p. 114. A claim for work and labour merely does not cover materials, which should be specifically claimed for (*Heath v. Freeland* (1836), 1 M. & W. 543; see also *Cotterell v. Apsey*, *supra*).



SECT. 1.  
Nature of  
Contract.

chattel or materials belonging to another party for a consideration (*n*). His bailment of the chattel or materials falls under the heading of *locatio operis faciendi* (*o*).

Contract of  
service.

**1520.** Where one party employs another to do work, the contract may be one of service, or one for work and labour. If the employer, during the progress of the work, not only directs the other as to the work to be done, but also controls him as to the manner of doing it, the contract is one of service (*p*). If the person doing the work exercises his employment independently of the person employing him, the contract is one for work and labour (*q*).

Agency.

**1521.** In the contract of agency there are limitations, both as to the nature of the employment and the manner of carrying out the purpose of the employment, which do not exist in the contract of work and labour. The work of an agent is essentially that of creating a legal relation between his employer, otherwise his principal, and some third party (*r*); while in executing the services indicated by the principal (*s*) the agent must keep within the scope of the authority delegated to him as defined by the agency contract (*t*), and to this extent he is subject to the principal's control during his employment. No such limitations exist in the case of a person employed under a contract of work and labour; his contract only requires him to produce a certain result (*a*).

SECT. 2.—*Parties to the Contract.*

SUB-SECT. 1.—*Individuals.*

In general.

**1522.** When one person is employed by another to do work, the person employed can *primâ facie* only look for his remuneration to the actual employer (*b*), unless it is known to both parties that the work is for the benefit of some third party and the employer is

(*n*) See, further, title BAILMENT, Vol. I., pp. 556—557. For various forms of contract relating to work, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 125 *et seq.*

(*o*) As to *locatio operis faciendi*, see title BAILMENT, Vol. I., pp. 556 *et seq.*

(*p*) *Sadler v. Henlock* (1855), 4 E. & B. 570; and see title MASTER AND SERVANT, Vol. XX., p. 65. A domestic servant cannot recover a month's wages in lieu of notice upon a claim for work and labour (*Fewings v. Tisdal* (1847), 1 Exch. 295). For forms of agreement relating to service by workmen, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 75, 82.

(*q*) *Clay v. Yates* (1856), 1 H. & N. 73, *per* POLLOCK, C.B., at p. 77: "It appears from Chitty on Pleading that a count for work, labour and materials may be resorted to by farriers, medical men and surveyors, and that such is the form in which they are in the habit of suing"; see title MASTER AND SERVANT, Vol. XX., pp. 67, 68.

(*r*) See title AGENCY, Vol. I., p. 148.

(*s*) "A principal has the right to direct what the agent has to do" (*R. v. Walker* (1858), 27 L. J. (M. C.) 207, C. C. R., *per* BRAMWELL, B., at p. 208).

(*t*) See title AGENCY, Vol. I., p. 148.

(*a*) See title MASTER AND SERVANT, Vol. XX., p. 66.

(*b*) *Schmaling v. Thomlinson* (1815), 6 Taunt. 147; *Cull v. Backhouse* (1793), 6 Taunt. 148, n.; *Meriel v. Wymondsold* (1661), Hard. 205.

acting simply as agent for such third party (*c*). Special considerations apply in the following cases, namely:—

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An infant is not liable upon a contract for work and labour done to enable him to carry on trade (*d*), although he may enforce such a contract (*e*); but he is held bound by a contract for services which can be classed as necessities, whether as employer (*f*) or employed (*g*).

Infants.

Necessary expenditure for the protection of the person and estate of a lunatic is recoverable from the estate of the lunatic as upon an implied contract (*h*).

Lunatics.

A person acting as the general agent of his principal in the conduct of a business has authority to pledge his principal's credit for such matters as belong to the usual conduct of the business (*i*).

General  
agents.

The master of a ship, as agent for the owners, has a general authority to act for them, and may bind his owners for such repairs to his ship as may be reasonably necessary (*j*).

Shipmasters.

Every partner in a firm is the agent of the firm for the purpose of its business, and anything done by a partner for the purpose of carrying on in the usual way business of the kind carried on by his firm is binding upon the firm, unless in any particular case the partner has in fact no authority to act for the firm, and the other

Partners.

(*c*) *Chidley v. Norris* (1862), 3 F. & F. 228. But the immediate employer is liable if he leads the person employed to believe that he, and not the third party, will pay for the work (*ibid.*); see, generally, title CONTRACT, Vol. VII., pp. 335 *et seq.*

(*d*) *Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, C. A. But "there is nothing illegal or improper in an infant's carrying on a trade" (*ibid.*, per JESSEL, M.R., at p. 121); see also *Lowe v. Griffith* (1835), 1 Scott, 458; *Turberville v. Whitehouse* (1823), 1 C. & P. 94.

(*e*) *Warwick v. Bruce* (1813), 2 M. & S. 205; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 67, 73.

(*f*) *Chapple v. Cooper* (1844), 13 M. & W. 252; and see, generally, title INFANTS AND CHILDREN, Vol. XVII., pp. 63—74. For a form of authority by father to supply goods to infant and guarantee of payment, see *Encyclopædia of Forms and Precedents*, Vol. VI., p. 555.

(*g*) *De Francesco v. Barnum* (1890), 45 Ch. D. 430, per FRY, L.J., at p. 439; *Roberts v. Gray*, [1913] 1 K. B. 520, C. A.

(*h*) *Williams v. Wentworth* (1842), 5 Beav. 325; and see *Stedman v. Hart* (1854), Kay, 607; *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94, C. A.; title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*

(*i*) *Summers v. Solomon* (1857), 7 E. & B. 879; and see title AGENCY, Vol. I., p. 201. For various forms of agreement relating to agency, see *Encyclopædia of Forms and Precedents*, Vol. I., pp. 282 *et seq.*

(*j*) *Webster v. Seekamp* (1821), 4 B. & Ald. 352, per ABBOTT, C.J., at p. 354 ("I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term 'necessary' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable"); *The Riga* (1872), L. R. 3 A. & E. 516; *The Orienta*, [1894] P. 271, 277; *Foong Tai & Co. v. Buchheister & Co.*, [1908] A. C. 458, 466, P. C. But the master of a ship is personally liable on an order given for repairs to be executed if it does not appear that credit was given to the shipowners (*Essery v. Cobb* (1832), 5 C. & P. 358); and see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 223, 246, 247. For a form of agreement for

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personal  
representa-  
tives.

party either knows that the partner has no authority or does not know or believe him to be a partner (*k*).

The legal personal representative of a deceased person can only be liable personally, and not in his representative capacity, upon a contract entered into by him for work and labour for the purpose of the estate; he cannot be charged in such capacity save in cases where the consideration for the promise of the executor or administrator was a contract or transaction with the deceased (*l*). If he carries on the trade or business of the deceased he is personally liable upon all contracts entered into by him for the purpose of such trade or business (*m*).

Married  
women.

A married woman cannot render herself personally liable upon a contract, but she can bind such of her separate estate as she is not restrained from anticipating (*n*). A wife residing with her husband has implied authority to pledge her husband's credit for such things as are necessary for the maintenance of their joint household in a manner reasonably appropriate to their position in life (*o*). The cost of necessities supplied to the wife who has been deserted by her husband or to the wife who has separated from her husband by mutual consent may be recovered from the husband unless the wife has adequate funds at her own disposal (*p*).

Bankrupts.

Subject to the trustee's power to intervene, an undischarged bankrupt may sue upon a contract for work and labour entered into subsequently to his adjudication in bankruptcy (*q*).

SUB-SECT. 2.—*Bodies Corporate and Unincorporate.*

Non-trading  
corporations.

**1523.** The contracts of non-trading corporations (*r*) must be made under the common seal of the corporation (*s*) if the corporation as a separate legal entity is to be bound. If not made under seal the contract is that of the individual members of the corporation who entered into it (*t*). To this general rule there are the following

employment of master of ship, see *Encyclopædia of Forms and Precedents*, Vol. XIV., p. 75.

(*k*) *Partnership Act*, 1890 (53 & 54 Vict. c. 39), s. 5; see title *PARTNERSHIP*, Vol. XXII., p. 24. For various forms of articles of partnership, see *Encyclopædia of Forms and Precedents*, Vol. IX., pp. 478 *et seq.*

(*l*) *Farhall v. Farhall* (1871), 7 Ch. App. 123, 127—129; *Corner v. Shew* (1838), 3 M. & W. 350; and see title *EXECUTORS AND ADMINISTRATORS*, Vol. XIV., p. 314; as to funeral expenses, see *ibid.*, p. 240.

(*m*) See *ibid.*, pp. 294, 295; and compare the liability of receivers, as to which see title *RECEIVERS*, Vol. XXIV., pp. 402—403.

(*n*) See title *HUSBAND AND WIFE*, Vol. XVI., p. 411.

(*o*) See *ibid.*, pp. 420 *et seq.*

(*p*) See *ibid.*, pp. 423 *et seq.*

(*q*) *Jameson v. Brick and Stone Co., Ltd.* (1878), 4 Q. B. D. 208, C. A.; and see title *BANKRUPTCY AND INSOLVENCY*, Vol. II., pp. 166, 167.

(*r*) As to the definition and classification of corporations, see title *CORPORATIONS*, Vol. VIII., pp. 301 *et seq.*

(*s*) *Ibid.*, p. 380. Requirements as to sealing for the purpose of a valid contract may be contained in the statute incorporating the company; see *Crampton v. Varna Rail. Co.* (1872), 7 Ch. App. 562.

(*t*) See title *CONTRACT*, Vol. VII., pp. 335 *et seq.*



exceptions, namely :—(1) convenience requires that the affixing of the common seal shall not be necessary for the doing of acts of frequent recurrence or of small significance (*a*) or of immediate necessity (*b*); and (2) where the purposes for which a corporation is created render it necessary that work should be done to effect such purposes, and orders for such work are given by the corporation, and the work is done and accepted by the corporation and the whole consideration for payment executed, the corporation cannot refuse payment on the ground that the contract was not under seal (*c*).

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Contract.

**1524.** Urban authorities within the Public Health Acts (*d*) may enter into such contracts as are necessary for carrying out their statutory obligations under the Public Health Act, 1875 (*e*).

Urban  
authorities.

**1525.** The Crown cannot be sued, nor can a servant of the Crown upon a contract made by him as agent for the Crown (*f*). Where, however, officials or bodies of officials, though agents of the Crown, are clothed with the power of contracting as principals, such officials or bodies may be sued upon contracts as for work and labour (*g*). Moreover, a public official who enters into a contract for work and labour which is no part of his public duty, and in regard to which he has no authority to pledge any other person's credit or the credit of any fund, is personally liable (*h*).

The Crown.

**1526.** Trading corporations (*i*) may enter into contracts which are binding although not under seal, including contracts for work and labour, if for the purposes for which they are incorporated (*k*).

Trading  
corporations.

**1527.** Associations which are unincorporated, and which therefore are not legal entities, cannot, as associations, become parties to

Unincor-  
porated  
associations.

(*a*) *Church v. Imperial Gas Light and Coke Co.* (1838), 6 Ad. & El. 846, 861.

(*b*) *Wells v. Kingston-upon-Hull* (1875), L. R. 10 C. P. 402.

(*c*) *Clarke v. Cuckfield Union Guardians* (1852), Bail Ct. Cas. 81, 93; *Lawford v. Billericay Rural Council*, [1903] 1 K. B. 772, C. A.; *Douglass v. Rhyl Urban Council*, [1913] 2 Ch. 407; see title CORPORATIONS, Vol. VIII., p. 384.

(*d*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*).

(*e*) 38 & 39 Vict. c. 55, s. 174. As to the statutory requirements with regard to such contracts, see p. 867, *post*; title LOCAL GOVERNMENT, Vol. XIX., pp. 268 *et seq.*

(*f*) *Unwin v. Wolseley* (1787), 1 Term Rep. 674; *Dunn v. Macdonald*, [1897] 1 Q. B. 555, C. A.; see titles CONSTITUTIONAL LAW, Vol. VI., pp. 412 *et seq.*; AGENCY, Vol. I., p. 221, note (*s*).

(*g*) *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781, where the Commissioners of Public Works were held liable to an action by a builder for breach of contract. The Secretary of State for War and the Postmaster-General are similarly liable, though a judgment against such an official can only be declaratory, as no execution can follow upon it against Crown property (*ibid.*, per PHILLIMORE, J., at p. 790).

(*h*) *Auty v. Hutchinson* (1848), 6 C. B. 266, where the clerk of a county court was held personally liable upon a contract for fitting up the court.

(*i*) As to trading corporations, see title CORPORATIONS, Vol. VIII., p. 304.

(*k*) *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 3 C. P. 463, affirmed (1869), L. R. 4 C. P. 617, Ex. Ch.; see title CORPORATIONS, Vol. VIII., p. 383. As to contracts entered into by companies incorporated under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), see title COMPANIES, Vol. V., pp. 297 *et seq.*, 710 *et seq.*

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contracts. The liability for work and labour done for the benefit of such associations is determined according to the rules of law in regard to agency (*l*). Thus, if work is done for the committee of a projected railway company (*m*), or for a mess (*n*), or for a volunteer corps (*o*), or for a public entertainment managed by a voluntary body of stewards or other persons (*p*), the parties who gave the orders for the work to be done are the persons liable upon the contract (*q*). Persons may, however, become liable on such contracts when they have given another person authority to make the contract, or when they have so conducted themselves as to lead the person employed to do the work to believe that they had given such authority, and that person acts in such belief (*r*).

SECT. 3.—*Formation of the Contract.*

Tender.

**1528.** A tender for work and labour, even though in the form of an "estimate" (*s*), amounts to an offer, which, when accepted, constitutes a binding contract (*t*).

When writing  
necessary.

**1529.** A contract for work and labour is not required to be in writing unless it is a contract which is not to be performed within the space of one year from the making thereof or for some other reason is within the Statute of Frauds (*u*). A person is not debarred from recovering for work and labour because the contract therefor is contained in a contract relating to an interest in land of which evidence cannot be given because it is not in writing (*w*); and an agreement for services, which is not to be performed within one

(*l*) See titles AGENCY, Vol. I., p. 145; CONTRACT, Vol. VII., pp. 339, 341.

(*m*) *Bailey v. Macaulay* (1849), 13 Q. B. 815; *Rennie v. Clarke* (1850), 5 Exch. 292. For a form of adoption by company of agreement made on its behalf before incorporation, see *Encyclopædia of Forms and Precedents*, Vol. IV., p. 204.

(*n*) *Hawke v. Cole* (1890), 62 L. T. 658.

(*o*) *Jones v. Hope* (1880), 3 T. L. R. 247, n., C. A.; see title CONTRACT, Vol. VII., p. 340.

(*p*) *Longman v. Hill* (Lord A.) (1891), 7 T. L. R. 639; *Pilot v. Craze* (1888), 4 T. L. R. 453; see title CONTRACT, Vol. VII., p. 340.

(*q*) See, generally, title CONTRACT, Vol. VII., pp. 339 *et seq.*; and as to clubs in particular, see titles CLUBS, Vol. IV., pp. 420 *et seq.*

(*r*) *Bailey v. Macaulay*, *supra*; *Pilot v. Craze*, *supra*, *per* FIELD, J. In *Brailhuaité v. Skofield* (1829), 9 B. & C. 401, it was held, on a claim for work done for a building society, that the defendant having been present at a meeting of the society and having joined in a resolution to have the work done, had authorised the employment of the workmen and was liable for the work done; see, further, titles CONTRACT, Vol. VII., p. 340; BUILDING SOCIETIES, Vol. III., p. 352.

(*s*) *Croshaw v. Pritchard and Renwick* (1899), 16 T. L. R. 45.

(*t*) See titles CONTRACT, Vol. VII., p. 346; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 167.

(*u*) 29 Car. 2, c. 3; see title CONTRACT, Vol. VII., pp. 361 *et seq.* As to the necessity of writing, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 171. For various forms of contract relating to work and conditions of service, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 44 *et seq.*, Vol. XVI., pp. 657 *et seq.*

(*w*) *Pulbrook v. Lawes* (1876), 1 Q. B. D. 284; *Savage v. Canning* (1867), 1 I. R. C. L. 434.

year and is not in writing, is admissible on a claim upon a *quantum meruit*, as evidence of the value of the services, if the rendering of the services can be proved otherwise (a).

**1530.** Contracts made with urban authorities within the Public Health Acts whereof the value or amount exceeds £50 must be in writing and sealed, and also must specify the work, materials, matters, or things to be furnished or done, the price to be paid, the time for performance, and some pecuniary penalty for non-performance (b).

**1531.** A written contract for work and labour of the value of £5 and upwards must be stamped as an agreement (c). A plaintiff may recover for work and labour done notwithstanding that the request of the defendant to do the work is contained in a collateral agreement which cannot be put in evidence; in such a case he recovers as upon a *quantum meruit* (d).

#### SECT. 4.—*Rights and Obligations under the Contract.*

##### SUB-SECT. 1.—*Remuneration.*

**1532.** Whether or not work and labour is to be remunerated, and if so to what extent, are questions which depend upon the contract under which the work was done (e), and the burden is on the party

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Contracts  
with urban  
authorities.

Stamps.

Implied  
contract.

(a) *Scarisbrick v. Parkinson* (1869), 20 L. T. 175.

(b) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174; see titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 172; LOCAL GOVERNMENT, Vol. XIX., pp. 268 *et seq.*; *Douglass v. Rhyl Urban Council*, [1913] 2 Ch. 407. For various forms of contracts under the Public Health Acts, see *Encyclopædia of Forms and Precedents*, Vol. X., pp. 289 *et seq.*

(c) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Agreement"; and see title CONTRACT, Vol. VII., pp. 538 *et seq.*; and as to stamp duties generally, see title REVENUE, Vol. XXIV., pp. 700 *et seq.* In this connexion a contract for work and labour must be distinguished from a contract for the hire of any labourer, artificer, manufacturer or menial servant, which is exempt from stamp duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Agreement"; *Hughes v. Budd* (1840), 8 Dowl. 478). Correspondence containing offers which have not yet become an agreement by acceptance is admissible as evidence although not stamped (*Hudspeth v. Yarnold* (1850), 9 C. B. 625).

(d) *Pulbrook v. Lawes* (1876), 1 Q. B. D. 284, *per* BLACKBURN, J., at p. 289: "An agreement which cannot be put in evidence, such as an unstamped document, may be looked at for a collateral purpose"; see title CONTRACT, Vol. VII., p. 530.

(e) *Reeve v. Reeve* (1858), 1 F. & F. 280, *per* MARTIN, B. ("An action cannot be maintained for remuneration merely because it may appear to be reasonable"); *Taylor v. Brewer* (1813), 1 M. & S. 290 (where it appeared that a committee contracted for work and labour by the plaintiff on the terms that "any service to be rendered by the plaintiff . . . to be taken into consideration and such remuneration made as shall be deemed right," and on a claim for work and labour it was held that it was for the committee to judge if any and what remuneration was due); *Moffatt v. Laurie* (1855), 15 C. B. 583 (where the plaintiff agreed to perform certain services as an architect gratuitously, but if the land was disposed of for building purposes he was to be appointed architect for remuneration, and the defendants having put it out of their power to dispose of the land for building purposes, the plaintiff was held not entitled to recover any remuneration, as the circumstances had not arisen on which payment depended); *Ex parte Metcalfe* (1856), 6 E. & B.



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claiming payment to show that he was to be paid (*f*). The mere acceptance of the benefit of another's work does not give rise to an implied promise to pay therefor, especially when there is no option in the person whom it is sought to make liable whether he will take the benefit of the work or not (*g*). Where a professional person is engaged there is an implication, which, however, may be rebutted, that he is to be paid for his services (*h*), as in the case of a conveyancer (*i*), or a registered medical practitioner (*k*), or an arbitrator (*l*). It is otherwise, however, in the case of a barrister (*m*), unless for work done otherwise than within the ordinary scope of the practice of a barrister (*n*), or in the case of a director of a company for services in that capacity (*o*), or in the case of work done by a public officer in his official capacity under a statutory obligation (*p*).

No remuneration can be claimed for work done voluntarily or without request, even though the defendant accepts the benefit thereof and even though a subsequent promise to pay is made (*q*). But a request is implied so as to render the work and labour good consideration when the plaintiff is compelled to do what the defendant was under a legal duty to do (*r*), or when the work was done for the benefit of the defendant's property and he adopts the benefit of it in such circumstances as give rise to an inference of a fresh contract to pay (*s*), or when the plaintiff voluntarily does what the

287; see also title MASTER AND SERVANT, Vol. XX., p. 83. For various forms of contracts relating to work and personal service, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 44 *et seq.*, Vol. XVI., pp. 657 *et seq.*

(*f*) *Hingeston v. Kelly* (1849), 18 L. J. (EX.) 360.

(*g*) *Sumpter v. Hedges*, [1898] 1 Q. B. 673, C. A.; *Wheeler v. Stratton* (1912), 105 L. T. 786.

(*h*) *Manson v. Baillie* (1855), 2 Macq. 80, H. L.; *Higgins v. Hopkins* (1848), 3 Exch. 163; *Hingeston v. Kelly*, *supra*; *Alexander v. Worman* (1860), 6 H. & N. 100, *per* BRAMWELL, B., at p. 108; and see title AGENCY, Vol. I., p. 194.

(*i*) *Poucher v. Norman* (1825), 3 B. & C. 744.

(*k*) See title MEDICINE AND PHARMACY, Vol. XX., p. 336.

(*l*) *Crampton and Holt v. Ridley & Co.* (1887), 20 Q. B. D. 48, *per* A. L. SMITH, J., at pp. 52, 54; and see title ARBITRATION, Vol. I., p. 473.

(*m*) See title BARRISTERS, Vol. II., pp. 392, 393; see also *Wells v. Wells* (1914), 30 T. L. R. 437.

(*n*) See title BARRISTERS, Vol. II., p. 393.

(*o*) See title COMPANIES, Vol. V., p. 217.

(*p*) *Jones v. Carmarthen Corporation* (1841), 8 M. & W. 605, where a town clerk claimed for work done in pursuance of the directions of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45) (Reform Act), and the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), but no statutory provision having been made for payment in respect of the work in question, it was held that the work must be done without extra payment.

(*q*) *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438; *Wennall v. Adney* (1802), 3 Bos. & P. 247, 249, n.; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A., *per* COTTON, L. J., at p. 241; and see title CONTRACT, Vol. VII., p. 388; nor does work voluntarily done for another create any lien on the property benefited (*Falcke v. Scottish Imperial Insurance Co.*, *supra*; and see title LIEN, Vol. XIX., p. 19). The doctrine of salvage in maritime law does not prevail elsewhere; see title SHIPPING AND NAVIGATION, Vol. XXVI., pp. 557 *et seq.*

(*r*) *Bradshaw v. Beard* (1862), 12 C. B. (N. S.) 344.

(*s*) *Falcke v. Scottish Imperial Insurance Co.*, *supra*.

defendant was legally bound to do and the latter afterwards promises to pay (*t*).

**1533.** When remuneration is due for work and labour done, but there is no special agreement as to the amount of such remuneration, the amount recoverable by the person employed is such a sum as is just and reasonable (*a*). If it can be established that a certain rate of remuneration is customary for a particular employment, that rate is accepted as just and reasonable (*b*).

**1534.** If the contract is to do an entire work for a specific sum, the person employed can recover nothing unless the work is completed (*c*), and unless, when completed, it is the work stipulated for in the contract (*d*). If the employer refuses to perform or renders himself incapable of performing his part of the contract, or if by his own act he prevents the full performance of the contract by the

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tions  
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Entire  
contract.

(*t*) *Wing v. Mill* (1817), 1 B. & Ald. 104; and compare *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A.

(*a*) *Jewry v. Busk* (1814), 5 Taunt. 302; *Brown v. Nairne* (1839), 9 C. & P. 204, *per* ALDERSON, B., at p. 205; see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 184.

(*b*) *Brown v. Nairne, supra* (where the question was the amount to which a broker was entitled, in the absence of a special agreement, and ALDERSON, B., said to the jury: "If you are satisfied that in point of fact it is the practice for brokers to be paid £5 per cent. on such a charter as this you will find for the plaintiff. . . . If you think there is no practice on the subject you will find what is the amount that you think a reasonable remuneration"); *Price v. Hong Kong Tea Co.* (1861), 2 F. & F. 466 (accountant's remuneration); *A.-G. v. Drapers' Co.* (1869), L. R. 9 Eq. 69; *Debenham v. King's College, Cambridge* (1884), Cab. & El. 438 (surveyors' charges); *Toulmin v. Millar* (1887), 58 L. T. 96, P. C.; *Thompson, Rippon & Co. v. Thomas* (1895), 11 T. L. R. 304, C. A.; *Curtis v. Nixon* (1871), 24 L. T. 706; *Kirk v. Evans* (1889), 6 T. L. R. 9 (commission of estate agents and house agents); see title AGENCY, Vol. I., pp. 193 *et seq.* As to commercial travellers, see *Salomon v. Brownfield* (1896), 12 T. L. R. 239; and title MASTER AND SERVANT, Vol. XX., p. 66, note (*o*), p. 96, note (*e*), p. 97, note (*p*). As to the remuneration of architects, engineers, and surveyors, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 306, 307, 312; and of auctioneers, title AUCTION AND AUCTIONEERS, Vol. I., pp. 515, 516. As to evidence of custom, see titles EVIDENCE, Vol. XIII., pp. 444, 445; CUSTOM AND USAGES, Vol. X., p. 217.

(*c*) *Cutter v. Powell* (1795), 6 Term Rep. 320; and compare *Taylor v. Laird* (1856), 1 H. & N. 266; *Bates v. Hudson* (1825), 6 Dow. & Ry. (K. B.) 3; *Sinclair v. Bowles* (1829), 9 B. & C. 92, *per* Lord TENTERDEN, C.J., at p. 94: "the contract between the parties was that the plaintiff should make the chandeliers perfect for £10. The plaintiff has not performed his part of the contract, and cannot, therefore, recover anything"; *Planché v. Colburn* (1831), 8 Bing. 14, *per* TINDAL, C.J., at p. 16; *Adlard v. Booth* (1835), 7 C. & P. 108; *Sumpter v. Hedges*, [1898] 1 Q. B. 673, C. A.; *Appleby v. Myers* (1867), L. R. 2 C. P. 651, 660; *Hulle v. Heightman* (1802), 2 East, 145. The contract of a solicitor, when he accepts a retainer in an action, is an entire contract to carry on the action till it is finished, and he cannot sue for costs before the action is at an end (*Underwood, Son, & Piper v. Lewis*, [1894] 2 Q. B. 306, C. A.; *Court v. Berlin*, [1897] 2 Q. B. 396, C. A.; and see title SOLICITORS, Vol. XXVI., pp. 737, 738). As to an entire contract which is unfinished at the death of the person contracting to do the work, see *Crosthwaite v. Gardner* (1852), 18 Q. B. 640; see titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 182; CONTRACT, Vol. VII., p. 522.

(*d*) *Forman & Co. Proprietary v. Ship "Liddesdale,"* [1900] A. C. 190, P. C.

SECT. 4.  
Rights and  
Obligations  
under the  
Contract.

Discharge by  
impossibility.

Time when  
payment due.

person employed, the latter may rescind the special contract and sue at once upon a *quantum meruit* as on an implied contract to pay reasonable remuneration for the work done (*e*); or he may sue upon the special contract, in which case he may recover damages in respect of the lost price of the work done and the profits which would have accrued had he been permitted to complete the work (*f*). Where a person sues upon a *quantum meruit*, he must be prepared to show what the work was worth (*g*).

A party entering into an absolute contract to do certain work must perform the contract or pay damages for failing therein, even though such performance has in fact subsequently become difficult or even impossible (*h*). Where, however, from the nature of the contract, it appears that the parties must have known that the fulfilment of the contract depended on the continued existence of some particular thing, inasmuch as that thing was the foundation of what was to be done, the contract is subject to an implied condition that performance shall be excused if, before breach, it becomes impossible by reason of the perishing of the thing without fault on either side (*a*). Similarly, if, in the case of a contract for an entire work, the premises or things on which the work is contracted to be done are destroyed without fault on either side, both parties are excused performance of the contract, but neither has any right of action thereon (*b*).

**1535.** Where one party has undertaken to work upon the materials of another, the right of action for the agreed remuneration

(*e*) *Planchè v. Colburn* (1831), 8 Bing. 14, where an author, having agreed to write a volume for £100, wrote part and was ready and willing to complete the work, but the defendants refused to publish it or to pay for the work on the ground that the periodical in which the work was to appear was a failure, and had been abandoned, and TINDAL, C.J. said, at p. 16: "I agree that, when a special contract is in existence and open, the plaintiff cannot sue upon a *quantum meruit*; part of the question here, therefore, is whether the contract did exist or not. It distinctly appeared that the work was finally abandoned, and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour"; *Appleby v. Myers* (1867), L. R. 2 C. P. 651, Ex. Ch.; *Forman & Co. Proprietary v. Ship "Liddesdale,"* [1900] A. C. 202, P. C.; *De Bernardy v. Harding* (1853), 8 Exch. 822; *Prickett v. Badger* (1856), 1 C. B. (N. S.) 296; *Inchbald v. Western Neilgherry Coffee, Tea and Cinchona Plantation Co., Ltd.* (1864), 17 C. B. (N. S.) 733; *Kewley v. Stokes* (1846), 2 Car. & Kir. 435; see, further, titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 179; CONTRACT, Vol. VII., p. 440; as to a servant suing upon a *quantum meruit*, see title MASTER AND SERVANT, Vol. XX., p. 111; as to the measure of damages, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 242.

(*f*) See title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 242.

(*g*) *Basten v. Butter* (1806), 7 East, 479; *Green v. Mules* (1861), 30 L. J. (C. P.) 343.

(*h*) *Paradine v. Jane* (1647), Aleyn, 26; see title CONTRACT, Vol. VII., pp. 385, 426.

(*a*) *Taylor v. Caldwell* (1863), 3 B. & S. 826; and see *Clark v. Glasgow Assurance Co.* (1854), 1 Macq. 668, H. L.; title CONTRACT, Vol. VII., pp. 426—432.

(*b*) *Appleby v. Myers*, *supra*; compare *Adlard v. Booth* (1835), 7 C. & P. 108; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 194.



arises when that party has done the work and given the employer a reasonable opportunity of ascertaining whether it has been properly done (*c*). Where a person is employed to do work, but not upon a contract to do an entire work, he is entitled at any stage to ask for payment in respect of the work already done and to refuse to proceed further until such payment is made (*d*). A custom may be proved by which the person employed is not entitled to payment for any part of his work until the whole is completed (*e*).

SECT. 4.  
Rights and  
Obligations  
under the  
Contract.

When it is understood between the employer and the person employed that services are to be rendered not for immediate reward, but in expectation of a legacy, the person employed cannot, even if the legacy fails, sue the legal personal representatives for remuneration (*f*).

Expectation  
of a legacy.

**1536.** No remuneration can be recovered for work which cannot be done save by violating an Act of Parliament (*g*) or public morality (*h*); but if the work is partly lawful and partly unlawful, and the person employed was at the time of undertaking the work ignorant of the illegality of part of it, he can recover remuneration for so much of the work as is lawful (*i*).

Unlawful  
work.

**1537.** If the employer has by fraud induced a person to enter into a contract to do work for a lump sum, the person employed may, on discovering the fraud, discontinue the work, repudiate the contract, and bring an action against the employer for deceit; if, however, he continues the work after knowledge of the fraud, he is bound by the terms of the contract (*k*).

Contract  
induced by  
fraud.

(*c*) *Hughes v. Lenny* (1839), 5 M. & W. 183; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 48.

(*d*) *Roberts v. Havelock* (1832), 3 B. & Ad. 404; *Menetone v. Athawes* (1764), 3 Burr. 1592; *The Tergeste*, [1903] P. 26 (cases of the general employment of a shipwright); see *Sinclair v. Bowles* (1829), 9 B. & C. 92; title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 185, 308. Remuneration may be payable only on a certificate of approval; as to what amounts to approval, see *De Vile v. Arnold* (1822), 10 Price, 21.

(*e*) *Gillett v. Mawman* (1808), 1 Taunt. 137 (printer); see title CUSTOM AND USAGES, Vol. X., p. 280.

(*f*) *Osborn v. Guy's Hospital (Governors)* (1726), 2 Stra. 728; *Le Sage v. Coussmaker* (1794), 1 Esp. 187; *Shallcross v. Wright* (1850), 12 Beav. 558; compare *Baxter v. Gray* (1842), 3 Man. & G. 771; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 306.

(*g*) *Bensley v. Bignold* (1822), 5 B. & Ald. 335; *Waugh v. Morris* (1873), L. R. 8 Q. B. 202; *Taylor v. Crowland Gas and Coke Co.* (1854), 10 Exch. 293; see also *Gallini v. Laborie* (1793), 5 Term Rep. 242; *D'Allax v. Jones* (1856), 2 Jur. (N. S.) 979; *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549 (agreement to do something to the injury of a third party); see, further, title CONTRACT, Vol. VII., p. 390.

(*h*) *Poplett v. Stockdale* (1825), Ry. & M. 337, where it was held that the printer of an immoral and libellous work could not maintain an action for his bill against the publishers who employed him.

(*i*) *Olay v. Yates* (1856), 1 H. & N. 73; *Lara v. General Apothecaries Co.* (1857), 26 L. J. (EX.) 225; as to illegal contracts, see, further, title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*k*) *Selway v. Fogg* (1839), 5 M. & W. 83; and see titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 169; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*

SECT. 4.  
Rights and  
Obligations  
under the  
Contract.

Lien.

Assignment  
of claim.

Claim for  
materials.

**1538.** A person who has done work upon a particular chattel has a lien upon such chattel in respect of his charges, but not for the cost of taking care of the chattel (*l*).

**1539.** An assignment by sale of a claim in respect of work and labour may be a good consideration to support the contract in an action for the purchase-money due on such sale (*m*).

A person contracting to supply materials as well as work and labour under an entire contract cannot claim payment for materials used in the work before the whole work is completed, so that if such materials are destroyed, as by fire, without fault on either side, there is no right of action in respect of the materials so supplied (*n*). If the contract is not an entire contract, and materials used thereon are destroyed before the completion of the work, the employer must pay for the materials already used in the destroyed work as well as for the labour already performed thereon (*o*).

If, on an entire contract, work is to be done upon materials supplied by the employer, and those materials are destroyed by accident and without default on the part of the person employed before the completion of the work, the employer cannot recover from the person employed for the loss of the materials (*p*).

SUB-SECT. 2.—*Duty of the Person Employed.*

Completion  
by due date.

**1540.** It is the duty of a person undertaking work to complete it in the time agreed upon, if any such agreement exists; but if he is prevented by the act of the employer from so completing the work he is not liable (*q*). When no time for completion is fixed there is an implied contract that the work will be completed within a reasonable time (*r*).

If by his own act the person employed incapacitates himself from performing his contract, he forthwith becomes liable for the breach thereof (*s*).

Due care and  
skill.

**1541.** When a professional man, as, for example, a medical

(*l*) See title LIEN, Vol. XIX., pp. 12 *et seq.*, 25, 26; and compare *ibid.*, pp. 3, 4. The person holding the lien has, in general, no right to sell the property (*ibid.*, p. 25).

(*m*) *McGreevy v. Russell* (1887), 56 L. T. 501, P. C.; and see title CHOSER IN ACTION, Vol. IV., p. 359.

(*n*) *Appleby v. Myers* (1867), L. R. 2 C. P. 651. As to the meaning of "entire contract," see p. 869, *ante*.

(*o*) *Menetone v. Athawes* (1764), 3 Burr. 1592; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 260.

(*p*) *Gillett v. Mawman* (1808), 1 Taunt. 137; and compare *Adlard v. Booth* (1835), 7 C. & P. 108.

(*q*) *Holme v. Guppy* (1838), 3 M. & W. 387.

(*r*) See titles CONTRACT, Vol. VII., pp. 412 *et seq.*; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 189. For the measure of damages in the case of non-completion of work in the proper time, see titles DAMAGES, Vol. X., pp. 338, 339; PRESS AND PRINTING, Vol. XXIII., p. 217.

(*s*) *Lovelock v. Franklyn* (1846), 8 Q. B. 371; *Short v. Stone* (1846), 3 Dow. & L. 580; *Caines v. Smith* (1846), 3 Dow. & L. 462; see title CONTRACT, Vol. VII., p. 438.

practitioner (*t*), solicitor (*a*), surveyor (*b*), or patent agent (*c*), undertakes work in the exercise of his profession, he impliedly undertakes to exercise a reasonable amount of care and a reasonably competent degree of skill and knowledge (*d*). In accordance with the same principle, a workman or tradesman impliedly warrants that he possesses and will exercise in the task which he undertakes reasonable skill and competency (*e*).

For failure to exercise reasonable care and skill resulting in damage to the employer an action for negligence lies (*f*); and, in any case, if the work is so negligently done as to be useless, no remuneration in respect thereof is recoverable (*g*).

**1542.** When one person contracts with another to do work the result of which is to be applied to a particular use or purpose, the person employed impliedly contracts that his work shall be reasonably fit for such use or purpose (*h*).

**1543.** Where the work to be performed is of such a nature that personal performance is not of the essence of the contract, it may be done by the promisor himself or by his nominee (*i*).

SECT. 4.  
Rights and  
Obligations  
under the  
Contract.

Warranty of  
fitness.

Performance  
by deputy.

(*t*) *Rich v. Pierpont* (1862), 3 F. & F. 35; *Lanphier v. Phipos* (1838), 8 C. & P. 475; *Seare v. Prentice* (1807), 8 East, 348; *Slater v. Baker* (1767), 2 Wils. 359; and see title MEDICINE AND PHARMACY, Vol. XX., pp. 330 *et seq.*

(*a*) *Bracey v. Carter* (1840), 12 Ad. & El. 373; *Shaw v. Arden* (1832), 9 Bing. 287; see also *Leakey v. Lucas* (1863), 14 C. B. (N. S.) 491, Ex. Ch.; and title SOLICITORS, Vol. XXVI., p. 753.

(*b*) *Money Penny v. Hartland* (1824), 1 C. & P. 352; *Jenkins v. Betham* (1855), 15 C. B. 168; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 311.

(*c*) *Lee v. Walker* (1872), L. R. 7 C. P. 121.

(*d*) *Lanphier v. Phipos*, *supra*, per TINDAL, C.J., at p. 479: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill . . . but he undertakes to bring a fair, reasonable and competent degree of skill."

(*e*) *Norris v. Staps* (1617), Hob. 210; *Seare v. Prentice* (1807), 8 East, 348, per Lord ELLENBOROUGH, C.J., at p. 352 ("the farrier who undertakes to cure my horse must have common skill at least in his business, and that is implied in his undertaking"); *Pearce v. Tucker* (1862), 3 F. & F. 136; *Harmer v. Cornelius* (1858), 5 C. B. (N. S.) 236; see, further, title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 189, 196.

(*f*) *Seare v. Prentice*, *supra*; *Lee v. Walker*, *supra*; *Combe v. Simmonds* (1853), 1 W. R. 289; see titles NEGLIGENCE, Vol. XXI., p. 367; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 295.

(*g*) *Bracey v. Carter*, *supra*; *Shaw v. Arden*, *supra*; *Money Penny v. Hartland*, *supra*; *Pardow v. Webb* (1842), Car. & M. 531; *Hamond v. Holiday* (1824), 1 C. & P. 384; *Townsend v. Neale* (1809), 2 Camp. 190; compare title MASTER AND SERVANT, Vol. XX., p. 100.

(*h*) *Francis v. Cockrell* (1870), L. R. 5 Q. B. 501, Ex. Ch.; *Grote v. Chester and Holyhead Rail. Co.* (1848), 2 Exch. 251; *Basten v. Butler* (1806), 7 East, 479; see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 188.

(*i*) *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149; and see *Falle v. Le Sueur and Le Huquet* (1859), 12 Moo. P. C. C. 501; and title CONTRACT, Vol. VII., p. 410.



SECT. 4.  
Rights and  
Obligations  
under the  
Contract.

Personal  
services.

**1544.** A contract for services which can only be rendered by the person employed, and not by his deputy, servant or agent, is deemed to be subject to the implied condition that the person employed shall be physically capable of carrying out the contract. In such a case, accordingly, illness, and consequent incapacity to fulfil the contract, is a lawful excuse for non-performance of the work or services contracted to be done or rendered (*a*). The parties may, however, expressly exclude this implied condition in their contract (*b*).

If the person contracting to perform personal services should die, his legal personal representatives are not liable in damages for non-performance of the contract (*c*).

Specific performance of an agreement for personal work or services will not be decreed (*d*).

## Part II.—Statutory Determination of Minimum Rates of Wages.

### SECT. 1.—*Coal Mines.*

Duty to pay  
minimum  
rate.

**1545.** It is an implied term (*e*) of every contract for the employment of a workman (*f*) underground in a coal mine (*g*) that the employer shall pay to that workman wages at not less than the minimum rate settled by the joint district boards (*h*) appointed for that purpose in the various districts concerned (*i*) and applicable to

(*a*) *Hall v. Wright* (1859), E. B. & E. 765, Ex. Ch., *per* POLLOCK, C.B., at p. 794; *Robinson v. Davison* (1871), L. R. 6 Exch. 269; *Poussard v. Spiers* (1876), 1 Q. B. D. 410, *per* BLACKBURN, J., at p. 414; see title CONTRACT, Vol. VII., p. 431. The person employed is "discharged of his service, not in breach of the contract, but by implied condition" (*Farrow v. Wilson* (1869), L. R. 4 C. P. 744, *per* WILLES J., at p. 746). For various forms of contract relating to personal service, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 44 *et seq.*

(*b*) *Robinson v. Davison*, *supra*, *per* BRAMWELL, B., at pp. 277, 278.

(*c*) *Hall v. Wright*, *supra*, *per* POLLOCK, C.B., at pp. 793, 794, approved in *Robinson v. Davison*, *supra*, *per* KELLY, C.B., at p. 274; *Stubbs v. Holywell Rail. Co.* (1867), L. R. 2 Exch. 311; see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 305; MASTER AND SERVANT, Vol. XX., p. 94.

(*d*) *White v. Boby* (1877), 37 L. T. 652, C. A.; see titles INJUNCTION, Vol. XVII., pp. 242, 246; SPECIFIC PERFORMANCE, Vol. XXVII., p. 9.

(*e*) As to the meaning of this expression, see title CONTRACT, Vol. VII., p. 463.

(*f*) "Workman" as here used does not include a person employed underground occasionally or casually only, or solely in surveying or measuring, or as a mechanic, or as a manager or under-manager or other official of the mine whose position in the mine is recognised by the joint district board as having a position different from that of a workman (Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 5 (1)).

(*g*) The expression "coal mine" includes a mine of stratified ironstone (*ibid.*).

(*h*) As to these boards, see pp. 876, 877, *post*.

(*i*) See note (*l*), p. 876, *post*.

that workman (*k*). Any agreement for the payment of wages is void in so far as it contravenes this provision (*l*).

**1546.** In settling any minimum rate of wages regard must be had to the average daily rate of wages paid to the workmen of the class for which the minimum rate is to be settled (*m*); but the operation of any agreement entered into or custom existing before the 29th March, 1912 (*n*), for the payment of wages at a rate higher than such minimum is not prejudiced (*o*).

**1547.** District rules must be made by the various joint district boards (*p*) laying down conditions for their respective districts regarding the exclusion from the right to wages at the minimum rate of aged and infirm workmen and workmen partially disabled by illness or accident, and with respect to the regularity and efficiency of the work to be performed by the workmen (*q*), and the time for which a workman is to be paid in the event of any interruption of work due to an emergency (*r*). The rules must also

SECT. 1.

Coal  
Mines.Basis of  
minimum  
rate.

District rules.

(*k*) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 1 (1). The Act is to continue in force for three years from the date of its passing (29th March, 1912) and so much longer as Parliament may determine (*ibid.*, s. 6 (2)). The minimum rate of wages is payable from the date of the passing of the Act, although such rate was not then settled, and any sum found due by reason of this provision when the minimum rate is ultimately settled is recoverable by the workman from the employer (*ibid.*, s. 1 (3)). The Act creates no privity of contract where none existed previously, and so *ibid.*, s. 1, imposes no liability on the colliery owners to pay the wages of the "fillers" (*Richards v. Wrexham and Acton Collieries, Ltd.*, *Davies v. Same*, [1914] 2 K. B. 497, C. A.). As to conditions of labour in other respects, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 594 *et seq.*

(*l*) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 1 (1).

(*m*) It appears that "the average daily rate of wages" refers to wage rates paid to day men and not to piecework earnings.

(*n*) This is the date of the passing of the Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2). For an example of such an agreement relating to work in abnormal places in a mine, see *Jones v. Phoenix Colliery Co.* (1912), 28 T. L. R. 374.

(*o*) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 2 (1). An agreement, made before 1912, that in certain circumstances workmen should receive a full day's wage, though not working for a full day, is not superseded by a rule made under the Act providing that in similar circumstances they shall be paid a portion of the minimum rate proportionate to the time actually occupied in working (*Mackinnon v. North's Navigation Collieries* (1889), *Ltd.* (1913), 29 T. L. R. 615).

(*p*) See pp. 876, 877, *post*.

(*q*) In *Davies v. Glamorgan Coal Co.*, [1914] 1 K. B. 674, C. A., a district rule providing that "in ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks" was held to be *ultra vires* as not being within the power of the district board. A rule providing that "if at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate then . . . he shall forthwith give notice thereof to the official in charge of the district" on pain of forfeiture of his right to the minimum rate, lays down a condition with respect to regularity and efficiency of work and is within the powers conferred by the Act (*ibid.*); compare *Randle v. Clay Cross Co., Ltd.*, [1913] 3 K. B. 795.

(*r*) See *Mackinnon v. North's Navigation Collieries* (1889), *Ltd.*, *supra*.

SECT. 1.  
Coal  
Mines.

make provision that a workman is to forfeit the right to wages at the minimum rate if he does not comply with conditions as to the regularity and efficiency of work, except in cases where such non-compliance is due to some cause over which he has no control. Provision must similarly be made with respect to the persons by whom and the mode in which any question is to be decided as to whether any workman is a workman to whom the minimum rate of wages applies, or whether any workman has complied with the conditions laid down in the district rules, or whether, in case of non-compliance, he has forfeited his right to wages at the minimum rate, and for a certificate being given of any such decision(s). If it is certified that a workman is excluded under the district rules from the foregoing provisions for a minimum rate, or that he has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions of the district rules as to the regularity and efficiency of his work, he cannot claim wages at the prescribed minimum rate(t).

Joint district  
boards.

**1548.** The joint district boards by which the minimum rates of wages and district rules are settled are bodies recognised in each of the prescribed districts(u) by the Board of Trade as fairly and adequately representing the workmen in coal mines in their respective districts and the employers of such workmen(w). An independent chairman is chosen by the joint district board itself, or in default by the Board of Trade(a). The Board of Trade may require any body, as a condition of its recognition as a joint district board, to adopt a rule of procedure providing for equality of voting power between representatives of workmen

(s) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 1 (1), (2). In case of a dispute as to the amount due to miners when employers claim to deduct sums for inefficiency of work the county court has no jurisdiction, and the amount due must be settled by the joint district board (*Fairbanks v. Florence Coal and Iron Co., Ltd.*, [1914] 2 K. B. 461).

(t) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 1 (1).

(u) *Ibid.*, s. 2 (1), Schedule. The districts for which joint district boards have been respectively established are the following:—Northumberland, Durham, Cumberland, Lancashire and Cheshire, South Yorkshire, West Yorkshire, Cleveland, Derbyshire (excluding South Derbyshire), South Derbyshire, Nottinghamshire, Leicestershire, Shropshire, North Staffordshire, South Stafford (excluding Cannock Chase) and East Worcestershire, Cannock Chase, Warwickshire, Forest of Dean, Bristol, Somerset, North Wales, South Wales (including Monmouth), and the mainland of Scotland. Where a mine in one of these districts has for industrial purposes been customarily dealt with in the same manner as a mine in an adjoining district, that mine is treated as situate in the latter district if the joint district boards of the two districts so agree (*ibid.*, Schedule).

(w) *Ibid.*, s. 2 (2). Such body may be a body existing at the time of the passing of the Act, or may be constituted for the purposes of the Act (*ibid.*). In default of the recognition of a joint district board, the Board of Trade may appoint a person to act in place thereof; and if either employers or workmen fail to appoint representatives on a joint district board, the other party being willing to appoint their representatives, the Board of Trade may, instead of appointing a person to act in place of a board, appoint such representatives of the party in default as it thinks fit (*ibid.*, s. 4 (1)).

(a) *Ibid.*, s. 2 (2). The chairman may settle the first minimum rate of wages and district rules or vary rates or rules in default of the joint district board (*ibid.*, s. 4 (2)). The office of chairman may be committed to three persons acting by a majority (*ibid.*, s. 5 (2)).



and employers respectively and giving the chairman a casting vote (*b*).

SECT. 1.

Coal  
Mines.

Application  
of minimum  
rate.

**1549.** The general district minimum rates of wages settled by a joint district board apply to underground workmen in coal mines throughout the whole of the district for which the board is appointed (*c*); but if it is shown that any general district minimum rate is, owing to special circumstances, not applicable in the case of any group or class of coal mines within the district, the joint district board may settle a special minimum rate for that group or class of mines, which special rate may be higher or lower than the general district rate (*d*). Also the joint district board may subdivide its district into two or more parts, treating each part as a district for the purpose of the minimum rate (*e*).

**1550.** Similarly the general district rules settled by a joint district board apply throughout its district, unless special district rules, made in circumstances similar to those justifying special minimum rates, which special rules may be either more or less stringent than the general district rules, are applied to any group or class of coal mines (*f*); but joint district boards may agree to combine their districts and appoint a combined district committee for the purpose of settling district rules (*g*).

Application  
of rules.

**1551.** Any minimum rate of wages or district rules may be varied by a joint district board, at any time by agreement between the representatives of workmen and employers respectively, and after a year from the settlement or variation of the rate or rules (three months' notice after the expiration of the year being given) on the application of any workmen or employers who appear to the board to represent any considerable body of opinion amongst the workmen or the employers concerned (*h*).

Variation of  
rates or rules.

(*b*) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 2 (2).

(*c*) *Ibid.*, s. 2 (3).

(*d*) *Ibid.*, s. 2 (4). The joint district board may also declare the general district rate not to be applicable pending the decision of the question whether a special district rate ought to be settled, and the general rate does not then apply (*ibid.*).

(*e*) *Ibid.*, s. 2 (5). In *Lofthouse Colliery Co. v. Ogden* (1912), 107 L. T. 827, on a joint district board being unable to agree as to the line of division by which the district should be divided into two parts, the chairman had fixed a certain line of railway as the dividing line, and by an award had provided that all "pits" to be east of the line should form one part of the district and all "pits" to the west of the line should form the other part, the minimum rate of wage fixed for one part being different from that fixed for the other part; the owners of a colliery, the workings of which lay chiefly in the western district while the shafts were to the east of the dividing line, brought an action in the High Court for a declaration to determine in which district their colliery lay; and it was held (i.) that the word "pits" in the award meant shafts, and that the minimum rate of wage depended upon whether the shaft was east or west of the line; and (ii.) that under R. S. C., Ord. 25, r. 5, the court had jurisdiction to make the declaration prayed.

(*f*) Coal Mines (Minimum Wage), Act, 1912 (2 & 3 Geo. 5, c. 2), s. 2 (3), (4). The arrangement which may be made pending a decision equally applies in the case of rules (*ibid.*, s. 2 (4); see note (*d*), *supra*).

(*g*) Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), s. 2 (6).

(*h*) *Ibid.*, s. 3.

## SECT. 2.

Other  
Trades.

Trade boards.

SECT. 2.—*Other Trades.*

**1552.** Trade boards have been established for the purpose of fixing minimum rates of wages for both timework and piecework in certain branches of the tailoring, box-making, machine-made lace, and chain-making trades, and such other trades where wages are exceptionally low as the Board of Trade may by provisional order appoint (*i*).

## Part III.—Organisation of Labour.

SECT. 1.—*Labour Exchanges and Employment Registries.*SUB-SECT. 1.—*Establishment.*Powers of  
Board of  
Trade.

**1553.** The Board of Trade may establish and maintain labour exchanges where it thinks fit (*k*), and may assist or co-operate with other authorities or persons maintaining or having powers to maintain labour exchanges (*l*), and may take over any labour exchange from any such authority or person (*m*). Advisory committees may be set up for the purpose of giving the Board advice and assistance in connexion with the management of any labour exchange (*n*).

The Board is further empowered to employ such other means as it thinks fit to collect and furnish information as to employers seeking workpeople, and *vice versa* (*o*).

Definition  
of "labour  
exchange."

**1554.** The term "labour exchange" means any office or place used for the purpose of collecting and furnishing information, either by the keeping of registers or otherwise, respecting employers who desire to engage workpeople and workpeople who seek engagement or employment (*p*).

Board of  
Trade Regu-  
lations.

**1555.** Regulations may be made by the Board of Trade with respect to the exercise of the above-mentioned powers, but any regulations so made must be laid before both Houses of Parliament, and they

(*i*) Trade Boards Act, 1909 (9 Edw. 7, c. 22); see title TRADE AND TRADE UNIONS, Vol. XXVII., pp. 518 *et seq.* By the Trade Boards Provisional Orders Confirmation Act, 1913 (3 & 4 Geo. 5, c. clxii.), the Act has been applied to sugar confectionery and food preserving; shirt-making; hollow-ware making; and linen and cotton embroidery. A Provisional Order has also been made applying the Act to calendering and machine ironing in laundries.

(*k*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 1 (1). The expenses of labour exchanges are defrayed out of moneys provided by Parliament (*ibid.*, s. 4).

(*l*) *Ibid.*, s. 1 (1).

(*m*) *Ibid.*, s. 1 (3).

(*n*) *Ibid.*, s. 2 (5). The travelling expenses of members of advisory committees, together with allowances to such members, may be paid out of moneys provided by Parliament (*ibid.*, s. 4). As to the constitution of the committees, see note (*q*), *infra*.

(*o*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 1 (2).

(*p*) *Ibid.*, s. 5.

may be annulled by either House (*q*). Such regulations must provide that no person is to suffer any disqualification or prejudice by reason of his refusal of employment found for him by a labour exchange on the ground that there is in existence a trade dispute affecting his trade (*r*), or that the wages offered are lower than those current in the trade in the district where the employment is found (*s*). The regulations may also, subject to the approval of the Treasury, authorise advances by way of loan towards the expenses of workpeople travelling to places to take up employment found for them through a labour exchange (*t*).

SECT. 1.  
Labour  
Exchanges  
and  
Employ-  
ment  
Registries.

**1556.** Any person knowingly making any false statement or representation to any officer of or any person acting for the purposes of a labour exchange, for the purpose of obtaining employment or procuring workpeople, is liable on summary conviction to a fine not exceeding £10 for each offence (*a*).

False state-  
ments.

**1557.** Distress committees under the Unemployed Workmen Act, 1905 (*b*), and the central body for London under the same Act (*c*) are charged with the duty of furthering the purposes of that Act by establishing, taking over, or assisting labour exchanges and employment registers, and by the collection of information and otherwise as they think fit. County councils and county borough councils acting through a special committee established in default of a distress committee (*d*) must collect information with respect to

Duties of  
Distress Com-  
mittees.

(*q*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 2 (1), (3). Regulations have been made under this provision dated the 28th January, 1910 (Stat. R. & O., 1910, p. 340). They provide, *inter alia*, for the cases where applicants for employment may register by post, and where they must attend personally (*ibid.*, regulation 1); for the period during which registration holds good without renewal (*ibid.*, regulation 2); require the central office in London to be consulted before notifying to applicants any vacancies outside the British Isles (*ibid.*, regulation 6); and prescribe the procedure upon granting accommodation in labour exchange premises (*ibid.*, regulation 8). *Ibid.*, regulation 7, defines the constitution and prescribes the procedure of advisory trade committees, which consist of equal numbers of representatives of employers and workmen, with an elected chairman; the members are appointed by the Board of Trade, and the term of office is three years. There are special rules for juvenile applicants. They are made under *ibid.*, regulation 9, after consultation with the Board of Education, and provide, *inter alia*, for special advisory committees for juvenile employment.

(*r*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 2 (2); and see Board of Trade Regulations, 1910, regulations 3, 4, which provide for the filing at the labour exchange of statements as to the existence of strikes or lock-outs and for the notification of such statements to applicants for vacancies in the affected firms and to the employers concerned.

(*s*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 2 (2).

(*t*) *Ibid.*, s. 2 (1); and see Board of Trade Regulations, 1910, regulation 5, which limits the amount to the fare.

(*a*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 3.

(*b*) 5 Edw. 7, c. 18, s. 2. The Act has been continued by the Expiring Laws Continuance Act, 1913 (3 & 4 Geo. 5, c. 15); see, further, pp. 883, 884, *post*.

(*c*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (4); see, further, titles METROPOLIS, Vol. XX., pp. 413, 438; MORTGAGE, Vol. XXI., p. 112.

(*d*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 2 (3).



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and  
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ment  
Registries.  
—

the conditions of labour within their area by establishing, taking over, or assisting labour exchanges and employment registers (*e*).

Labour exchanges or employment registers may only be established, and their maintenance may only be undertaken by any central unemployed body, distress committee, or special committee of a county or county borough council, with the sanction of and subject to any conditions imposed by the Local Government Board, which sanction may only be given after consultation with the Board of Trade (*f*).

Metropolitan  
boroughs.

**1558.** The metropolitan borough councils may establish and maintain labour bureaux (*g*) and defray the expenses thereof out of the general rate (*h*).

Port of  
London  
Authority.

**1559.** The Port of London Authority must, either by itself or in co-operation with other bodies or persons, by establishing or maintaining or assisting in the maintenance or establishment of employment registers, offices, and waiting-rooms, and by the collection and communication of information and otherwise, take such steps as it thinks best calculated to diminish the evils of casual employment and to promote the more convenient and regular engagement of workmen employed in connexion with the Port (*i*).

SUB-SECT. 2.—Control.

Registration  
of servants'  
registries.

**1560.** In districts where the Public Health Acts Amendment Act, 1907 (*k*), Part VII. (*l*), is in force every person who carries on for the purpose of private gain a female domestic servants' registry must register with the local authority (*m*) his name and place of abode, and also the premises where such registry is carried on (*n*). The local authority (*m*) may make bye-laws as to the register to be kept and any other matter the authority deems necessary for the prevention of fraud or immorality in the conduct of such registries and for regulating the premises used for the purpose of or in connexion with such registry (*o*). A copy of any such bye-laws must be kept hung up in a conspicuous place on the registered premises (*p*).

(*e*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 2 (3); and see title LOCAL GOVERNMENT, Vol. XIX., p. 350.

(*f*) Labour Exchanges Act, 1909 (9 Edw. 7, c. 7), s. 1 (4).

(*g*) Labour Bureaux (London) Act, 1902 (2 Edw. 7, c. 13), s. 1. The definition of "labour bureau" is similar to that of "labour exchange" under the Labour Exchanges Act, 1909 (9 Edw. 7, c. 7); see p. 878, *ante*; see also title METROPOLIS, Vol. XX., p. 407.

(*h*) Labour Bureaux (London) Act, 1902 (2 Edw. 7 c. 13), s. 2.

(*i*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 28 (1).

(*k*) 7 Edw. 7, c. 53.

(*l*) As to adoption, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 385 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

(*m*) That is, the urban sanitary authority, urban district council, or rural district council, as the case may be (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13).

(*n*) *Ibid.*, s. 85 (1).

(*o*) *Ibid.*, s. 85 (2). As to bye-laws generally, see *ibid.*, s. 9.

(*p*) *Ibid.*, s. 85 (3).

The local authority has a power of entry to and inspection of such registries (*q*).

For non-registry of premises or for carrying on a registry after registration has been cancelled or suspended, or for contravention of bye-laws, there is a penalty not exceeding £5 and a daily penalty (*r*) not exceeding 40s., and the court may, in lieu of or in addition to such penalty, suspend or cancel registration (*s*).

Public notice of the foregoing provisions must be given by the local authority by advertisement in newspapers, by handbills, and otherwise as it thinks sufficient (*t*).

**1561.** No person may carry on, within the administrative county of London, any employment agency, that is to say, any agency or registry for or in connexion with the employment of persons in any capacity (*u*), without an annual licence from the licensing authority, that is to say, the London County Council or, if within the City of London, the Corporation of the City of London, authorising him to do so (*a*). This provision does not apply to labour exchanges or employment agencies carried on under the Labour Exchanges Act, 1909 (*b*), or any other statute (*c*), or to properly certified employment agencies carried on exclusively for the purpose of obtaining employment for ex-soldiers or ex-naval men or ex-prisoners or persons released from a Borstal Institution, reformatory, or industrial school (*d*). The licensing authority may refuse to grant or renew a licence to any person under the age of twenty-one, or upon the ground that the applicant is an unsuitable person to hold such licence, or that the proposed premises are unsuitable for the purpose, or that an employment agency has been or is being improperly conducted by the applicant (*e*). An appeal lies to a metropolitan police magistrate against a refusal to

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and  
Employ-  
ment  
Registries.

Penalties.  
Notice.

Employment  
agencies in  
London.

(*q*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 85 (4).

(*r*) Defined as "a penalty for each day on which an offence is continued after conviction therefor" (*ibid.*, s. 13).

(*s*) *Ibid.*, s. 85 (5).

(*t*) *Ibid.*, s. 85 (6).

(*u*) Including a company carrying on the business of lecture agents (*Lecture League, Ltd. v. London County Council* (1913), 108 L. T. 924).

(*a*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), ss. 4, 20, 22 (1), (3). As to the particulars to be furnished on application, see *ibid.*, s. 21 (1); and as to the fees payable, *ibid.*, s. 22 (2). See, further, title METROPOLIS, Vol. XX., p. 399.

(*b*) 9 Edw. 7, c. 7; see pp. 878 *et seq.*, *ante*.

(*c*) Among the excluded exchanges or agencies are those carried on by a metropolitan borough council under the Labour Bureaux (London) Act, 1902 (2 Edw. 7, c. 13), by the central body or a distress committee under the Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), or by the Port of London Authority under the Port of London Act, 1908 (8 Edw. 7, c. 68) (London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 4); as to these exchanges, see pp. 879, 880, *ante*.

(*d*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 4.

(*e*) *Ibid.*, s. 22 (1). The licensing authority must give the applicant seven days' notice of any objection received, and the applicant must, if he so desires, be given an opportunity of being heard against the refusal (*ibid.*). The applicant may also require the licensing authority to furnish him with written particulars of the refusal (*ibid.*, s. 22 (4)).

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ment  
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—

grant or renew a licence (*f*), and a further appeal is allowed to the next practicable quarter sessions (*g*). The licensing authority may make bye-laws for the conduct of employment agencies and for the regulation of the premises used for the purposes thereof (*h*), and has powers of entry and inspection (*i*). Penalties are prescribed for carrying on employment agencies without a licence and for other infringements of the foregoing provisions (*k*).

## SECT. 2.—*Advice and Assistance as to Employment.*

### SUB-SECT. 1.—*Juveniles.*

Local  
education  
authorities.

**1562.** The powers of county and county borough councils as local education authorities (*l*) include the power to make arrangements, subject to the approval of the Board of Education, for giving to boys and girls under seventeen years of age assistance with respect to the choice of suitable employment, by means of the collection and communication of information and the furnishing of advice (*m*). The council of a non-county borough or urban district which is a local education authority (*l*) may enter into arrangements with the county council for the assistance of the latter in the exercise of the foregoing powers or for the exercise within its borough or district of all or any of those powers on behalf of the county council (*n*).

### SUB-SECT. 2.—*Unemployed Workmen.*

London.

**1563.** The Central (Unemployed) Body for London (*o*) is charged

(*f*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 22 (5). The appeal must be made within fourteen days from the date of refusal, and four days' notice of the appeal must be given to the licensing authority (*ibid.*).

(*g*) *Ibid.*, s. 22 (6); *R. v. London County Council, Ex parte Thornton* (1911), 27 T. L. R. 422, where the court, in discharging a rule for a mandamus to the London County Council to hear and determine an application for a licence, while holding that there was no ground for saying that the Council had declined to hear the application, also expressed the opinion that the statutory remedy was far better than a mandamus.

(*h*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 23; see title METROPOLIS, Vol. XX., p. 461.

(*i*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 24.

(*k*) *Ibid.*, ss. 25, 26.

(*l*) See title EDUCATION, Vol. XII., p. 16.

(*m*) Education (Choice of Employment) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 37), s. 1 (1). As to the employment of children and young persons generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 150 *et seq.*

(*n*) Education (Choice of Employment) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 37), s. 1 (2). The Special Rules of the Board of Trade dated the 7th February, 1910, issued under the General Regulations relating to Labour Exchanges (see note (*q*), p. 878, *ante*) and relating to juvenile applicants, provide, *inter alia*, for the appointment of special advisory committees for juvenile employment, with power to take steps to give information, advice and assistance to boys and girls and their parents, with respect to the choice of employment and other matters bearing thereon.

(*o*) The central body for London has jurisdiction over the area of the administrative county of London. It is made up of members of and selected by the various distress committees, members of and selected by



with the duty of superintending and, as far as possible, co-ordinating and aiding the work of the distress committees (*p*) of the metropolitan boroughs (*q*). It is also empowered to assist unemployed persons referred to it by distress committees (*p*) by aiding the emigration or removal to another area of such persons together with any of their dependants, or by providing or contributing towards the provision of temporary work in such manner as is thought best calculated to put such unemployed persons in a position to obtain regular work or other means of supporting themselves (*r*). The central body also manages the central fund out of which are paid its own expenses and such expenses of the distress committees as are incurred with its consent (*s*).

SECT. 2.  
Advice  
and Assist-  
ance as to  
Employ-  
ment.

**1564.** The duty of the distress committees of the councils of the London boroughs (*t*) is to make themselves acquainted with the conditions of labour within their respective areas, and, when so required by the central body, to receive, inquire into and discriminate between applications from unemployed persons (*a*). They may not, however, entertain any application unless satisfied that the applicant has resided in London for a period of not less than twelve months immediately before the application, or for such longer period as the central body may fix (*a*). If the distress committee is satisfied that any such applicant is honestly desirous of obtaining work, but is temporarily unable to do so from exceptional causes over which he has no control, and considers that his case is capable of more suitable treatment at its hands than

Distress  
committees of  
metropolitan  
boroughs.

the London County Council, and (to the extent of not more than one-fourth of the whole) co-opted members and members nominated by the Local Government Board. One member at least must be a woman (Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (1)). The Local Government Board was empowered, by *ibid.*, s. 4 (1), (2), to provide for the constitution and procedure of the central body and of the distress committees; and this has been done by the Organisation (Unemployed Workmen) Establishment Order, 1905, dated the 20th September, 1905 (Stat. R. & O., 1905, p. 1347), as amended by Orders dated the 21st October, 1905 (*ibid.*, p. 1357), and the 31st August, 1910 (Stat. R. & O., 1910, p. 838). The Act is continued by the Expiring Laws Continuance Act, 1913 (3 & 4 Geo. 5, c. 15). Otherwise it was to continue in force for three years only (Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 8).

(*p*) See the text, *infra*.

(*q*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (4). As to its powers in regard to labour exchanges, see p. 879, *ante*.

(*r*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (5).

(*s*) *Ibid.*, s. 1 (6). The central fund is supplied by voluntary contributions and contributions by the metropolitan borough councils made on demand by the central body, with a maximum of a halfpenny rate or such higher rate, not exceeding one penny, as the Local Government Board may approve (*ibid.*).

(*t*) A distress committee consists of members of the borough council, members of the boards of guardians within the borough, and persons experienced in the relief of distress; one member must be a woman (*ibid.*, s. 1 (1)). The City of London counts as a metropolitan borough for the purposes of the Act (*ibid.*, s. 1 (8)). The Local Government Board may, by order, and upon the application of the council of any borough or district adjoining or near to London, extend the provisions of the Act thereto as if it were a metropolitan borough (*ibid.*, s. 1 (9)).

(*a*) *Ibid.*, s. 1 (2).

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ance as to  
Employ-  
ment.

Outside  
London.

under the poor law, it may endeavour to obtain work for the applicant or refer the case to the central body (*b*). A distress committee has no power to provide or contribute towards the provision of work for any unemployed person (*c*).

**1565.** Where a central body and distress committees have been established in any county or part of a county outside London, they have, subject to any exceptions contained in the Local Government Board order establishing them, the same duties and powers as respects their area as the central body and distress committees respectively in London (*d*). Distress committees of the respective councils of municipal boroughs and urban districts with a population of not less than 50,000 have the same powers and duties, so far as is applicable to their respective boroughs or districts, as the central body and the distress committees in London (*e*).

Regulations.

**1566.** The Local Government Board may make regulations concerning the work and proceedings of the central bodies and distress committees (*f*).

Electoral  
franchise.

**1567.** A person who has been provided with temporary work or other assistance under the foregoing provisions is not thereby disentitled to be registered or to vote as a parliamentary, county, or parochial elector, or as a burgess (*g*).

### SECT. 3.—*Regularisation of Labour.*

Statutory  
provision.

**1568.** In approving, executing, or making advances in respect of the execution of any work under the Development and Road Improvement Funds Act, 1909 (*h*), which involves the employment

(*b*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (3).

(*c*) *Ibid.*

(*d*) *Ibid.*, s. 2 (2). These bodies may be established by Local Government Board order on or independently of the application of any county, borough, or district council or board of guardians (*ibid.*). As to the powers of county councils and county boroughs in regard to labour exchanges, see p. 880, *ante*.

(*e*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 2 (1). Detailed provisions as to their constitution and procedure are contained in the Urban Distress Committees (Unemployed Workmen) Order, 1905, dated the 20th September, 1905 (Stat. R. & O., 1905, p. 1358), and made by the Local Government Board under the powers of the Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 4 (1), (2). Similar distress committees may be established in municipal boroughs or urban districts with a population of less than 50,000 but not less than 10,000 upon application by their respective councils (*ibid.*, s. 2 (1)).

(*f*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 4 (3). The Regulations (Organisation for Unemployed), 1905, dated the 10th October, 1905 (Stat. R. & O., 1905, p. 1378), lay down conditions as to, *inter alia*, applications for assistance, emigration, temporary work, farm colonies and labour exchanges. See also Regulations (Organisation for Unemployed), 1906 (Record Paper Amendment), dated the 13th January, 1906 (Stat. R. & O., 1906, p. 845); Order of Local Government Board, dated the 13th June, 1906, as to form of financial statement (*ibid.*, p. 849); and Regulations (Organisation for Unemployed), Second Series, 1908, dated the 17th November, 1908 (Stat. R. & O., 1908, p. 1000).

(*g*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (7).

(*h*) 9 Edw. 7, c. 47.

of labour on a considerable scale, regard must be had, so far as is reasonably practicable, to the general state and prospects of employment (i).

**1569.** The Port of London Authority must take into consideration the methods and conditions existing at the time of the passing of that Act of engagement of workmen employed in dock, riverside and warehouse labour in connexion with the port (k), and take steps to promote the more convenient and regular engagement of such workmen, and to diminish the evils of casual employment (l).

SECT. 3.  
Regularisation  
of  
Labour.

Port of  
London  
Authority.

## Part IV.—Unemployment Insurance.

SECT. 1.—*Workmen to Whom Compulsory Insurance Applies.*

**1570.** Every workman employed in certain trades, which are specified in the National Insurance Act, 1911 (m), Part II., as “insured trades,” is subject to compulsory insurance against unemployment (n).

Scope of  
statutory  
provisions.

**1571.** The expression “workman” means any person of the age of sixteen or upwards (o) employed wholly or mainly by way of manual labour (p) who has entered into or works under a contract of service with an employer (q), whether such contract is expressed or implied, is oral or in writing. The expression also applies to unemployed persons if, when employed, they satisfy the foregoing conditions. An indentured apprentice is not a workman for the purposes of compulsory insurance (r). Workmen employed by or under

Persons  
included.

(i) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 18.

(k) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 1.

(l) *Ibid.*, s. 28. As to the power of the Port Authority in regard to employment registers, see p. 880. *ante*. As to the Port Authority, generally, see, further, titles METROPOLIS, Vol. XX., pp. 410, 411; SHIPPING AND NAVIGATION, Vol. XXVI., p. 639, note (m); WATERS AND WATERCOURSES, pp. 405, 406, *ante*.

(m) 1 & 2 Geo. 5, c. 55.

(n) *Ibid.*, ss. 84, 85. As to the “insured trades,” see p. 886. *post*.

(o) As to birth certificates for proof of age, see note (r), p. 889, *post*. It will be seen that the term “workman” includes both males and females.

(p) As to the meaning of “manual labour,” see titles FACTORIES AND SHOPS, Vol. XIV., p. 517, note (f); MASTER AND SERVANT, Vol. XX., p. 147.

(q) For the definition of “contract of service,” see title MASTER AND SERVANT, Vol. XX., pp. 64—70. For various forms relating to contracts of service, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 44 *et seq.*; Vol. XVI., pp. 657 *et seq.*

(r) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1). “Workman” includes any person employed under a local or other public authority, who would have been a workman within the definition if the contract with the authority had been a contract of service (National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 15 (1)). Any question whether a person is a workman within this definition is determined in like manner as questions whether a workman is a workman in respect of whom contributions are payable, or whether a trade is an “insured trade” (National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 3 (1); and see note (u), p. 886, *post*, and p. 902, *post*).



SECT. 1.  
Workmen  
to Whom  
Compulsory  
Insurance  
Applies.

Insured  
trades.

the Crown, unless serving in an established capacity in its permanent service (*s*), are on the same footing as those in private employment (*t*).

**1572.** The "insured trades" are the following, namely (*u*):—

(1) Building—that is, the construction, alteration, repair, decoration, or demolition of buildings (*v*), including the manufacture of any fittings of wood of a kind commonly made in builders' workshops or yards;

(2) Construction of works—that is, the construction, reconstruction, or alteration (*w*) of railroads, docks, harbours, canals, embankments, bridges, piers or other works of construction;

(3) Shipbuilding—that is, the construction, alteration, repair, or decoration of ships, boats or other craft by persons not being usually members of a ship's crew, including the manufacture of any fittings of wood of a kind commonly made in a shipbuilding yard;

(4) Mechanical engineering (*a*), including the manufacture of ordnance and firearms;

(5) Ironfounding, whether included under the foregoing headings or not;

(6) Construction of vehicles—that is, the construction, repair, or decoration of vehicles;

(7) Sawmilling, including machine woodwork, carried on in con-

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (3).

(*t*) Subject, however, to such modifications as may be made by Order in Council for adapting the Act to such workmen; see Unemployment Insurance Regulations, 1912 (Stat. R. & O., 1912, p. 1002), regulation 37. By Order in Council dated the 24th June, 1912 (Stat. R. & O., 1912, p. 1026), special regulations as to unemployment insurance books, stamping etc. in the case of workmen employed by the Admiralty are substituted for the Unemployment Insurance Regulations, 1912, regulations 3—9, as to which see note (*e*), p. 890, *post*. There is a similar Order in Council (Stat. R. & O., 1912, p. 1035) relating to workmen employed in the service of the Army Council.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 84, Sched. VI. *Ibid.*, s. 89 (1), provides for the appointment of an umpire by the Crown for the purposes of unemployment insurance, and by *ibid.*, s. 91 (1) (b), the Board of Trade has power to make regulations for giving employers, workmen and the Board an opportunity of obtaining a decision by the umpire on any question whether compulsory insurance applies to any workman or class of workmen. As to the umpire's jurisdiction, see *Robinson v. Morewood* (1914), 30 T. L. R. 547. The Unemployment Insurance (Umpire) Regulations, 1912 (Stat. R. & O., 1912, p. 1023), prescribe, *inter alia*, the form in which applications for the decision of the umpire are made, provide for publication of the notice of the application in the *Board of Trade Journal* in the more important cases, and indicate the manner in which persons interested may make representations to him. By the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 101 (6), the umpire's decision is made final in proceedings under the Act (see, further, p. 902, *post*). The decisions of the umpire, numbering many hundreds, are collected and indexed in volumes published at intervals, and the *Board of Trade Journal* (weekly) and *Board of Trade Labour Gazette* (monthly) contain the most recent decisions (see Unemployment Insurance (Umpire) Regulations, 1912, Regulation 5).

(*v*) See *Robinson v. Morewood*, *supra*.

(*w*) The umpire has decided, in the cases of railroads (Decision No. 178*a*) and tramway lines (Decision No. 221), that the word "alteration" does not refer to work of a kind usually chargeable to revenue account.

(*a*) See *Nunnery Colliery Co. v. Stanley* (1914), 30 T. L. R. 549.

nexion with any other insured trade or of a kind commonly so carried on.

In determining whether any trade is an insured trade regard is had to the nature of the work in which the workman is engaged rather than to the business of the employer (*b*).

**1573.** Compulsory insurance does not apply in the case of a workman in a district which is rural in character who is employed in an insured trade occasionally only, usually following some other occupation, but employer and workman may, in such a case, agree to insure (*c*).

The Board of Trade may make regulations for permitting workmen who are employed under the same employer partly in an insured trade and partly not, to be treated, with the employer's consent, as if they were wholly employed in an insured trade (*d*).

Temporary work provided by a central body or distress committee, or to the provision of which those bodies contribute, under the Unemployed Workmen Act, 1905 (*e*), is not deemed employment in an insured trade (*f*).

**1574.** The Board of Trade may, with the consent of the Treasury, extend by special order (*g*) compulsory insurance against unemployment to other trades, or to vary the definition of "workman" with respect to age, and may do so either with or without modifications of rates of contribution (*h*) or rates or periods of benefit (*i*).

# SECT. 1.

## Workmen to Whom Compulsory Insurance Applies.

Occasional, partial, or temporary employment.

Extension of statutory provisions.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5. c. 55), s. 107 (2). The chief classes of workmen affected by this principle are : (i.) Building trade operatives, such as bricklayers, carpenters, joiners, plumbers, painters, scaffolders, plasterers, and the labourers of each (Decision No. 54). (ii.) Mechanics, such as fitters, smiths and their labourers. Thus, the wheelwrights employed by a firm of brickmakers have been held to be insurable (Decision No. 64) on the ground that they are engaged in the construction or repair of vehicles, which is one of the "insured trades." On the other hand, stokers, engine drivers etc. are not regarded as working upon the maintenance or upkeep of machinery and are therefore not to be insured (see Decision No. 55). The umpire has decided that contributions are payable in respect of the following, namely: all classes of labourers in factories and workshops or in yards or stores immediately connected therewith, when the aforesaid factories or workshops are wholly or mainly engaged in carrying on any of the insured trades (Decision No. 749). This decision covers such workmen as packers, window-cleaners, and storekeepers' labourers.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 97. The meaning of the word "occasionally" is illustrated in Decision No. 1198, where contributions are declared to be payable in respect of the following, namely:—Estate carpenters, masons and slaters described as working at general estate repairs to farm buildings and cottages or rebuilding the same in the Mostyn district, North Wales, when not occupied in their small holdings, at hay and corn harvest, and attending local cattle sales or fairs. In the opinion of the umpire workmen as above described cannot be regarded as employed in an insured trade "occasionally only."

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (1); and see Unemployment Insurance Regulations, 1912, regulation 35.

(*e*) 5 Edw. 7, c. 18; see p. 883, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1).

(*g*) See note (*m*), p. 901, *post*.

(*h*) See pp. 889, 890, *post*.

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 103; National

SECT. 1.  
Workmen  
to Whom  
Compulsory  
Insurance  
Applies.

Exclusion  
from  
statutory  
provisions.

**1575.** The Board of Trade may also, by special order (*j*), exclude from compulsory insurance any occupation which appears to be common to insured and uninsured trades alike, and ancillary only to the purposes of an insured trade; also any occupation which appears to be an occupation in a business which, though concerned with the making of parts or the preparation of materials for use in connexion with an insured trade, is mainly carried on as a separate business or in connexion with trades other than insured trades (*k*). Any workman who, by reason of such an order, has ceased to be employed in an insured trade, and in respect of whom the number of contributions paid are less than ten, may within six months after the making of the order, or after the 10th August, 1914, whichever is the later, apply for repayment of the contributions paid by him whilst employed in the occupation so excluded, any unemployment benefit he may have received being deducted; but if after such repayment he becomes entitled to unemployment benefit he will be treated as if no contributions had been paid in respect of him while so employed (*l*). The Board of Trade may also exempt any class of workmen who are in as permanent a position as that of persons serving in an established capacity in the permanent service of the Crown, regard being had to their claim to pension or to the other terms of their service (*m*).

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Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 10. No such special order may be made if the preliminary inquiry results in a report against it, or if the order would increase the public contribution to the unemployment fund (see p. 900, *post*) to a sum exceeding one million pounds a year before the expiration of three years from the order, also the normal rate of contributions by workmen and employers (see pp. 889, 890, *post*) must not be increased (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 103). The approval in writing of the person who held the inquiry is necessary to any variations from the draft order contained in the final order (National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 11). As to benefits, see pp. 891 *et seq.*, *post*.

(*j*) See note (*m*), p. 901, *post*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 104. The Special Exclusion (Drivers etc.) Order, 1912 (Stat. R. & O., 1912, p. 1002), excludes the following occupations: (i.) The drivers or attendants of any vehicle; (ii.) stablemen or other workmen employed in tending horses or to clean any vehicle; (iii.) wood carvers; (iv.) workmen employed in the manufacture and fitting of upholstery for the purpose of the construction, alteration, repair or decoration of buildings, ships, boats or other craft, unless such manufacture and fitting is substantially the sole occupation of such workmen; (v.) workmen employed in the manufacture of fittings of leather or celluloid for cycles or motor cycles. The Special Exclusion (Dredgermen etc.) Order, 1913 (Stat. R. & O., 1913, p. 2341), excludes the occupation followed by crews of dredgers, hoppers, or other vessels engaged in (i.) excavating materials by dredging, or conveying materials so excavated, or (ii.) conveying away materials, whether excavated or not, in or in connexion with the construction, reconstruction, or alteration of harbours, docks or channels. The Special Exclusion (Stone Carvers and Sculptors) Order, 1913 (Stat. R. & O., 1913, p. 2342), excludes stone carvers and sculptors.

(*l*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 12.

(*m*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (4); and see pp. 885, 886, *ante*.



## SECT. 2.—Contributions.

SECT. 2.  
Contribu-  
tions.Amount of  
contribution.

**1576.** By way of unemployment insurance contribution every workman (*n*) of the age of eighteen and upwards employed within the United Kingdom in an insured trade (*o*) must pay  $2\frac{1}{2}d.$  for every week he is so employed (*p*) and in receipt of remuneration from his employer (*q*); and  $2\frac{1}{2}d.$  is payable in respect of each workman by every employer of one or more workmen for each week he employs the workman (*p*) and pays him remuneration (*q*) in an insured trade (*o*). In the case of workmen below eighteen years of age the contributions of workman and employer are in each case  $1d.$  instead of  $2\frac{1}{2}d.$  (*r*). A period of employment of less than a week counts as a week unless such period is two days or less, when the contributions of workman and employer are each  $1d.$  if the period does not exceed one day, and  $2d.$  if it exceeds one but is not more than two days (*s*).

**1577.** A member of the Naval Reserves, Army Reserve, or Territorial Force employed in an insured trade (*t*) is, during training, provided that he receives pay from army or navy funds, deemed to be in the employment of the Crown in an insured trade (*a*).

Members of  
Reserve  
Forces.

**1578.** Subject to regulations made by the Board of Trade (*b*), the employer is, in the first instance, liable to pay both his own and the workman's contributions, but is entitled, subject to such regulations (*b*), to recover the workman's contribution by deduction from wages or any other payment payable by him to the workman (but not otherwise), notwithstanding any statute or contract to the contrary, provided such deduction is from wages or other payment in respect of the period, or part of the period, of employment for which the contribution was payable, or in respect of a period of employment ending not later than four weeks after the termination of the period for which the contribution was payable (*c*). The

Payment of  
contributions.

(*n*) For the definition, see p. 885, *ante*.

(*o*) For the definition, see p. 886, *ante*.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 85 (2), Sched. VIII.

(*q*) *Ibid.*, s. 107 (1).

(*r*) *Ibid.*, Sched. VIII. Birth certificates may be obtained for  $6d.$  for the purposes of the Act on application by means of the prescribed form, which forms are obtainable free of charge from registrars and superintendent registrars of births and deaths (*ibid.*, s. 114). The form of requisition for such certificate is prescribed by Local Government Board Order dated the 14th March, 1912 (Stat. R. & O., 1912, p. 1044); see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS. Vol. XXIV., p. 449.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VIII. It will be seen that casual workmen and their employers are required to pay proportionately greater contributions than in the case of those employed regularly.

(*t*) For definition, see p. 886, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 98; and see pp. 885, 886, *ante*.

(*b*) See note (*e*), p. 890, *post*. The Unemployment Insurance Regulations, regulation 9 (see note (*e*), p. 890, *post*), provides for such recovery from the workman.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 85 (3); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 9.

SECT. 2.  
Contribu-  
tions.

employer cannot, however, in any way recover his own contributions from the workman notwithstanding any contract to the contrary (*d*).

The Board of Trade may make regulations as to the payment and collection of contributions, and in particular as to the stamps, books and cards used for that purpose (*e*).

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Contributions made by an employer on the workman's behalf are deemed to be contributions by the workman (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1)).

(*d*) *Ibid.*, s. 85 (4).

(*e*) *Ibid.*, s. 85 (5). The Unemployment Insurance Regulations, 1912, as amended by the Unemployment Insurance (Supplementary) Regulations, 1913 (Stat. R. & O., 1913, p. 2342), and the Unemployment Insurance (Supplementary) Regulations, 1914, make provision by regulations 3—9 as to unemployment insurance books, stamping etc. Every workman employed or about to be employed in an insured trade must obtain an "unemployment book," for which no charge is made, from the labour exchange or other "local office." The book must be delivered by the workman to the employer (see *Nunnery Colliery Co. v. Stanley* (1914), 30 T. L. R. 549), and the latter then becomes responsible for its safe custody and must produce it to an inspector as required, but the workman has the right to inspect it. If the book is at a local office the workman must deliver up the receipt for it, so that the employer may obtain the book therefrom. A person returning to the local office a lost book may receive a reward not exceeding 1s., and the person responsible for the safe custody of the book at the time it was lost is liable to repay the sum (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 100 (3)). On leaving the employment the workman must obtain the book from the employer and, if unemployed, deliver it to the local office, where it will be kept until the workman again obtains employment in an insured trade. If for any reason the book is not thus returned to the workman, the employer must hand it in to the local office. An employer is not liable in damages in respect of loss of employment sustained by a workman by reason of the latter's failure to produce his unemployment insurance card or book, such card or book having been posted to the workman by the employer but lost in the post (*Price v. Webb*, [1913] 2 K. B. 367). On the death of a workman the book must be delivered to the local office. A book is current for a certain specified number of weeks, after which it must be returned to the local office and a fresh book obtained. On or before each payment of wages, or at weekly intervals, and on the termination of employment, the employer must affix to the book stamps representing the value of his own and the workman's contributions (see p. 889, *ante*), and must then cancel such stamps. Where remuneration is in some form other than wages, board or lodging for instance, the stamps must be affixed on termination of the employment, or, if the employment lasts more than a week, on the last day of employment in each calendar week. Stamps are procurable through the Post Office; see National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 108; the Inland Revenue Commissioners may (*ibid.*) make regulations applying to insurance stamps the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), and the Post Office Act, 1908 (8 Edw. 7, c. 48), s. 65; see title REVENUE, Vol. XXIV., pp. 700 *et seq.* Such regulations have been made dated the 6th February, 1914. In cases of regular employment, the employer may, in lieu of stamping books as above, deposit with the Board of Trade a sum equal to the estimated amount of the contributions payable by him in respect of himself and the workman for three months or such less period as the Board may agree to. The Board may accept such sum in the form of weekly payments. The Emergency Book (Unemployment Insurance) Regulations, 1912 (Stat. R. & O., 1912, p. 1020), provide for the supply of an emergency book to the employer in cases where the workman has failed to deliver an unemployment book to him.

**1579.** Regulations may similarly be made for providing that where any workmen are employed in or for the purposes of the business of any person, but are not actually employed by him, he, as the substantial employer, may be treated as their employer, and may deduct from any payments made by him to the actual or immediate employer any sums paid by him as contributions on behalf of the workmen, and for allowing the immediate employer to recover the like sums from the workmen (*f*).

SECT. 2.  
Contribu-  
tions.

Substantial  
and actual  
employers.

**1580.** In the distribution of the property of a bankrupt (*g*) and in the distribution of the assets of a company being wound up (*h*) unless voluntarily merely for the purposes of reconstruction or amalgamation with another company (*i*), there are included among the debts which are to be paid in priority to all other debts all contributions payable in respect of unemployment insurance contributions by the bankrupt or company during the four months before the date of the receiving order or, as the case may be, the commencement of the winding up, or the winding-up order (*k*).

Preferential  
debt.

### SECT. 3.—*Unemployment Benefit.*

#### SUB-SECT. 1.—*Conditions to be Fulfilled.*

**1581.** A workman is entitled to “unemployment benefit” so long as he fulfils the following conditions (*l*):—

When  
unemploy-  
ment benefit  
payable.

(1) He must be a workman (*m*) who has been employed in an insured trade (*n*).

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (1) (*f*). Such provision is made by the Unemployment Insurance Regulations, 1912, regulation 36, where the immediate employer is “some other person who himself works wholly or mainly by way of manual labour in that business.” The substantial employer is there required to pay the contributions under the Act in respect of insured trades. The Board of Trade, however, by the Regulation in question, retains the power to “direct to the contrary.” By a Direction as to Sub-contractors and Piecemasters in the Building Trade and in Works of Construction (Stat. R. & O., 1913, p. 2345), the immediate employer is ordered to be treated as the employer, “in the case of workmen employed in building and construction of works, where the substantial employer has not an exclusive right to the services of the immediate employer.”

(*g*) Under the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1; Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 33; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 217.

(*h*) Under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209; see title COMPANIES, Vol. V., p. 516.

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 110 (3).

(*k*) *Ibid.*, s. 110 (1). In the case of the winding up of a company within the meaning of the Stannaries Act, 1887 (50 & 51 Vict. c. 43), the contributions payable in respect of a miner have the like priority as is conferred on miners' wages by *ibid.*, s. 9 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 110 (2)). Formal proof of the debts to which priority is thus given in respect of contributions is not required unless otherwise provided by rules made under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (repealed as from the 1st January, 1915, and re-enacted by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59)), or the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 110 (1)).

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 84.

(*m*) For the definitions of “workman” and “insured trade,” see pp. 885, 886, *ante*.



SECT. 3.  
Unemploy-  
ment  
Benefit.

Statutory  
conditions.

(2) He must be unemployed. A workman is not deemed to be unemployed whilst he is following any remunerative occupation in an insured trade, or any other occupation from which he derives remuneration or profit greater than unemployment benefit would yield, unless such other occupation has ordinarily been followed by him in addition to his employment in an insured trade and outside the ordinary working hours of such trade, and the vote of remuneration therefrom does not exceed £1 a week (*n*).

(3) He must prove certain "statutory conditions," namely (*o*), that not less than ten contributions (*p*) have been paid by him; that he is capable of work but is unable to obtain suitable employment; that he has not exhausted his right to unemployment benefit; that he has made application for unemployment benefit in the prescribed manner (*q*); and that since the date of the application he has been continuously unemployed (*r*). If the repeated failure of any insured workman to obtain or retain employment appears to be due to defective skill or knowledge, the insurance officer may offer to arrange for a test of his skill or knowledge at the expense of the unemployment fund; and if the workman does not avail himself of the offer, or does not produce satisfactory evidence of competence, or if the test proves defective skill or knowledge and there is no prospect of such defects being remedied, such facts are to be taken into consideration in determining what is suitable employment for the workman; if it appears, however, that technical instruction would probably remedy such defects, and that the charge on the unemployment fund is likely thereby to be decreased, such technical instruction may be provided at the expense of the fund (*s*). A workman is not to be deemed to have failed to satisfy the statutory conditions only because he has declined an offer of employment in a situation vacant in consequence of a stoppage of work due to a trade dispute (*a*); or an offer of employment in the district where he was last ordinarily employed at a rate of wages lower, or on conditions less favourable, than

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 15 (2).

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 86; National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 1 (1).

(*p*) See p. 889, *ante*.

(*q*) The Board of Trade may make regulations for prescribing the manner in which claims may be made (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (1)). The form of written application is prescribed in the Unemployment Insurance Regulations, 1912, regulation 10, Sched. I.

(*r*) Two periods of unemployment of not less than two days each, separated by a period of not more than two days, during which the workman has not been employed for more than twenty-four hours, or two periods of unemployment of not less than one week each, separated by an interval of not more than six weeks, are treated as continuous unemployment (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 107 (1)).

(*s*) *Ibid.*, s. 100 (1).

(*a*) *Ibid.*, s. 86 (*a*). A "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment, non-employment, terms of employment, or conditions of labour of any persons, whether or not workmen in the employment of the employer with whom the dispute arises (*ibid.*, s. 107 (1)).

those which he there habitually obtained in his usual employment, or would have obtained had he continued so employed (*b*); or an offer of employment in any other district at a rate of wages lower or on conditions less favourable than those generally observed in such district by agreement between associations of employers and workmen, or, failing such agreement, than those generally recognised in such district by good employers (*c*).

SECT. 3.  
Unemploy-  
ment  
Benefit.

(4) He must not be disqualified. The following are disqualifications, namely:—loss of employment by reason of a stoppage of work due to a trade dispute (*d*) at the factory, workshop, or other premises where he was employed (*e*), in which case the disqualification lasts so long as the stoppage continues, but the disqualification is removed if he has, during the stoppage, become *bonâ fide* employed elsewhere in an insured trade (*f*); loss of employment through misconduct or through voluntarily leaving without just cause, in which case the disqualification lasts for six weeks from the date of such loss of employment (*g*); being an inmate of any prison or workhouse or other institution supported wholly or partly out of public funds (*h*); temporary or permanent residence outside the United Kingdom (*i*); or the receipt of sickness benefit, disablement benefit, or disablement allowance under the provisions relating to national health insurance (*j*).

Disqualifica-  
tions.

**1582.** No unemployment benefit is payable for the first week of any period of unemployment (*k*). A period of unemployment commences when the workman has applied for unemployment benefit in the prescribed manner (*l*); and any time during which a workman is disqualified for receiving such benefit (*m*) is excluded in computing periods of unemployment (*n*).

Period of  
unemploy-  
ment.

SUB-SECT. 2.—*Amount Payable.*

**1583.** For workmen of the age of eighteen and upwards the scale of unemployment benefit is 7s. per week. No benefit is payable in the case of a workman below the age of seventeen; and in the case of a workman of seventeen years of age but below eighteen half the rate for workmen of the age of eighteen and upwards is payable (*o*).

Rate of  
benefit.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 86 (*b*).

(*c*) *Ibid.*, s. 86 (*c*).

(*d*) For the definition, see note (*a*), p. 892, *ante*.

(*e*) Where separate branches of work commonly carried on as separate businesses in separate premises are carried on in separate departments on the same premises each department is considered a separate factory, workshop or premises (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 87 (*i*)).

(*f*) *Ibid.*

(*g*) *Ibid.*, s. 87 (2).

(*h*) *Ibid.*, s. 87 (3).

(*i*) *Ibid.*

(*j*) *Ibid.*, s. 87 (4); and see pp. 905 *et seq.*, *post*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VII.

(*l*) See note (*g*), p. 892, *ante*.

(*m*) See the text, *supra*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VII.

(*o*) *Ibid.*

SECT. 3.  
Unemploy-  
ment  
Benefit.

Duration of  
benefit.

Benefit is not payable for more than fifteen weeks in an insurance year, nor for a fraction of a day. Also no workman may receive more benefit than in the proportion of one week's benefit for every five contributions paid by him (*p*), but a workman over twenty-one who has habitually worked at an insured trade before the commencement of the Act (*q*) may add to the number of his actual contributions five contributions for each period of three months or part of such period during which he has so worked before the commencement of the Act up to a maximum of twenty-five contributions (*r*). Where contributions are paid at intervals greater than a week each contribution counts as so many contributions as there are weeks in the period for which the contribution is paid (*s*). The penny a week contribution paid by workmen below the age of eighteen (*t*) is counted as two-fifths of a contribution except as regards the payment of unemployment benefit before the age of eighteen, or as regards the fulfilment of the first "statutory condition" for the receipt of unemployment benefit (*u*); and the reduced rates of 1*d.* and 2*d.* payable when the period of employment is two days or less (*v*) count as two-fifths or four-fifths of a contribution respectively (*w*).

Alteration of  
rates and  
periods.

**1584.** The Board of Trade is empowered to prescribe other rates of benefit than that above-mentioned within limits of 6*s.* and 8*s.*, and to reduce the period of benefit below fifteen weeks. Other alterations in regard to rates and periods can only be effected by special order (*x*). Rates and periods may be prescribed either generally or in respect of any particular trade or branch thereof (*a*).

SUB-SECT. 3.—*Miscellaneous Provisions.*

Evidence.

**1585.** The Board of Trade may make regulations prescribing the evidence to be required as to the fulfilment of the conditions and qualifications for benefit (*b*).

(*p*) See pp. 889, 890, *ante*.

(*q*) The Act came into operation on the 15th July, 1912.

(*r*) A workman in respect of whom no contributions have been paid before the 10th August, 1914, is not entitled to any such additions (National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 17 (2)).

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 84, Sched. VII.; National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 17 (1). "Insurance year" means a prescribed period of not less than fifty-two nor more than fifty-three weeks (*ibid.*, s. 18 (2)); and see Unemployment Insurance (Supplementary) Regulations, 1914 (regulation 6), which provides that the "insurance year" shall end on the 17th July, 1915, and thereafter on the Saturday nearest to the 14th July in every year.

(*t*) See p. 888, *ante*.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VIII.; National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 1 (2). As to the "statutory conditions," see p. 892, *ante*.

(*v*) See pp. 889, 890, *ante*.

(*w*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VIII.

(*x*) See note (*m*), p. 901, *post*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VII.

(*b*) *Ibid.*, s. 91 (1) (c). A workman who desires to obtain unemployment benefit must apply on the prescribed form, lodge his unemployment book at the local office, unless, for good cause shown, this cannot be done,



**1586.** A board of guardians may not take unemployment benefit into consideration in granting outdoor relief, except so far as such benefit exceeds 5s. a week (*c*).

**1587.** Unemployment benefit cannot be assigned or charged, nor does it pass to any trustee in bankruptcy or to any other person on behalf of creditors (*d*).

SECT. 3.  
Unemployment  
Benefit.

Outdoor  
relief.  
Benefit not  
assignable.

#### SECT. 4.—*Refunds and Repayments of Contributions.*

**1588.** If an employer has paid not less than forty-five contributions during an insurance year (*e*) in respect of a workman, the Board of Trade must refund to the employer out of the unemployment fund the sum of 3s. in respect of the workman. Application for such refund must be made within two months of the termination of the insurance year in respect of which the claim is made (*f*). In calculating the number of contributions so paid, any contributions from which he may have been exempted in respect of workmen working short time (*g*) are deemed to have been paid; any contributions paid by the Crown in respect of Reservists or members of the Territorial Force during training (*h*) are deemed to have been paid by the employer by whom the workman was employed immediately before the training; and where the employer has made an arrangement with a labour exchange for the discharge by the latter of his duties in regard to unemployment insurance he is, in respect of any contributions paid under such arrangement, deemed to have paid that number of contributions which he would have been liable to pay in the absence of such an arrangement (*i*).

Refund to  
employer.

**1589.** When it appears to the Board of Trade that there is exceptional unemployment in any trade or branch of a trade, the Board may, on application in the prescribed manner by any employer in that trade or branch, and under the prescribed

Effect of  
"short time."

show by the production of his insurance book or otherwise that he is not in receipt of sickness or disablement benefit or allowance, and attend at the local office and sign a register as evidence of being unemployed on every working day or at longer intervals if he resides more than three miles from the local office. Benefit is paid weekly at the local office at which the workman's unemployment book is lodged. Notice that a book has been lodged is to be sent by the Board to the workman's last employer (Unemployment Insurance Regulations, 1912, regulations 10—12, as amended by the Unemployment Insurance (Supplementary) Regulations, 1913). The regulations may enable claims for benefit to be made and payment thereof to be effected through the Post Office (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (2)).

(*c*) *Ibid.*, s. 109.

(*d*) *Ibid.*, s. 111.

(*e*) As to the meaning of "insurance year," see note (*s*), p. 894, *ante*.

(*f*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 5 (1). For certain purposes of adjustment the Board of Trade is empowered to apply the provision to any period less than an insurance year, with a proportionate reduction in the number of contributions and in the refund (*ibid.*, s. 5 (2)).

(*g*) See the text, *infra*.

(*h*) See p. 889, *ante*.

(*i*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 5 (3); and see p. 896, *post*.

SECT. 4.  
Refunds  
and Repay-  
ments of  
Contribu-  
tions.

Repayment to  
workman.

conditions, make an order exempting workmen of any specified class or description employed by him who are systematically working short time, and the employer, from contributions. The Board of Trade is empowered to make regulations in regard to this provision (*j*).

**1590.** If a workman satisfies the Board of Trade that he has paid contributions in respect of five hundred weeks or upwards, and that he has reached the age of sixty, he is entitled to be repaid the amount, if any, by which the total amount of such contributions has exceeded the total amount of unemployment benefit received by him, with compound interest at  $2\frac{1}{2}$  per cent. per annum; if the workman is dead his personal representatives are entitled to make the claim (*k*). If the workman was over the age of fifty-five when contributions first became payable in respect of him, the number of weeks in respect of which he must pay contributions to entitle him or his representatives to such repayments are reduced by fifty weeks for every year or part of a year by which his age at that time exceeded fifty-five (*l*). Such repayment does not affect the workman's liability to pay contributions; and if after any such repayment he becomes entitled to unemployment benefit (*m*), he is treated as having paid in respect of the period for which repayment was made the full number of contributions most nearly equal to five-eighths of the number of contributions actually paid during that period (*n*). If the workman has received such a repayment, and has paid further contributions, he is entitled to a further repayment if the number of such further contributions exceeds one hundred; and in the case of his death his representatives will be entitled to such further repayments whatever the number of such further contributions (*o*).

Payment  
under  
mistake.

**1591.** Contributions paid by employer and workman in respect of a workman wrongly believed to be a workman in an insured trade (*p*) may be returned in accordance with Board of Trade regulations, subject, in the workman's case, to deduction of any unemployment benefit received by him under that belief (*q*).

SECT. 5.—*Arrangements by Employers with Labour Exchanges.*

Effect of  
arrangements

**1592.** In respect of workmen engaged by an employer through a labour exchange (*r*) or already in his employ, an arrangement may

(*j*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 7, which section takes effect as from the 1st January, 1915.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 95 (1).

(*l*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 6 (1).

(*m*) See pp. 891, 892, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 95 (2).

(*o*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 6 (2).

(*p*) See p. 886, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 100 (2). The form to be used in applying for such return of contributions is prescribed by the Unemployment Insurance Regulations, 1912, regulation 31.

(*r*) See p. 878, *ante*.

be made whereby the labour exchange undertakes to perform on behalf of the employer his duties in regard to unemployment insurance (*s*). Such an arrangement, furthermore, enables different periods of employment, whether of the same or different workmen, to be treated as a continuous employment of a single workman for the purpose of the employer's contributions (*t*), but not for the purpose of a refund thereof (*a*). On the other hand, a workman engaged through a labour exchange may ask that all the periods of employment during which he is employed by one or more employers with whom such an arrangement has been made shall be treated as a continuous period of employment under one employer for the purpose of his contributions (*b*), and regulations may provide for the refund of part of his contributions accordingly (*c*).

SECT. 5.  
Arrangements by  
Employers with  
Labour  
Exchanges.

SECT. 6.—*Arrangements with Workmen's Associations for the Encouragement of Voluntary Insurance.*

**1593.** In lieu of unemployment benefit being paid to the workman through the local office (*d*), an arrangement may be made with any association of workmen which, under its rules, gives unemployed pay to its members, being workmen in an insured trade (*e*), whereby the association receives periodically from the unemployment fund (*f*) such sum as appears to be equivalent to the aggregate amount which such workmen would have received during that period as statutory unemployment benefit (*g*), but not exceeding

Payment of  
benefit to  
associations.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 99 (1). Such duties would include, *e.g.*, the keeping and stamping of insurance books. It must be part of such an arrangement that the employer shall deposit with the Board of Trade a sum sufficient to cover the estimated amount of the contributions for three months, or a less period by agreement, payable by him on his own and the workmen's behalf, and that, failing such deposit, the employer shall not recover from the workman his share of the contributions (Unemployment Insurance Regulations, 1912, regulation 32). The workman has the same right of inspecting his book while it is in the custody of a labour exchange as if it were in the custody of the employer (*ibid.*, regulation 33). As to the performance by a labour exchange of the employer's duties under the statutory provisions relating to national health insurance, see p. 919, *post*.

(*t*) See p. 889, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 99 (1); as to refunds, see p. 895, *ante*.

(*b*) See p. 889, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 99 (2). Each of such employers, unless the arrangement otherwise provides, is entitled to make the same deductions from the wages or other payments due to the workman as he would if no such arrangement had been made; but if such deductions exceed in the aggregate the amount that would have been deducted if the workman had been continuously employed by one employer, the workman is entitled to be repaid the excess except in respect of any contributions already taken into account for the purpose of determining the amount of unemployment benefit to which he may be entitled (Unemployment Insurance Regulations, 1912, regulation 34). As to such deductions and refunding, see pp. 889, 895, *ante*.

(*d*) See note (*b*), p. 894, *ante*.

(*e*) See p. 886, *ante*.

(*f*) See p. 900, *post*.

(*g*) See p. 893, *ante*.



SECT. 6.  
 Arrangements with Workmen's Associations for the Encouragement of Voluntary Insurance.

three-fourths of the amount of the payments made during that period by the association to such unemployed workmen (*h*). There is substituted for this limitation on the amount to be repaid periodically to an association by reference to three-fourths of the amount of the payments made, as regards any payments made by an association to its members in respect of unemployment occurring on or after the 28th September, 1914, or such later date as may have been fixed by the Board of Trade in any particular case after consultation with the association concerned, the restriction that the Board of Trade shall not make or continue any such arrangement with an association unless they are of opinion that the payments authorised by the rules of the association to be made to its members when unemployed (inclusive of any payments in respect of which a refund may be so made to the association) represent a provision for employment, as respects such of its members as are workmen in an insured trade, which is at least one-third greater than the statutory unemployment benefit (*i*). An association may enter into such an arrangement notwithstanding that persons other than workmen can be members, provided it is substantially an association of workmen (*j*).

Treatment of contributions.

**1594.** The governing body of the association entering into such an arrangement may treat the statutory contributions of its members due by way of compulsory insurance (*k*), or any part thereof, as if they were part of the subscriptions payable by such members to the association, and may reduce the rates of those members' subscriptions accordingly, anything in the rules of the association to the contrary notwithstanding (*l*).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (1); see also title TRADE AND TRADE UNIONS, Vol. XXVII., p. 670. The Unemployment Insurance Regulations, 1912, regulations 14—18, as amended by the Unemployment Insurance (Supplementary) Regulations, 1913, prescribe the form of application by an association for such an arrangement; provide for cancellation of the arrangement upon the association ceasing to comply with the conditions thereof; make it a condition of such arrangement that the association shall have a satisfactory system of notifying unemployed members of opportunities of employment and shall allow the Board of Trade to inspect the association's accounts etc.; provide for notice being given to the association of unemployment books having been lodged at the local office by members, together with an intimation of the amount of unemployment benefit to which such members are entitled, and, on the other hand, for a statement of all payments in respect of unemployment in respect of which the association proposes to claim repayment; and prescribe that in determining the aggregate amount which a workman would have received as unemployment benefit no payment shall be taken into account during any period (i.) during which the workman's book was not lodged at a local office; (ii.) in respect of which the workman has failed to furnish the prescribed evidence of unemployment; or (iii.) during which he would not be entitled to unemployment benefit. When the workman desires to obtain unemployed pay from his association he must still lodge his book at the local office (Unemployment Insurance Regulations, 1912, regulation 10).

(*i*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 13 (1).

(*j*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (5).

(*k*) See pp. 889 *et seq.*, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (2).

For purposes of unemployment insurance, the amount of any sum which, in the absence of an arrangement as aforesaid, would have been paid to a workman by way of unemployment benefit (*m*) is deemed to have been so paid (*n*).

Questions arising under the foregoing provision are referred to insurance officers, courts of referees, or the umpire (*o*) under Board of Trade regulations (*p*).

**1595.** There may be repaid out of public funds to any association of persons not trading for profit, which gives unemployed pay to its members, whether workmen in an insured trade (*q*) or not, a proportion, not exceeding one-sixth, of the aggregate amount which the association has expended on such payments during the preceding year or other prescribed period, exclusive of the sum, if any, repaid to the association in respect of such period in pursuance of an arrangement as above mentioned for paying unemployment benefit through the association (*r*).

Where it appears to the Board of Trade that the rules of any association enable persons when unemployed to obtain from the association, or from the association and the unemployment fund together, payments at rates not exceeding 17s. a week, the sums which might otherwise be repaid by the Board to the association under the above provision are subject to such reductions (if any) as the Board think just (*s*).

Where the association is an association of workmen with which the Board of Trade have made an arrangement in lieu of paying unemployment benefit (*t*) and the highest weekly rate of unemployment payment (inclusive of any payment in respect of which a

SECT. 6.  
Arrangements with Workmen's Associations for the Encouragement of Voluntary Insurance.

Umpire.

Repayment to associations.

(*m*) See p. 893, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (3); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 13 (2).

(*o*) See pp. 901 *et seq.*, *post*.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 105 (4); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 13 (3); see Unemployment Insurance Regulations, 1912, regulation 19.

(*q*) See p. 886, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 106 (1); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 14 (1); and see p. 897, *ante*; see also title TRADE AND TRADE UNIONS, Vol. XXVII., p. 671. The Unemployment Insurance Regulations, 1912, regulations 27—30, as amended by the Unemployment Insurance (Supplementary) Regulations, 1913, prescribe the form in which application for such repayment must be made, and the form of annual returns of payments to members; provide that no repayment may be made in respect of payments made otherwise than for unemployment, or in respect of payments made to a member unemployed by reason of being engaged in a trade dispute, or while sick, superannuated, or temporarily suspended for disciplinary reasons, or in respect of payments made to any member to provide him with tools or to enable him to travel to or in search of a situation; and determine that any question arising as to the amount of repayment shall be referred to the umpire for decision.

(*s*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 14 (1). The limit of 17s. may be varied with any variation of the rate of unemployment benefit (*ibid.*).

(*t*) See p. 897, *ante*.

SECT. 6.  
Arrangements with  
Workmen's  
Associations for the  
Encouragement of  
Voluntary  
Insurance.

Unemployment fund.

refund may be made to the association) is less than 13s., the whole amount of repayment under such arrangement is not to be excluded, but such part only as bears the same proportion to the whole amount as such highest rate of weekly payment bears to 13s. (u).

#### SECT. 7.—*Financial Provisions.*

**1596.** Unemployment benefit is met out of a fund called the unemployment fund, which is made up of the contributions of workmen and employers, together with an annual contribution from public funds paid by the Treasury equal to one-third of the total contributions received from employers and workmen during the year (v). A charge is also made on the unemployment fund in respect of costs of administration, not exceeding one-tenth of the total contributions of workmen and employers paid into the fund; the balance of the expenses is paid out of voted moneys (a).

Advances by  
Treasury.

**1597.** The Treasury may advance out of the Consolidated Fund on the security of the unemployment fund any sum required to discharge the liabilities of that fund up £3,000,000 (b); and if whilst any part of any such advance is outstanding the unemployment fund appears to the Treasury to be insolvent, the Board of Trade must, on direction by the Treasury, make temporary modifications in the rates of contribution or the rates or periods of unemployment benefit to the extent necessary to secure the solvency of the fund (c).

Revision of  
rates.

**1598.** The rates of contribution may be revised every seven years in respect of any particular trade or branch thereof (d).

(u) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 14 (1).

(v) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 85 (1), (6), 92 (1). As to the calculation of the contribution from public funds, see National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 4 (1). The fund is audited by the Comptroller and Auditor-General (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 92 (2); see title PARLIAMENT, Vol. XXI., p. 684). Any moneys forming part of the fund may be paid over to the National Debt Commissioners and by them invested (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 92 (3)), and see Regulations dated the 12th August, 1912 (Stat. R. & O., 1912, p. 1043), as to such payment over for investment.

(a) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 89 (2). See also National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 4 (2).

(b) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 93 (1). This is a provision made in view of the possibility of an exceptionally severe depression of trade which might temporarily exhaust the fund.

(c) *Ibid.*, s. 93 (2). The weekly rate of benefit must not be reduced below 5s., nor the rates of contribution increased by more than 1d., and any increase must be equal as between employers and workmen (*ibid.*). Any order making such modification must be laid before Parliament (*ibid.*, s. 93 (4)). As to borrowings by the Treasury for the purpose of the fund, see *ibid.*, s. 93 (5)–(7).

(d) *Ibid.*, s. 102. Such revision must be by special order, as to which see note (m), p. 901, *post*. The rates of contribution must not be increased by more than a penny above the rates laid down in Sched. VIII., nor must such variation be unequal as between employers and workmen (*ibid.*, s. 102).



SECT. 8.—*Administration.*SUB-SECT. 1.—*The Board of Trade.*SECT. 8.  
Administra-  
tion.Board of  
Trade.

**1599.** The central authority for the administration of unemployment insurance is the Board of Trade. Subject to Treasury consent as to numbers, the Board appoints insurance officers and the other necessary officers, inspectors, and servants (*e*), but not the umpire (*f*), who is appointed by the Crown (*g*). The Board makes regulations for carrying into effect the statutory provisions as to unemployment insurance, which regulations have effect as if enacted in the statute (*h*), but any such regulations must be laid before each House of Parliament, by which they may be annulled (*i*). The unemployment fund (*k*) is controlled and managed by the Board (*l*). For certain purposes the Board may make special orders (*m*), namely, for excluding certain occupations from the list of insured trades (*n*), and, with the sanction of the Treasury, and provided that the order is not negated by Parliament, before which it must be laid (*o*), for revising rates of contributions (*p*) and extending compulsory insurance to other workmen and other trades (*q*). The President, Secretary, or Assistant Secretary of the Board, or any person authorised by the President, may act for the Board (*r*).

SUB-SECT. 2.—*Determination of Claims.*

**1600.** To the umpire (*s*) is referred, for final decision, at the request of the court of referees (*t*), any question at issue between the court of referees and the insurance officer (*u*) as to the determination of

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 89.

(*f*) As to the umpire's powers, see the text, *infra*.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 89 (1).

(*h*) *Ibid.*, s. 91 (1).

(*i*) *Ibid.*, s. 91 (3).

(*k*) See p. 900, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 92 (1).

(*m*) The procedure for making special orders has been adapted from that prescribed in the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), for the purpose of making regulations under that Act, as to which see title FACTORIES AND SHOPS, Vol. XIV., p. 481 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 113 (1) and Sched. IX.). Special orders may be revoked, varied or amended by other special orders made in like manner as the original order (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), ss. 40 (1), 43 (2)). For the rules for the conduct of inquiries with regard to special orders, see the Special Extension Order (Unemployment Insurance) Rules, 1914 (Stat. R. & O., 1914, No. 730).

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 104; and see p. 886, *ante*; Special Exclusion Order (Unemployment Insurance) Rules, 1912 (Stat. R. & O., 1912, p. 1000). In this case the provisions of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (3), as to the laying of regulations before Parliament apply (*ibid.*, ss. 104, 113 (2)).

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 113 (2).

(*p*) *Ibid.*, s. 102; and see p. 900, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 103 and see p. 887, *ante*.

(*r*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 16.

(*s*) As to the appointment of the umpire, see the text, *supra*.

(*t*) See p. 902, *post*.

(*u*) See p. 903, *post*.

SECT. 8.  
Administra-  
tion.

claims (*a*). The Board of Trade may also make regulations for giving employers and workmen and the Board itself an opportunity of obtaining a decision by the umpire on any question whether compulsory insurance applies to any workman or class of workmen (*b*), and for matters consequential upon any such decision (*c*); and for referring to him any question as to the amount of repayment to an association through which unemployment benefit is paid (*d*). The decision of the umpire on any question whether a trade is an insured trade (*e*) or not is conclusive in proceedings and prosecutions under the Act (*f*). If no decision has been given, and a decision is necessary for the determination of proceedings, the question may be referred to him for decision (*g*).

Courts of  
referees.

**1601.** Courts of referees consist of a chairman chosen by the Board of Trade and one or more members representing employers and an equal number of members representing workmen, the members in each case being chosen from panels constituted by the Board for different districts and trades or groups of trades (*h*). Board of Trade regulations provide not only for the constitution of courts of referees (*i*), but also for the reference to referees chosen from the above-mentioned panels, for consideration and advice, of questions bearing on unemployment insurance (*k*).

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 88 (1).

(*b*) *Ibid.*, s. 91 (1). The Unemployment Insurance (Umpire) Regulations, 1912 (Stat. R. & O., 1912, p. 1023), make provision for the decision by the umpire of questions whether contributions are payable. The application must be in the prescribed form, and may be made by associations of employers or workmen. The umpire may be asked to revise any previous decision. Unless the question does not admit of reasonable doubt he must give public notice in the *Board of Trade Journal* of the application, and representations in regard thereto may be made by parties interested, and such persons may be heard before him.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 91 (1).

(*d*) *Ibid.*, s. 105 (4); Unemployment Insurance Regulations, 1912, regulation 19; and see p. 899, *ante*.

(*e*) See p. 886, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 101 (6).

(*g*) *Ibid.*; Unemployment Insurance (Umpire) Regulations, 1912, regulation 7.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 90 (1), (2). The chairman and members may be paid remuneration, and persons attending before them may receive travelling and other allowances, including compensation for loss of time (*ibid.*, s. 90 (5)).

(*i*) *Ibid.*, s. 90 (3). The term of office of a panel in the case of the first panels is not less than one or more than three years, and in the case of subsequent panels three years; members of a panel representing employers are appointed by the Board of Trade, while those representing workmen are elected by ballot by the workmen in the trades concerned. Casual vacancies may be filled by the Board, which also determines the numbers of the various panels (Unemployment Insurance Regulations, 1912, regulation 20, as amended by the Unemployment Insurance (Supplementary) Regulations, 1914). A court of referees consists of the chairman and of one person drawn from the employers' panel and one from the workmen's panel, each member of a panel being, so far as possible, summoned to serve in turn. The chairman must not be a member of the trade or group of trades represented on the panel (Unemployment Insurance Regulations, 1912, regulation 21).

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 90 (4); Unemployment Insurance Regulations, 1912, regulation 22. The chair-

**1602.** All claims for unemployment benefit (*l*), and all questions arising in connexion with such claims, including questions whether the statutory conditions (*m*) are fulfilled or continue to be fulfilled by the workman, or whether there is any disqualification (*n*) in the workman, are determined by insurance officers (*o*) appointed for the various areas (*a*).

SECT. 8.  
Administra-  
tion.

Insurance  
officers.

In any case where unemployment benefit is refused or stopped or is not allowed to the amount claimed, the workman may require the insurance officer to report the matter to a court of referees, which, after consideration thereof, must make recommendations on the matter to the insurance officer (*b*). If the insurance officer agrees with those recommendations he is to give effect thereto; but if he disagrees, he must, upon request by the court of referees, refer the matter to the umpire (*c*) for final and conclusive decision (*d*). The insurance officer may also himself refer any claim or question to the court of referees instead of determining it himself (*e*).

Report to  
court of  
referees.

**1603.** An insurance officer, umpire, or court of referees may, on new facts, revise a previous decision or recommendation, when the revised decision or recommendation takes effect as if it were an original decision or recommendation, without prejudice to the retention of any benefit received under the previous decision or recommendation (*f*). Where a decision by the umpire that contributions are not payable in respect of any workman or class of

Revision of  
decisions.

man of the court of referees is, nominally, chairman of the meeting of referees (*ibid.*). As to procedure, see National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 2 (1); and Unemployment Insurance (Supplementary) Regulations, 1914 (regulation 5).

(*l*) See pp. 891 *et seq.*, *ante*.

(*m*) See pp. 892, 893, *ante*.

(*n*) See p. 893, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 88 (1).

(*a*) *Ibid.*, s. 89 (1).

(*b*) *Ibid.*, s. 88 (1) (*a*). The workman must give notice requiring such report within twenty-one days from the communication of the insurance officer's decision. The Board of Trade may extend the time (National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 2 (2)). Before it is considered by the court of referees the chairman may refer such a matter to representatives of employers and workmen respectively, drawn from the panel, and residing in the workman's neighbourhood, for previous examination and report (Unemployed Insurance Regulations, 1912, regulation 21 (5)).

(*c*) See pp. 901, 902, *ante*.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 88 (1) (*a*). If the court of referees has recommended the allowance of a claim, and the insurance officer refers the matter to the umpire, the workman is entitled to receive unemployment benefit as from the date of the recommendation until the umpire determines the claim (*ibid.*, s. 91 (1) (*e*); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 2 (3); Unemployment Insurance (Supplementary) Regulations, 1914, regulation 4).

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 88 (1) (*b*); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 2 (4). The Arbitration Act, 1889 (52 & 53 Vict. c. 49), does not apply to proceedings before the umpire (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 88 (3)).

(*f*) *Ibid.*, s. 88 (2); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 3 (3).



SECT. 8. workman has been reversed by him, contributions are only payable from the date when the decision was so revised (*g*).  
 Administra-  
 tion.

SUB-SECT. 3.—*Inspectors.*

Inspectors. **1604.** Inspectors appointed by the Board of Trade have powers of entry upon any premises other than a private dwelling-house not being a workshop, if there are reasonable grounds for supposing that any workmen in an insured trade are there employed, for the purpose of ascertaining whether the foregoing statutory provisions are being complied with. They may also call for documents and information generally (*h*).

SECT. 9.—*Penalties and Civil Proceedings.*

False statements. **1605.** False statements or false representations knowingly made by any person for the purpose of obtaining any unemployment benefit or payment for himself or any other person, or of avoiding payments required to be made under the statutory provisions relating to unemployment insurance, or of enabling any other person to avoid them, are punishable on summary conviction with imprisonment up to three months, with or without hard labour (*i*).

Failure to pay contributions. **1606.** Failure to pay any contributions due, or non-compliance with any of the requirements of the statutory provisions relating to unemployment insurance or the regulations made thereunder, are punishable, on summary conviction, by a fine not exceeding £10 for each offence, and also by liability to pay three times the amount of any unpaid contribution up to a maximum of £5. Where an employer has been so convicted for failure or neglect to pay any contribution, evidence of failure or neglect to pay other contributions in respect of the same workman during the year preceding the date when the information was laid may be given, but notice of such intention must be served with the summons or warrant. On proof of such failure or neglect the employer is liable to pay to the unemployment fund a sum equal to the total of all his unpaid contributions (*j*).

Consent of the Board of Trade. **1607.** The consent of the Board of Trade is necessary for the institution of the above proceedings, and they must be commenced

(*g*) National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 3 (2) ).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 112. There are penalties for wilfully delaying or obstructing an inspector in the exercise of his duties (*ibid.*, s. 112 (3) ); and the occupier may require the inspector to produce his certificate of appointment in the prescribed form before admitting him (*ibid.*, s. 112 (5) ). The form of the certificate of appointment of an inspector is prescribed in the Inspectors' (Unemployment Insurance) Regulations (Stat. R. & O., 1912, p. 1021).

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 101 (1).

(*j*) *Ibid.*, s. 101 (2); National Insurance (Part II. Amendment) Act, 1914 (4 & 5 Geo. 5, c. 57), s. 8 (1). Such payments are treated as a satisfaction of the unpaid contributions, and in the latter case the employer cannot recover from the workman the workman's portion of such contributions (*ibid.*).

within three months of the date when knowledge of the offence is obtained by the Board (*k*).

**1608.** The Board of Trade may recover by civil proceedings, as debts due to the Crown, any sums due to the unemployment fund (*l*). Any unemployment benefit received by any person to which he was not entitled is similarly recoverable (*m*).

SECT. 9.  
Penalties  
and Civil  
Proceed-  
ings.

Civil  
proceedings.

## Part V.—National Health Insurance.

### SECT. 1.—*Insured Persons.*

**1609.** The statutory provisions relating to national health insurance have reference to two classes of “insured persons,” namely, compulsorily insured persons, herein referred to as “employed contributors,” and persons who are voluntarily insured, herein referred to as “voluntary contributors” (*n*).

Two classes  
of insured  
persons.

### SECT. 2.—*Employed Contributors.*

#### SUB-SECT. 1.—*Persons Compulsorily Insured.*

**1610.** With certain exceptions (*o*), compulsory health insurance includes within its scope, as employed contributors, all persons, male and female, whether British subjects or not, who are of the age of sixteen (*p*) and upwards, and are employed in the United Kingdom under any contract of service (*q*) or apprenticeship (*r*), whether written or oral, expressed or implied (*s*). It is

Persons in  
compulsory  
health  
insurance  
included.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 101 (3).

(*l*) *Ibid.*, s. 101 (4).

(*m*) *Ibid.*, s. 101 (5).

(*n*) *Ibid.*, s. 1. The National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), amending the principal Act of 1911, so far as it relates to national health insurance, was appointed to come into operation on 1st September, 1913, or such other date, not later than 15th January, 1914, as the Joint Committee might by order appoint; see the National Insurance Act, 1913 (Dates of Commencement), Order, 1913 (Stat. R. & O., 1913, No. 866).

(*o*) See pp. 907 *et seq.*, *post*.

(*p*) A person is deemed not to have attained that age until the commencement of the anniversary of the day of his birth, and so with regard to other ages (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79). As to birth certificates, see note (*r*), p. 889, *ante*, which is equally applicable here.

(*q*) As to the nature of a contract of service, see title MASTER AND SERVANT, Vol. XX., pp. 64—70.

(*r*) For the definition, see *ibid.*, pp. 71, 72.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (1), (2), Sched. I, Part I. (a). Ordinary fully-licensed curates of the Church of England and probationary curates holding a temporary licence (*Re National Insurance Act, 1911, Re Employment of Church of England Curates*, [1912] 2 Ch. 563), ministers of the United Methodist Church and ministers under probation of the Wesleyan Methodist Church (*Re Employment of Ministers of the United Methodist Church, Re Employment of Ministers (under Probation) of the Wesleyan Methodist Church* (1912), 107 L. T. 143), assistant ministers and student missionaries in the Church of Scotland and the United

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Employed  
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tors.

immaterial whether a person so employed serves under one or more employers, whether he is paid by the employer or some other person, whether the mode of payment is by time or piece or otherwise, and, save in the case of an apprentice, that there is no money payment at all (*t*). Such compulsorily insured persons include the master and crew of any ship registered in the United Kingdom or of any other British ship or vessel of which the owner, managing owner, or manager resides or has his principal place of business in the United Kingdom (*u*); outworkers, that is to say, persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale in their own homes or on other premises not under the control or management of the person (here deemed to be the employer (*w*)) who gave out the articles or materials for the purposes of the latter's trade or business, unless excluded by a special order (*a*);

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Free Church of Scotland (*Scottish Insurance Commissioners v. Church of Scotland*, [1914] S. C. 16), members of the medical staff of an infirmary (*Scottish Insurance Commissioners v. Edinburgh Royal Infirmary*, [1913] S. C. 751), and officers of poor law unions in Ireland (*Re National Insurance Act*, 1911 (*Officers of South Dublin Union*), [1913] 1 I. R. 244) do not require to be insured. In none of these cases is there a contract of service. On the other hand, lay missionaries in the Church of Scotland or the United Free Church of Scotland (*Scottish Insurance Commissioners v. Church of Scotland*, *supra*), and pupil teachers and monitors in National Schools in Ireland (*Re National Insurance Act*, 1911 (*Pupil Teachers and Monitors*), [1913] 1 I. R. 219), require to be insured. As to the meaning of implied contract, see title CONTRACT, Vol. VII., p. 463.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2), Sched. I., Part I. (a).

(*u*) *Ibid.*, s. 1 (2), Sched. I., Part I. (b). As to the special provisions relating to the mercantile marine, see pp. 985 *et seq.*, *post*.

(*w*) The Commissioners may, as respects any outworkers or class of outworkers, specify by special order the person to be deemed the employer (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 26).

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2), Sched. I., Part I. (c). As to outworkers, see, further, p. 915, *post*; and title FACTORIES AND SHOPS, Vol. XIV., pp. 461 *et seq.* The employment of a master tailor who makes garments for a merchant tailor or wholesale clothing manufacturer, the work being done at the master tailor's premises, is employment as an outworker within this provision (*Re National Insurance Act*, 1911, *Re Master Tailors as Outworkers* (1913), 29 T. L. R. 725). As to the procedure for making special orders, see National Health Insurance (Special Order Inquiry) Rules (England), 1912 (Stat. R. & O., 1912, p. 683); and note (*m*), p. 901, *ante*. As to health insurance special orders in particular, Provisional Special Orders are made in accordance with the procedure established by the National Health Insurance (Special Orders Acceleration) Order, 1912 (Stat. R. & O., 1912, p. 636), and the National Health Insurance (Special Orders Acceleration) Order (No. 2) (Stat. R. & O., 1912, p. 638) made under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 78, and continue in force only until a Special Order has been made in accordance with *ibid.*, s. 113, Sched. IX. (Stat. R. & O., 1912, p. 689, *n*). By the National Health Insurance (Outworkers' Exclusion) Order, 1913 (Stat. R. & O., 1913, p. 775), blind persons to whom work is given out by or on behalf of any charitable or philanthropic institution, and who are not wholly or mainly dependent for their livelihood on their earnings in respect of that work, are excluded; and by the National Health Insurance (Outworkers' Exclusion) Order, 1913 (No. 2), (*i*.) persons to whom articles or materials are given out, but who are not themselves



persons who in the United Kingdom ply for hire with any vehicle or vessel used under a contract of bailment in consideration of the payment to the owner (for this purpose deemed to be the employer) of a fixed sum or a share in the earnings or otherwise (*b*); and persons employed under any local or other public authority except such as may be excluded by a special order (*c*). Married women who are employed under a contract of service otherwise than by the husband (*d*), and servants of the Crown not otherwise equally well provided for (*e*), are also within the scope of compulsory health insurance. For persons in the naval and military service of the Crown, including officers' training corps, there are special provisions (*f*).

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tors.

SUB-SECT. 2.—*Exemptions.*

**1611.** The following classes of employment are exempt from compulsory health insurance, namely (*g*), employment under the Crown or any local or other public authority where it is certified by the Insurance Commissioners that the terms of employment secure provision for sickness and disablement on the whole not less favourable than is conferred by health insurance (*h*); employment as a clerk or other salaried official (*i*) in the service of a railway or other statutory company, or of a joint committee of two or more such companies, where it is certified that the terms of employment secure provision for sickness and disablement not less favourable than is conferred by health insurance (*h*), and where the employment carries rights to benefits in a statutory superannuation fund ;

Exemptions  
from  
compulsory  
health  
insurance.

substantially engaged in the actual manipulation of those articles or materials; and (ii.) persons to whom articles or materials are given out, not being articles or materials which it is the trade or business of the person by whom they are given out to manufacture, make up, clean, wash, alter, ornament, finish, or repair, or adapt for sale, are excluded.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (1), (2), Sched. I., Part I. (*d*); see also title MASTER AND SERVANT, Vol. XX., p. 67. As to the definition of a contract of bailment, see title BAILMENT, Vol. I., pp. 524, 525.

(*c*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 6. Such exclusions are made as follows by the National Health Insurance (Employment under Local and Public Authorities) Exclusion Order, 1914: employment as chaplain or other minister of religion, as a duly qualified medical practitioner, as a coroner or deputy coroner, as a public analyst, as a public vaccinator, and as superintendent registrar or deputy superintendent registrar, registrar of births and deaths or deputy registrar of births and deaths, and registrar of marriages or deputy registrar of marriages; employment under a contract of apprenticeship without money payment; employment as an unpaid officer of any local or other public authority; employment otherwise than as an officer or servant of a local or other public authority, not being an employment specified in the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. I., Part I. (*a*), (*b*), (*c*), or (*d*).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (13), Sched. I., Part II. (1). As to the special provisions relating to married women, see pp. 975 *et seq.*, *post*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 53 (1); see pp. 993, 994, *post*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46; see pp. 979, 980, *post*.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2), Sched. I., Part II.

(*h*) As to the benefits under health insurance, see pp. 919 *et seq.*, *post*.

(*i*) So, apparently, excluding workmen from the exception.

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tors.

employment as a teacher to whom the Elementary School Teachers (Superannuation) Act, 1898 (*k*), or any similar future enactment applies or shall apply; employment as an agent paid by commission or fees or a share in profits, or partly in one and partly in another such ways, where the person so employed is mainly dependent for his livelihood on some other occupation, or where he is ordinarily employed as such agent by more than one employer on no one of whom he is mainly dependent for his livelihood; employment on an agricultural holding under the occupier thereof in respect of which no wages or other money payment is made, or where the person employed is the child of or is maintained by the employer; employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value £160 a year, or in cases of part-time service at a rate which in the opinion of the Insurance Commissioners is equivalent to a rate exceeding £160 for whole-time service (*l*); employment of a casual nature otherwise than for the purposes of the employer's trade or business (*m*), and otherwise than for the purposes of any game or recreation where the persons employed are engaged or paid through a club, the club in such cases being deemed to be the employer; employment of any class which may be specified in a special order (*n*) as being of such a nature that it is ordinarily adopted as subsidiary employment only, and not as the principal means of livelihood (*o*); employment as an outworker

(*k*) 61 & 62 Vict. c. 57; see title EDUCATION, Vol. XII., pp. 127 *et seq.*

(*l*) In determining whether or not a person is employed by way of manual labour, it is his substantial employment that must be regarded, to the exclusion of manual labour which is merely incidental or accessory thereto. A dairyman's foreman and a tailor's cutter are not engaged on work which is primarily manual labour, and they are accordingly outside the scope of compulsory health insurance if their remuneration exceeds £160 a year (*Re National Insurance Act, 1911, Re Dairyman's Foremen and Re Tailors' Cutters* (1912), 107 L. T. 342). The manual work of an artist is not manual labour; hence, neither a lithographic artist, nor an engraver engaged in the correction of half-tone engraved plates, if earning over £160 a year, is within the Act (*Re National Insurance Act, 1911, Re Lithographic Artists, and Re Engravers* (1913), 29 T. L. R. 440). As to manual labour, see, further, title MASTER AND SERVANT, Vol. XX., p. 147.

(*m*) The terms of this provision correspond with those by which casual labour is excluded from the definition of "workman" in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), as to which see *Dewhurst v. Mather*, [1908] 2 K. B. 754, C. A.; *Hill v. Begg*, [1908] 2 K. B. 802, C. A.; *Rennie v. Reid*, [1908] S. C. 1051; *M'Carthy v. Norcott* (1908), 43 I. L. T. 17, C. A.; title MASTER AND SERVANT, Vol. XX., pp. 155, 156.

(*n*) As to the procedure for making special orders, see note (*m*), p. 901. *ante*.

(*o*) By the National Health (Subsidiary Employments) Consolidated Order, 1914, the following classes of employment are specified as being of a subsidiary nature only:—(i.) Employment, involving part-time service only, in or about a cathedral, church, or other place of religious worship in any of the following capacities: acolyte, beadle, bellringer, member of the choir, organ blower, organist or other musician, sacristan, vergier or sexton; employment, involving part-time service only, in any of the following capacities: bible-woman, chapel-keeper, lay preacher or Scripture reader; (ii.) Employment, involving occasional attendance only, as usher, crier, order officer, attendant, messenger at sittings of the judge or registrar of a county court; employment as a sub-postmaster remunerated by scale payment, unless the employed person is mainly dependent for his livelihood on the earnings derived by him from employment as a sub-postmaster and renders on the average eighteen or more



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hours' personal service in each week in that capacity; employment as a collector or deliverer of postal letters under allowance giving not more than eighteen hours' service weekly; employment, occupying not more than eighteen hours in the week, as messenger conveying Post Office mails on station service or pier service; employment as an assessor of taxes or as a collector of taxes under the Acts relating to income tax, inhabited house duty, and land tax, unless the employment, or, if the employment is in both such capacities, the employment in both capacities, involves whole time service; employment as a distributor of stamps by the Board of Inland Revenue; employment, involving part-time service only, in the capacity of (a) civilian butt-marker or look-out man at rifle ranges used by members of the Territorial Force; (b) temporary drill instructor in the Territorial Force; (iii.) Employment, involving part-time service only, by any local or other public authority, as a person employed to act in relief of gymnasium, lavatory, or playground attendants, or park constables; employment, involving part-time service only, by a local or other public authority, or by any company or body responsible for the lighting of any borough or other local area, as lamp lighter or extinguisher, whether the employment does not include the duty of cleaning or keeping in order the lamps, unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; employment, involving part-time service only, by a local education authority or by the managers of a public elementary school in the cleansing of drains, cesspools, pits, or offices in or about any public elementary school; employment, involving attendance on Sundays only, by a local education authority in relief of a school keeper in a public elementary school or by the managers of a public elementary school in relief of the school keeper in the school; employment by a local education authority or by the managers of a public elementary school as a supervisor of meals provided in accordance with the Education (Provision of Meals) Act, 1906; employment by a local or other public authority in the removing of snow in or about any streets or other public places, unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; employment, involving occasional service only, as a mace-bearer, unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; employment in the capacity of (a) special constable; (b) town crier; employment, involving part-time service only, in the capacity of (a) member of a fire brigade; (b) probation officer under the Probation of Offenders Act, 1907; employment, involving part-time service only, as fishery officer under certain local fisheries committees and powers of conservators; (iv.) Employment, involving part-time service only, (a) as civilian in charge of a rocket life-saving apparatus and gear connected therewith, being the property of the Board of Trade; (b) in or with a volunteer company enrolled for the purpose of working a rocket life-saving apparatus; or (c) in keeping a look-out in connection with the Board of Trade life-saving apparatus for wrecks or signals of distress at sea; employment, involving part-time service only, by a local or general lighthouse authority, or dock, harbour, or conservancy authority or board, in connection with the care or upkeep of minor lights, buoys, beacons, signals and tide-gauges; employment as a member of the crew of a lifeboat; (v.) Employment on an agricultural holding in any of the following capacities: flower-puller, fruit-picker, hop-picker, onion-peeler, pea-picker, or potato-picker, unless the person was at the time of entering on the employment an insured person or a holder of a certificate of exemption granted in pursuance of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 81; employment on an agricultural holding as hop-tyer; (vi.) Employment, involving part-time service only, in or about a theatre, music hall, or other place of public entertainment, (a) as bar attendant or programme seller, unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; or (b) as supernumerary unless he is otherwise ordinarily engaged in or about the theatre, music hall, or other place of public entertainment; or (c) as check taker, dresser, flyman, linkman,



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where the person so employed is the wife of an insured person and is not wholly or mainly dependent for her livelihood on such employment (*p*); employment as a member of the crew of a fishing vessel where the members of such crew are remunerated by shares in the profits or gross earnings of the working of such vessel in accordance with any prevailing custom or practice at any port, if a special order is made for the purpose by the Insurance Commissioners (*q*); employment in the service of the husband or wife of the employed person.

Removal of  
exemptions.

**1612.** The Insurance Commissioners may, with the approval of the Treasury, provide by special order for including amongst the persons to whom compulsory health insurance is applicable, either conditionally or unconditionally, any persons engaged in any of the foregoing excepted employments (*r*).

money taker, property man, stage hand, or usher; (vii.) Employment, involving only occasional service or service outside the ordinary hours of work, as secretary or clerk of a society, club, philanthropic institution, school, local pension committee, or otherwise in the performance of clerical duties; employment, for a period not exceeding one day on each occasion, as an occasional helper to, or substitute for, a weaver regularly employed in a cotton, woollen, or worsted mill, where the employer of the weaver pays no wages or other pecuniary remuneration, in respect of the employment, to the person so employed as a helper or substitute; employment as a milker, that is to say, as a person engaged in milking, unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; employment in the delivery of milk or newspapers, where the employment is not continued later than 9 a.m., unless the person so employed is otherwise ordinarily employed by the authority, company, or other body or person to whom the service is rendered; employment as a caretaker, where no wages are paid or other money payments are made; employment, involving part-time service only, in the capacity of (a) member of a town band, (b) political agent, (c) water bailiff; employment, involving part-time service only, in reading to the blind. By the National Health Insurance (Subsidiary Employment) Provisional Order, 1914 (No. 3) (Stat. R. & O., 1914, No. 1228), there is similarly specified employment involving part-time service only, by an approved society or a branch of an approved society, as a sick visitor.

(*p*) As to the definition of "outworker," see p. 906, *ante*. This class of employment has by special order under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2), been made an employment to which compulsory health insurance applies; see note (*r*), *infra*. Where a marriage has to be proved for the purpose of national insurance a certificate of marriage is obtainable for 1s. on application on the prescribed form, which form is obtainable gratis from the person having the care of the register (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 35; National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 114; and see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS, Vol. XXIV., p. 450); for form of requisition, see Order of the Local Government Board, dated the 18th August, 1913 (Stat. R. & O., 1913, p. 1008).

(*q*) The National Health Insurance (Share Fishermen) Order, 1913 (Stat. R. & O., 1913, p. 779), makes such special order with regard to such employment at any port within the limits of the ports of Penzance and St. Ives (as defined in the Order in Council of the 24th March, 1902 (Stat. R. & O., 1902, p. 258), under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 373, for making regulations for the registry, lettering and numbering of British sea-fishing boats).

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2). A married woman engaged in employment as an outworker is deemed to be a person employed within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Part I., notwithstanding that she is the wife of

**1613.** A person otherwise within the scope of compulsory health insurance is entitled to an exemption certificate on proving that he is either in receipt of any pension or income of the annual value of £26 or upwards not dependent upon his personal exertions, or is ordinarily and mainly dependent for his livelihood upon some other person, or is ordinarily and mainly dependent for his livelihood on the earnings derived by him from an occupation which is not employment to which compulsory insurance applies (*s*).

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tors.

Certificate of  
exemption.

**1614.** Persons above the age of seventy are not required to become insured (*t*).

Persons over  
seventy.

### SECT. 3.—*Voluntary Contributors.*

**1615.** Persons of the age of sixteen to seventy (*u*) may be insured as voluntary contributors provided that they satisfy the following conditions, namely: they must not be persons to whom compulsory health insurance is applicable; either they must be engaged in some regular occupation and be wholly or mainly dependent for their livelihood on the earnings derived from that occupation, or have been insured persons for five years or upwards, or, being of the age of sixty or upwards, show to the satisfaction of the Insurance Commissioners that they have ceased to be insurable as employed contributors; and either their total income from all sources must not exceed £160 a year or they must have been insured persons for five years or upwards (*w*).

Conditions to  
be fulfilled.

### SECT. 4.—*Contributions.*

#### SUB-SECT. 1.—*Employed Contributors.*

##### (i.) *Rate of Contributions.*

**1616.** In respect of each employed contributor (*x*) there is contributed by employer and employed a total weekly sum of 7*d*. in the case of men and 6*d*. in the case of women, these sums being herein referred to as the "employed rate." Of these total sums the employer contributes 3*d*. in the case of both men and women.

Employed  
rate.

an insured person and that she is not wholly or mainly dependent for her livelihood on her earnings as an outworker (National Health Insurance (Married Women Outworkers) Order, 1912, dated the 18th February, 1914).

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 2; National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 5. A claim for exemption must be in the form prescribed in the National Health Insurance (Claims for Exemption) Regulations (England), 1914 (Stat. R. & O., 1914, No. 457), and must be addressed to the Insurance Commissioners. A certificate of exemption remains in force for not more than two years, but may be renewed. If during its currency the holder becomes disentitled to the certificate it becomes void (*ibid.*). As to contributions in respect of persons holding exemption certificates, see p. 916, *post*; and as to benefits, pp. 930, 931, *post*.

(*t*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 3 (2).

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (1); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 3 (2).

(*w*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (1), (3); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 4. As to the circumstances in which married women may become voluntary contributors, see pp. 975, 976, *post*; as to the meaning of "insured person," see p. 905, *ante*; as to the rates of contributions, see pp. 916, 917, *post*; as to medical benefit, see p. 920, *post*.

(*x*) As to the definition, see p. 905, *ante*.

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tions.  
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Special cases.

The balance is contributed by the employed contributor, that is to say, men contribute 4*d.* and women 3*d.* (a).

**1617.** In the case of employed contributors of the age of twenty-one or upwards whose remuneration (b) does not include the provision of board and lodging by the employer, and whose remuneration does not exceed 2*s.* 6*d.* a working day, the employed rate is specially apportioned as follows:—

Where the remuneration exceeds 2*s.* but does not exceed 2*s.* 6*d.* a working day, the employer pays 4*d.* for men and 3*d.* for women, men and women employed contributors each paying 3*d.*

Where the remuneration does not exceed 2*s.* a working day, employer and employed together only contribute 6*d.* a week in respect of male, and 5*d.* in respect of female employed contributors, the remaining 1*d.* being contributed out of public funds. The 6*d.* and 5*d.* are respectively contributed as follows:—

Where the remuneration exceeds 1*s.* 6*d.*, but does not exceed 2*s.* a working day, the employer contributes 5*d.* for men and 4*d.* for women, the employed contributor, whether man or woman, contributing 1*d.* (c).

Where the remuneration does not exceed 1*s.* 6*d.* a working day, the employer contributes the whole 6*d.* payable for men and the whole 5*d.* payable for women, the employed contributor contributing nothing (d).

Where the persons employed by any employer or group of employers in any class or classes of work are in general in receipt of a rate of remuneration which, though liable to fluctuation, is normally within any of the following limits per working day, namely:—not exceeding 1*s.* 6*d.*; exceeding 1*s.* 6*d.*, but not exceeding 2*s.*; exceeding 2*s.*, but not exceeding 2*s.* 6*d.*, the Insurance Commissioners may, by special order, declare that such persons are, for the purposes of national health insurance, to be treated as if in constant receipt of the normal rate of remuneration, notwithstanding that they or any of them may in fact in any week receive a higher or lower rate (e).

(a) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4 (1), Sched. II., Part I.

(b) The term "remuneration" is not confined to pecuniary payment; see title MASTER AND SERVANT, Vol. XX., p. 86. As used in the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), it appears to be used in the sense in which the term "earnings" is used in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), as to which see title MASTER AND SERVANT, Vol. XX., pp. 201, 202.

(c) In *Don Brothers, Buist & Co., Ltd. v. Scottish National Insurance Commissioners*, [1913] 1 Scots Law Times, 221, a woman was paid at the rate of 11*s.* 7*d.* a week, being employed ten hours a day for five days a week and five hours on Saturdays; and it was held by the commissioners that she was employed six days a week, not five and a half days, and that therefore her remuneration did not exceed 2*s.* a day.

(d) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4 (1), Sched. II., Part I. In the case of "low wage contributors," that is, employed contributors of the age of twenty-one or upwards whose remuneration does not include board and lodging, and whose remuneration does not exceed 2*s.* a working day, a special card is to be used for stamping purposes (see note (a), p. 918, *post*) (National Health Insurance (Collection of Contributions, Consolidated Regulations), 1914).

(e) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 25; and see the



**1618.** Contributions cease to be payable in respect of employed contributors when they reach the age of seventy (*f*).

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tions.

(ii.) *Payment by Employer.*

**1619.** The employer must pay, in the first instance, both his own and the employed contributor's contributions, but is entitled to recover, by deduction from wages or otherwise, the contributions payable by the latter. In regard hereto the following rules apply (*g*):—

When  
contributions  
cease.

Rules as to  
payment.

(1) A weekly contribution is payable for each calendar week during the whole or any part of which an employed contributor has been employed. A calendar week is the period from midnight on one Sunday to midnight on the following Sunday. No contributions are payable in respect of any week during which no remuneration has been received or services rendered by an employed contributor, nor in respect of any week during which no services have been rendered by the employed contributor and he has been in receipt of sickness or disablement benefits during the whole or any part of that week.

(1) Weekly  
contributions.

(2) The employed contributor's share must be recovered, where possible, by deduction from wages or other remuneration payable in respect of the period for which the contribution is payable, and no contract to the contrary can defeat such right of deduction. If this is not possible the contributions may be recovered summarily as a civil debt (*h*), but proceedings must be instituted within three months.

(2) Recovery  
from  
employee.

(3) Unless otherwise prescribed, where the contributor is employed by more than one employer in any calendar week the first employer in the week is responsible for contributions (*i*).

(3) Where  
several  
employers.

National Health Insurance (Normal Rate of Remuneration) Provisional Order (No. 3), 1914 (Stat. R. & O., 1914, No. 1267), by which the persons employed otherwise than as outworkers in the following classes of work are to be so treated, namely:—Hand-hammered chain making up to and including  $\frac{3}{4}$  in., by persons of either sex, the limits of remuneration being in this case exceeding 1s. 6d., but not exceeding 2s.; machine-made lace and net finishing, including the finishing of the product of plain net machines, by persons of either sex, the limits being then exceeding 2s., but not exceeding 2s. 6d.; work by women in making of boxes or parts thereof made wholly or partially of paper, cardboard, chip, or similar material, or in those branches of the ready-made and wholesale bespoke tailoring trade which are engaged in making garments worn by male persons, the limits being in these cases exceeding 2s., but not exceeding 2s. 6d.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4 (3).

(*g*) *Ibid.*, s. 4 (2), Sched. III.

(*h*) See title MAGISTRATES, Vol. XIX., pp. 609, 610. Such method of recovery is appropriate in the case of employed persons whose pecuniary remuneration comes elsewhere than from their employers, as, for example, waiters or cabmen.

(*i*) The National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part V., provide for cases of contributors employed by more than one person in a calendar week. Where any persons are ordinarily employed by two or more employers in a week, the employers may submit a scheme as to the payment of contributions in respect of those persons for the approval of the Insurance Commissioners. The parties to the scheme who have employed any person during the week to whom the scheme applies are deemed jointly to be the employer of such person. In the case of a person employed as an agent by two or more employers and paid by commission etc., the employer in the employment on which the person employed is mainly dependent for his livelihood is deemed the

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tions.

(4) Principal  
and  
immediate  
employer.

(5) Where  
employer  
bears both  
contributions.

(4) Regulations may provide for cases where employed contributors work under the general control and management of some person other than their immediate employer, making such person responsible for contributions, and enabling him to deduct the employed contributors' contributions from any sum payable by him to the immediate employer, the latter in his turn being enabled to recover from the employed contributors (*k*).

(5) Where no wages or other money payments are paid to the contributor, the employer must pay both employer's and

employer for the purpose of contributions. In the case of outworkers to whom the National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part IV. (note (*n*), p. 915, *post*), do not apply, the employer is deemed to be the person to whom work is returned at a time when a contribution has not already been paid in respect of the outworker for that week. If it cannot be said that anyone is the first person employing the contributor in a particular week, the responsible employer is that one who first makes a money payment to the person employed in respect of his employment in that week. The several employers may enter into an agreement in the prescribed form for the payment of contributions in rotation. Employers desiring to enter into such an agreement must sign their names in the special book prescribed for the purpose.

(*k*) By the National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part VI., such provision has been made in the following cases, the person under whose general control and management the contributor works being referred to as the "principal employer" (and shown in brackets in the following list) as distinguished from the immediate employer:—(i.) employment in a coal mine within the meaning of the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50) (the owner of the mine within the meaning of the said Act); (ii.) employment in a metalliferous mine within the meaning of the Metalliferous Mines Regulation Acts, 1872 (35 & 36 Vict. c. 77) and 1875 (38 & 39 Vict. c. 39) (the owner of the mine within the meaning of the said Acts); (iii.) employment in a quarry under the Quarries Act, 1894 (57 & 58 Vict. c. 42) (see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 634) (the owner of the quarry for the purposes of the said Act); (iv.) employment in a factory or workshop within the meaning of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22) (not being a tenement factory or workshop, or a factory or workshop within which an insured trade within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Part II., is carried on, or a quarry under the Quarries Act, 1894 (57 & 58 Vict. c. 42)) (see title FACTORIES AND SHOPS, Vol. XIV., p. 433) (the occupier of the factory or workshop); (v.) employment in an insured trade within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Part II. (other than the trade of building or of the construction of works), where the immediate employer of the contributor himself works wholly or mainly by way of manual labour in or for the business of the principal employer (see p. 887, *ante*) (the person in whose business or for the purposes of whose business the contributor is employed); (vi.) employment in the trade of building or of the construction of works (within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. VI., where the immediate employer of the contributor himself works wholly or mainly by way of manual labour in or for the business of the principal employer and where the principal employer has a right to the exclusive services of the immediate employer of the contributor (see p. 887, *ante*) (the person in whose business or for the purposes of whose business the contributor is employed); (vii.) employment in a tenement factory or workshop within the meaning of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), where the owner of the factory or workshop has a right to the exclusive services of the immediate employer of the contributor (see title FACTORIES AND SHOPS, Vol. XIV., p. 433) (the owner of the factory or workshop). Whether or not persons are under the general control and management of the principal employer or the immediate employer is a question of fact (*Newell v. King* (1913), 110 L. T. 76).



contributor's contributions, and cannot recover any part thereof from the contributor.

(6) No contract may be entered into entitling the employer to deduct from wages or otherwise recover from the contributor the employer's contribution (*l*).

(7) Deductions made as aforesaid are deemed to be entrusted to the employer for the purpose of paying the contribution in respect of which the deductions were made.

(8) The Insurance Commissioners may provide, by regulations, that in the case of outworkers(*m*) the contributions to be paid may be determined by reference to the work actually done instead of by reference to the weeks in which it is done (*n*).

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Contribu-  
tions.

(6) No  
contracting  
out.

(7) Deduc-  
tions allo-  
cated to  
contributions.

(8) Out-  
workers.

(*l*) As to the penalty for deducting from wages the employer's contribution, see p. 999, *post*.

(*m*) For the definition, see p. 906, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4 (2), Sched. III. (10). The National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part IV., provide as follows:—Employers who desire to pay contributions in respect of outworkers by reference to the work actually done (that is, the "unit" method) must send to the Commissioners a notice of entry in the prescribed form. Contributions are paid in respect of units of work, a unit of work being the quantity of work in respect of which certain amounts are paid, after allowing any expenses incurred by the outworker which are necessarily incidental to the work. Units of work have been determined generally and in the case of certain classes of work as follows:—Hand-hammered chain making up to and including  $\frac{3}{4}$  in. (that is, small sizes), the unit of work is work in respect of which is paid 10s.; dollied or tommied chain making and hand-hammered chain making of  $\frac{3}{4}$  in. diameter and over up to  $\frac{1}{2}$  in. inclusive, 20s.; machine-made lace and net finishing, including the finishing of the product of plain net machines, 11s.; the mending in brown of laces, nets, and curtains, for female workers, 11s.; the making of boxes or parts thereof made wholly or partially of paper, cardboard, chip, and similar material, for female workers, 12s., for male workers, 24s.; those branches of the ready-made and wholesale bespoke tailoring trade in Great Britain which are engaged in making garments to be worn by male persons, for female workers, 13s., for male workers, 24s.; fives and racquet ball covering, 10s. 6d.; glove making by machine, for female workers, 13s.; the weaving of horse-hair cloths for tailors and dressmakers in hand looms, for female workers, 12s. 6d., for male workers, 16s.; fringing knitted scarves, tasselling dress and hat girdles and button making (including braid button coverings, but not silk and mohair thread button covering) in Leek and district, for female workers, 13s. 6d., silk skeining in Leek and district, 12s. 6d.; the making of paper bags in the city of Bristol, 9s. 3d., and in London, 11s. 6d.; linking and seaming by machine in the manufacture of hosiery, for female workers, 11s. 6d.; chevening and marking for hosiery, 10s.; net braiding in the city of Hull, for female workers, 10s.; net braiding in the borough of Great Grimsby, for female workers, 11s.; the snooding of fish hooks in the borough of Great Grimsby, for female workers, 12s. 6d.; the trimming of felt hats in the counties of Lancashire and Cheshire, for female workers, 12s. 6d.; the making of straw hats in the counties of Bedford and Hertford, 12s. 6d.; shirt making in the city of Manchester, 10s.; the carding of buttons, 7s. 6d.; the carding of hooks and eyes, 6s.; outworkers employed in net making by employers carrying on business as net manufacturers in the county of Dorset, 6s.; sewing lawn-tennis balls, 10s. 6d. All other classes of work, for female workers, 8s. 9d.; for male workers, 15s. (*ibid.*, Sched. III., Part III.). Any outworker or employer may claim, on the prescribed form, to have the unit of work varied (*ibid.*, Part IV.). In respect of each unit of work the contribution payable is the same as would be



## SECT. 4.

Contribu-  
tions.

Temporary  
unemploy-  
ment.

(iii.) *Temporary Unemployment.*

**1620.** A person whose normal occupation is such as to make him an employed contributor is, for the purpose of reckoning the number and rate of contributions, deemed to continue to be an employed contributor although temporarily unemployed, but it is otherwise if the unemployment continues beyond twelve months, unless due to inability to obtain employment and not to any change in his normal occupation (*o*).

(iv.) *Effect of Exemption.*

Contribution  
in case of  
exempted  
persons.

**1621.** Although a person who holds a certificate of exemption (*p*) is not required to be insured, and therefore is not liable to pay contributions, the employer of such person remains liable to pay the employer's contribution (*q*) in respect of such person (*r*).

SUB-SECT. 2.—*Voluntary Contributors.*

Voluntary  
rate.

**1622.** The "voluntary rate" payable by voluntary contributors is based upon the age of the voluntary contributor and is ascertained from the tables for insured persons prepared by the Insurance

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payable each week if the special provisions as to outworkers did not apply (see p. 915, *ante*). If in any year fifty-two contributions have been paid by or in respect of an outworker, he is entitled to a certificate that all contributions in respect of him for that year have been paid, and no further contributions are payable by any of his employers during the remainder of that year. For the purpose of calculating the number of contributions paid or of reckoning arrears, the total sum paid in respect of an outworker is reckoned as though it consisted of weekly contributions. There are special cards for stamping purposes in the case of outworkers. An outworker regularly employed by an employer who has not given notice of entry may give written notice to such of his employers as have given that notice of entry that he desires that the special provisions as to outworkers shall no longer apply to him. The employer must post up on his premises the foregoing table of rates and a statement of the relevant units of work, and must keep records of work given out. Employers must obtain the necessary cards and issue them to their outworkers as necessary. The employer may terminate the foregoing system by sending to the Insurance Commissioners a notice of withdrawal not less than one month before the date on which it is to take effect. The foregoing arrangement in regard to the payment of contributions does not apply to outworkers whose units of work would amount to not less than 30s. in the case of men and 17s. 6d. in the case of women, or to outworkers who do not themselves do the greater part of the work given out to them (National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part IV.). Save as aforesaid, *ibid.*, Part II. (see note (*a*), p. 918, *post*), applies to the employment of outworkers.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79.

(*p*) See p. 911, *ante*.

(*q*) See pp. 911, 912, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 4 (4). The National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, prescribe special cards for the purpose of stamping in the case of the persons referred to; also "exemption books" which are to be returned by exempt persons with the certificate of exemption when the latter expires or is surrendered. As to the benefits to which exempted persons are entitled, see pp. 930, 931, *post*.

Commissioners (s). Where, however, a person who has been an employed contributor for five years or upwards (t), or a person who, being of the age of sixty or upwards, shows to the satisfaction of the Insurance Commissioners that he has ceased to be insurable as an employed contributor (u), becomes a voluntary contributor, his rate of contribution continues at the employed rate (a). In the case of a voluntary contributor whose total income from all sources exceeds £160 a year, but who is entitled to be a voluntary contributor for the reason that he has been an insured person for a period of five years or upwards (b), the weekly contribution which would otherwise be payable by him is reduced by 1*l.* (c). Contributions by voluntary contributors cease at the age of seventy (d).

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tions.

**1623.** If an insured person becomes a member of an approved society (e) as a voluntary contributor, the rate payable in respect of him remains the voluntary rate, although he becomes employed within the meaning of the Act (f), until he gives notice in the prescribed form of his wish to be transferred to the employed rate (g). Until such notice is given the employer pays the employer's contribution of the employed rate (h), such payments being treated as in part satisfaction of the contributions at the voluntary rate payable by the contributor, and if the contributor fails to pay the balance he is deemed to be in arrear to that extent (i). Upon giving the notice referred to, the employed rate (h) becomes payable (k).

Voluntary  
contributors  
members of  
approved  
societies.

**1624.** If an employed contributor (l) within five years from his entry into insurance ceases to be employed and becomes a voluntary contributor (m), he is deemed to be in arrear as from the date of becoming a voluntary contributor, to the amount of the difference

Employed  
contributor  
becoming  
voluntary  
contributor.

(s) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 5 (1). For the rates for male and female voluntary contributors at various ages, see p. 1000, *post*. Persons entering into insurance within sixty-five weeks of the commencement of the Act, *i.e.*, before the 13th October, 1913, did so at special rates; see National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 5 (1) (a); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 2 (2); and Table I. of National Health Insurance (Voluntary Rate) Regulations, 1914 (Stat. R. & O., 1914, No. 1118).

(t) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 5 (1) (b).

(u) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 4.

(a) As to the employed rate, see pp. 911, 912, *ante*.

(b) See p. 911, *ante*.

(c) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 10 (1). This reduction in contribution is in consideration of loss of medical benefit (*ibid.*, and see p. 920, *post*).

(d) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 5 (2).

(e) See p. 942, *post*.

(f) See p. 905, *ante*.

(g) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 6 (1). For the prescribed form of notice, see National Health Insurance (Transfer from Voluntary to Employed Rate) Regulations, 1913 (Stat. R. & O., 1913, p. 991).

(h) See pp. 911, 912, *ante*.

(i) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 6 (3).

(k) *Ibid.*, s. 6 (2).

(l) See pp. 905 *et seq.*, *ante*.

(m) See p. 911, *ante*.

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tions.

between the aggregate contributions paid by or in respect of him since his entry into insurance and the aggregate of the contributions which would have been payable by him had he been a voluntary contributor throughout (*n*).

SUB-SECT. 3.—*Miscellaneous Provisions.*

Priority in  
bankruptcy.

**1625.** Contributions payable in respect of employed contributors by a bankrupt or a company being wound up have the same priority as contributions payable in respect of workmen in an insured trade (*o*).

Regulations.

**1626.** The Insurance Commissioners may make regulations as to the payment and collection of contributions (*a*).

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 6 (4). As to the effect of arrears, see p. 926, *post*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 110; and see p. 891, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 7. The National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, provide as follows in regard to employed contributors:—Contributions are paid by means of stamps affixed (and then cancelled) by the employer to contribution cards of the prescribed form. The stamps are procurable through the Post Office (for the statutory provisions as to stamps, see National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 108; as to regulations made under that provision by the Inland Revenue Commissioners, see note (*e*), p. 890, *ante*). A person entering an employment which entails compulsory health insurance must before doing so, or if already in such employment and under sixteen must before attaining that age, apply to his approved society (see pp. 937, 938 *post*) or, if he is not a member of an approved society, to the local post office for an insurance card. Application must similarly be made for a new card if the period of currency of one expires, or if the contributor is transferred from one society to another, or changes to an approved society from deposit insurance (see p. 943, *post*), or if the card is lost or rendered useless. If an employed contributor fails to deliver a card to his employer the latter should procure an emergency card from the post office. Arrangements may be made whereby stamps may be affixed at times or contributions paid in a manner otherwise than as prescribed herein, so, however, that no contribution is paid later than the date on which the wages for the period covered by the contributions are paid, unless deposit is made by way of security. Cards must be surrendered to the approved society or, if the contributor is not a member of a society, must be forwarded to the Insurance Commissioners by the contributor on leaving or, if he has been a deposit contributor, on joining an approved society, on a change of approved society, on the card becoming defaced, on the expiration of its period of currency, on becoming a voluntary contributor, on ceasing to be an insured person, and, in the case of a woman, on ceasing on or after marriage to be employed. Arrears must be paid by means of a special arrears card obtainable from the approved society. The foregoing regulations apply also to voluntary contributors, except that in the case of deposit contributors (see p. 943, *post*) the Insurance Commissioners take the place of the Post Office for the issue of cards, while the contributor himself does the necessary affixing and cancelling of stamps. The contribution of a voluntary contributor is payable on the first day of each week unless he is then incapable of work by reason of illness of which notice has been given, when it is payable on the first day of that week after the termination of the incapacity. If the contributor is so incapacitated for a continuous period of more than six days extending over parts of two weeks,



**1627.** An employer may make an arrangement through the Board of Trade whereby, in respect of workmen engaged by him through a labour exchange (*b*), or in his employ at the date of such arrangement, the performance of all or any of his duties under the statutory provisions relating to national health insurance, whether on his own or his workmen's behalf, may be undertaken for him by the labour exchange (*c*).

SECT. 4.  
Contribu-  
tions.

Labour  
exchanges.

#### SECT. 5.—*Classification of Benefits.*

##### SUB-SECT. 1.—*In General.*

**1628.** Insured persons, whether employed contributors (*d*) or voluntary contributors (*e*), are entitled to the following benefits, namely (*f*):—medical benefit (*g*), sickness benefit (*h*), disablement benefit (*i*), maternity benefit (*k*), and sanatorium benefit (*l*), whilst

Benefits  
payable.

no contribution is payable for the second week. In addition to his card, the insured person is to be supplied with an insurance book for the purpose of recording particulars of contributions, benefits, and arrears. The book is issued by an approved society with the card or, in the case of deposit contributors, by the Insurance Commissioners. The contributor must deposit the book with the society when giving notice of disease or disablement or when claiming maternity benefit. The contributor must deposit his book upon surrendering his card with his society or, if he is not a member of a society, must send it to the Insurance Commissioners, and with his society or the Insurance Commissioners upon the expiration of its period of currency or when it is so defaced as to be useless, and on his transfer to another society with the society he joins, and if he has been a deposit contributor, on his becoming a member of a society, with that society, and when he leaves a society otherwise than by transfer, with that society. As to the return of a card or book to a contributor by the employer by post and the liability of the latter in case of loss, see *Price v. Webb*, [1913] 2 K. B. 367; and note (*e*), p. 890, *ante*. As to the penalty for buying, taking in pawn or in exchange insurance cards or books, see p. 999, *post*. There are special regulations for outworkers (see note (*n*), p. 915, *ante*), grouped employers (see note (*i*), p. 913, *ante*), intermediate employers (see note (*k*), p. 914, *ante*), soldiers and sailors (see note (*c*), p. 980, *post*), and the mercantile marine (see note (*l*), p. 986, *post*). The duty to affix stamps to a card may be lawfully delegated by the employer, but he delegates it at his risk, for if the duty is not performed he is guilty of an offence (*Godman v. Crofton* (1913), 30 T. L. R. 193).

(*b*) See p. 878, *ante*; and compare pp. 896, 897, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 99 (1). Any such arrangement must provide that the employer is to deposit with the Board a sum sufficient to cover the maximum amount of the contributions payable by the employer for three months or during such less period as may be agreed upon, both on his own and the workmen's behalf; that the position of the workman as to obtaining and delivering his card is not to be less favourable than before; and that the employer is to pay the cost to the Exchequer of the performance by the Board of Trade of such duties on his behalf (Board of Trade Regulations dated the 25th June, 1912 (Stat. R. & O., 1912, p. 1022)).

(*d*) See p. 905, *ante*.

(*e*) See p. 911, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 1 (1), 8 (1).

(*g*) See p. 920, *post*.

(*h*) *Ibid*.

(*i*) See pp. 922, 923, *post*.

(*k*) See pp. 923, 924, *post*.

(*l*) See p. 924, *post*.

SECT. 5.  
Classifica-  
tion of  
Benefits.

Attendance  
and medicine.

in certain cases further benefits are payable, known as additional benefits (*m*):

SUB-SECT. 2.—*Medical Benefit.*

**1629.** "Medical benefit" means medical treatment and attendance, including the provision of proper and sufficient medicines, and such medical and surgical appliances as may be prescribed by regulations (*n*), but not including medical treatment or attendance in respect of a confinement (*o*).

A voluntary contributor whose total income from all sources exceeds £160 a year, but who is entitled to be a voluntary contributor for the reason that he has been an insured person for a period of five years or upwards (*p*), is not entitled to receive medical benefit (*q*). A person who is of the age of sixty-five or upwards at the time of entering into insurance is not entitled to medical benefit after the age of seventy unless the number of weekly contributions paid by or in respect of him exceeds twenty-six (*a*).

SUB-SECT. 3.—*Sickness Benefit.*

Periodical  
payments.

**1630.** "Sickness benefit" means periodical payments whilst rendered incapable of work by some specific disease or by bodily or mental disablement, of which notice has been given, commencing on the fourth day of such incapacity (*b*), and continuing for not more than twenty-six weeks. A day on which the incapacitated person was prevented, by the incapacity, from doing any effective work is treated, for this purpose, as a day of incapacity, but a Sunday is not so treated unless he would, but for the incapacity, have worked on that day (*c*). The contributor is not entitled to this benefit until twenty-six weeks have elapsed since his entry into insurance, and at least twenty-six weekly contributions have been paid by or in respect of him (*d*). The right ceases at the age of seventy (*e*).

Recurring or  
subsequent  
disease or  
disablement.

When an insured person recovers from the disease or disablement in respect of which he has received sickness benefit, any recurrence thereof, or any subsequent disease or disablement, is deemed to be a continuation of the previous disease or disablement, unless in the

(*m*) See pp. 924, 925, *post*.

(*n*) No medical benefit was available before the 15th January, 1913 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (8) (a)). The regulations in force are the National Health Insurance (Medical Benefit) Regulations (England), 1913 (Stat. R. & O., 1914, No. 5).

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (6).

(*p*) See p. 911, *ante*.

(*q*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 10 (1). As to the compensating reduction in contribution, see p. 917, *ante*.

(*a*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 3 (2). As to weekly contributions, see pp. 911, 912, *ante*.

(*b*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 13.

(*c*) *Ibid*.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (8) (b). The term "disease or disablement" means such disease or disablement as would entitle an insured person to sickness or disablement benefit (*ibid.*, s. 79). As to the weekly contributions referred to, see pp. 911, 912, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (3).

meanwhile at least twelve months have elapsed (*f*), but where by reason of his right to compensation or damages a part only of sickness benefit has been paid to an insured person (*g*), he is to be treated, for the purposes of this provision, as having been in receipt of sickness benefit for a period bearing the same proportion to the whole period in respect of which such part benefit was paid to him as that part bears to the whole benefit, and the period so resulting is deemed to have been continuous and to have expired on the last day of the incapacity in respect of which the partial benefit was paid (*h*).

A woman is not entitled to sickness benefit for four weeks after her confinement, unless suffering from disease or disablement not connected directly or indirectly with her confinement, except where she is herself an insured person and a married woman, or, if the child is posthumous, a widow, in which case she is entitled to sickness benefit in respect of her confinement in addition to the maternity benefit to which she or her husband may be entitled (*i*), or alternatively to a maternity benefit in addition to any maternity benefit to which she may be otherwise entitled in respect of her husband's or her own insurance. Approved societies and insurance committees must make rules requiring any woman in respect of whom any such sum is payable in respect of her own insurance to abstain from remunerative work for four weeks after her confinement (*k*).

SECT. 5.  
Classifica-  
tion of  
Benefits.

Married  
women and  
widows.

**1631.** The ordinary rate of sickness benefit is in the case of men 10s. a week, and in the case of women 7s. 6d. a week, throughout the whole period of twenty-six weeks (*l*). Rate.

In the case of insured persons who are under the age of twenty-one and unmarried there is a reduced rate of benefit as follows: during the first thirteen weeks 6s. a week for males and 5s. for females, and during the second thirteen weeks 5s. a week for males and 4s. for females (*m*); but in the case of an insured person who is a member of an approved society (*n*) and who can prove that one or more members of his family are wholly or mainly

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (5); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 12 (1).

(*g*) See p. 928, *post*.

(*h*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 12 (2). Thus, where an insured person who has received 5s. a week as compensation and, under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (1), 5s. a week only as sickness benefit during a period of twenty weeks, recovers, and then within twelve months again falls sick, the period of twenty weeks is to be regarded as a period arrived at by the formula  $x : 20 :: 5 : 10$ , i.e. 10 weeks, and the insured person accordingly remains entitled, not to six weeks only, but to sixteen weeks of sickness benefit during the twelve months.

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (6). As to maternity benefit, see pp. 923, 924, *post*; as to marriage certificates, see note (*p*), p. 910, *ante*.

(*k*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 14 (3).

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (2), Sched. IV., Part I., Table A.

(*m*) *Ibid.*, s. 9 (1), Sched. IV., Part I., Table B.

(*n*) See pp. 937 *et seq.*, *post*.



SECT. 5.  
Classifica-  
tion of  
Benefits.

Reduced  
benefit.

dependent upon him, the society must dispense with such reduction (o).

**1632.** There is a reduced rate of sickness benefit, but with a minimum of 5s. a week, in the case of insured persons who, not having been previously insured, become employed contributors subsequently to the 12th October, 1913, and are, when becoming so insured, of the age of seventeen or upwards. The reduced rate does not apply if such employed contributor proves that since the age of seventeen his time has been spent in a school or college, in indentured apprenticeship (p), or otherwise under instruction without wages, or otherwise in the completion of his education, or if he undertakes to pay the difference between the voluntary (g) and employed (r) rates, or pays to the Insurance Commissioners, to be credited to his society, such capital sum as will suffice to secure him benefits at the full rate. The reduced rate is fixed in accordance with tables prepared by the Insurance Commissioners (s). Such an insured person may subsequently qualify for a higher rate by electing to be treated as having become an employed contributor as from the age of seventeen or as from the 12th October, 1913, whichever is the later date, and as being in arrear for all contributions which, had he become an employed contributor at that date, would have been payable in respect of him between that date and the date when he actually became an employed contributor (t).

Where any insured person's rate of sickness benefit exceeds two-thirds of his usual rate of wages or other remuneration (a), such rate of benefit may be reduced as the society or committee administering the benefit (b) may, with the consent of the Insurance Commissioners, determine, additional benefits (c) of a value equivalent to the reduction being, however, granted (d).

Where an insured person gives notice of his desire to be changed from the voluntary to the employed rate he is only entitled to the reduced sickness benefit which would have been payable had he not previously been insured, subject to such additions as may, according to tables prepared by the Insurance Commissioners, represent the value at that time of his previous contributions (e).

SUB-SECT. 4.—*Disablement Benefit.*

When  
payable.

**1633.** "Disablement benefit" means, in the case of the disease or disablement continuing after the determination of

(o) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 9 (1).

(p) As to apprenticeship, see title MASTER AND SERVANT, Vol. XX., p. 79.

(q) See pp. 916, 917, *ante*.

(r) See pp. 911, 912, *ante*. As to the transfer values of persons undertaking to pay such difference, see National Health Insurance (Transfer Values) Regulations, 1914.

(s) For these tables, see p. 1001, *post*.

(t) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 9 (4); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 2 (1).

(a) As to the meaning of "remuneration," see note (b), p. 912, *ante*.

(b) See p. 954, *post*.

(c) See pp. 924, 925, *post*.

(d) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 9 (2).

(e) *Ibid.*, s. 6 (2).

sickness benefit (*f*), periodical payments so long as so rendered incapable of work by the disease or disablement. This benefit is not available for an insured person until 104 weeks have elapsed since his entry into insurance, and at least 104 weekly contributions have been paid by or in respect of him (*g*). The right to the benefit ceases at the age of seventy (*h*). Disablement benefit, or the alternative additional maternity benefit, is payable to a woman in respect of her confinement in addition to maternity benefit only on the same conditions as those on which sickness benefit, or the alternative additional maternity benefit, is payable in respect of a confinement in addition to maternity benefit (*i*).

SECT. 5.  
Classifica-  
tion of  
Benefits.

**1634.** The ordinary rate of disablement benefit is 5s. a week for men and women alike (*k*). Rates of  
benefit.

In the case of female insured persons who are under the age of twenty-one and unmarried, there is a reduced rate of benefit, namely, 4s. a week (*l*). The society must dispense with such reduction if the insured person has relations dependent upon her as in the case of reduced sickness benefit (*m*).

Where any insured person's rate of disablement benefit exceeds two-thirds of his usual rate of wages or other remuneration, such rate of benefit may be reduced on the same conditions as in the case of sickness benefit (*n*).

#### SUB-SECT. 5.—*Maternity Benefit.*

**1635.** "Maternity benefit" means payment of a sum of 30s. in the case of the confinement of the wife, or, where the child is posthumous, of the widow of an insured person, or of any other woman who is an insured person. No insured person is entitled to this benefit until twenty-six, or in the case of a voluntary contributor (*o*) fifty-two, weeks have elapsed since his entry into insurance, and at least twenty-six, or in the case of a voluntary contributor (*o*) fifty-two, weekly contributions (*p*) have been made by or in respect of him (*q*). When  
payable.

**1636.** Where a woman who is an employed contributor (*r*) is the wife, or, if the child is posthumous, the widow, of an insured person, then, if her husband is, or was at his death, a member of an approved society (*s*), and by reason of an insufficient number of Where  
woman  
contributor.

(*f*) See p. 920, *ante*.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (8) (c).

(*h*) *Ibid.*, s. 8 (3).

(*i*) See p. 921, *ante*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (2), Sched. IV., Part I., Table A.

(*l*) *Ibid.*, s. 9 (1), Sched. IV., Part I., Table B.

(*m*) *Ibid.*, s. 9 (1); see pp. 921, 922, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 9 (2); see p. 922, *ante*.

(*o*) See p. 911, *ante*.

(*p*) See pp. 911, 912, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (8) (d). As to obtaining marriage certificates, see note (*p*), p. 910, *ante*.

(*r*) See p. 905, *ante*.

(*s*) See pp. 937, 938, *post*.

SECT. 5.  
Classifica-  
tion of  
Benefits.

contributions having been paid by or in respect of him, or on account of arrears (*t*), no maternity benefit is payable in respect of his insurance, she is entitled, on her confinement, to receive in respect of her own insurance the sum that she would have been entitled to receive if he had not been an insured person. If her husband is, or was at his death, a deposit contributor (*u*), and by reason of an insufficient number of contributions or of the insufficiency of the sum standing to his credit in the Deposit Contributors Fund (*v*) no maternity benefit or a sum less than the full maternity benefit is payable in respect of his insurance, she is entitled, on her confinement, to receive in respect of her own insurance such sum as, with any sum payable in respect of her husband's insurance, equals the sum she would have been entitled to receive if he had not been an insured person (*w*).

Affiliation  
proceedings.

**1637.** In deciding whether or not to make an order under the Bastardy Laws Amendment Act, 1872 (*x*), for the payment of the expenses incidental to the birth of a child, the justices are not to take into consideration the fact that the mother is entitled to maternity benefit (*y*).

SUB-SECT. 6.—*Sanatorium Benefit.*

Extent of  
benefit.

**1638.** "Sanatorium benefit" means the treatment in sanatoria or other institutions or otherwise of such cases of tuberculosis or such other diseases as the Local Government Board with the approval of the Treasury may appoint (*z*), as may be recommended for such benefit by the insurance committee administering the benefit (*a*). The insurance committee may pay the whole or part of the expenses of conveying the patient to or from the institution (*b*), and may extend the benefit to an insured person's dependants resident within their area, that is to say, to persons dependent wholly or in part upon the insured person's earnings (*c*).

SUB-SECT. 7.—*Additional Benefits.*

Benefits  
included.

**1639.** There are certain benefits, called "additional benefits," to which certain insured persons may in certain circumstances become entitled (*d*). These additional benefits are the following, namely :—

- 
- (*t*) See p. 926, *post*.
  - (*u*) See p. 931, *post*.
  - (*v*) See p. 973, *post*.
  - (*w*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 14 (2).
  - (*x*) 35 & 36 Vict. c. 65; see title BASTARDY, Vol. II., p. 449.
  - (*y*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 18 (2).
  - (*z*) *Ibid.*, s. 8 (8), imposes no limitations as in the case of other benefits; and the right to this benefit, where granted, begins with entry into insurance.
  - (*a*) *Ibid.*, s. 16 (3). As to the insurance committee, see pp. 933 *et seq.*, *post*.
  - (*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 16 (4).
  - (*c*) *Ibid.*, ss. 17 (1), 79. Dependency is ascertained by the insurance committee (*ibid.*, s. 79).
  - (*d*) *Ibid.*, s. 8 (1) (f), Sched. IV., Part II.



(1) Medical treatment and attendance for any persons dependent upon the labour of a member;

(2) The payment of the whole or any part of the cost of dental treatment;

(3) An increase of sickness benefit or disablement benefit (*e*) in the case either of all members of the society or of such of them as have any children or any specified number of children wholly or in part dependent upon them;

(4) Payment of sickness benefit from the first, second, or third day after the commencement of the disease or disablement (*f*);

(5) The payment of a disablement allowance to members though not totally incapable of work (*g*);

(6) An increase of maternity benefit (*h*);

(7) Allowances to a member during convalescence from some disease or disablement in respect of which sickness benefit or disablement benefit has been payable;

(8) The building or leasing of premises suitable for convalescent homes and the maintenance of such homes;

(9) The payment of pensions or superannuation allowances whether by way of addition to old age pensions under the Old Age Pensions Act, 1908 (*i*), or otherwise;

(10) The payment, subject to the prescribed conditions (*k*), of contributions to superannuation funds in which the members are interested (*l*);

(11) Payments to members who are in want or distress, including the remission of arrears whenever such arrears may have become due;

(12) Payments for the personal use of a member who, by reason of being an inmate of a hospital or other institution, is not in receipt of sickness benefit or disablement benefit (*m*);

(13) Payments to members not allowed to attend work on account of infection;

(14) Repayment of the whole or any part of contributions thereafter payable under the statutory health insurance provisions by members of the society or any class thereof.

(*e*) See pp. 920, 922, 923, *ante*.

(*f*) See p. 920, *ante*.

(*g*) See pp. 922, 923, *ante*.

(*h*) See pp. 923, 924, *ante*.

(*i*) 8 Edw. 7, c. 40; see title POOR LAW, Vol. XXII., pp. 616 *et seq*.

(*k*) For these conditions, see the National Health Insurance (Contributions to Superannuation Funds) Regulations, 1913 (Stat. R. & O., 1913, p. 989). The fund to which contributions are paid must be approved by the joint committee (see pp. 932, 933, *post*), and the benefits to be provided out of the fund in consideration of contributions thereto are subject to the same approval. The accounts of the fund are audited by the joint committee, and the joint committee also sees that a periodical valuation of its assets and liabilities is effected.

(*l*) In regard to benefits (9) and (10), where a pension or superannuation allowance is payable by an approved society in whole or in part as there referred to, it may be made a condition of the grant of such pension or allowance that the right to sickness and disablement benefits (see pp. 920, 922, 923, *ante*), or either of them, may be wholly or partly excluded (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (7)).

(*m*) See p. 927, *post*.

SECT. 6.  
Benefits  
in Special  
Cases.

Residence  
abroad.

SECT. 6.—*Benefits in Special Cases.*

SUB-SECT. 1.—*Residence Abroad.*

**1640.** No insured person is entitled to any benefit while<sup>5</sup> resident temporarily or permanently outside the United Kingdom, but temporary residence in the Isle of Man or the Channel Islands disqualifies for medical benefit only. Moreover, if a person is temporarily resident outside the United Kingdom elsewhere than in those places with the consent of the society or committee administering the benefit, such society or committee may allow him to continue to receive sickness or disablement benefit. A person resident outside the United Kingdom is not disentitled to maternity benefit in respect of his wife's confinement if she is at the time of her confinement resident in the United Kingdom (*n*).

SUB-SECT. 2.—*Arrears of Contributions.*

Arrears.

**1641.** In calculating arrears of contributions no account is taken of arrears accruing during any period when the insured person in question has been, or would have been had he not become disentitled, in receipt of sickness (*o*) or disablement (*p*) benefit; or in the case of a woman who is an insured person and is herself entitled to maternity benefit (*q*) during two weeks before and four weeks after her delivery, or in the case of maternity benefit payable in respect of the posthumous child of an insured person during the period subsequent to the father's death (*r*). In all other cases insured persons who are in arrear are liable to such reduction, postponement, or suspension of benefits as may be prescribed, but any such reduction, postponement, or suspension of benefit must be approximately equivalent to the value of the loss occasioned by the failure to pay the contributions in arrear. The Commissioners may by regulations prescribe the time within which, and the conditions under which, arrears may be paid up (*s*).

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (4).

(*o*) See p. 920, *ante*.

(*p*) See pp. 922, 923, *ante*.

(*q*) See pp. 923, 924, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 10 (4); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 8. In the case of an employed contributor arrears are, furthermore, not counted which accrue before the 15th July, 1913 (*ibid.*).

(*s*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 8. The National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036), prescribe, in the case of insured persons who are employed or voluntary contributors, the manner of calculating arrears, the consequent reduction, suspension, or termination of benefits, and how the right to benefits may be resumed. When medical benefit is suspended by reason of arrears or marriage in the case of a member of an approved society (see pp. 975, 976, *post*), the society is to give notice to the insurance committee (see pp. 933 *et seq.*, *post*) and the committee to the insured person's medical attendant (see p. 946, *post*) or approved institution (see pp. 949, 950, *post*) (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulations 28 (b), 29); and see p. 946, *post*. As to the procuring and stamping of "arrears cards," see National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part II., and note (*a*), p. 918, *ante*.

**1642.** In the case of an employed contributor who is a member of an approved society (*a*), that portion of any arrears which is represented by the part which would have been payable by the employer (*b*) had the employed contributor continued in employment will be excused, if such employed contributor pays to his society such part of the arrears as would, had he continued in employment, have been payable otherwise than by the employer, and the amount of the arrears will be reduced accordingly. For the purpose of calculating such respective parts of arrears the rate of remuneration will be deemed to exceed 2s. 6d. a working day (*b*), unless the employed contributor proves to the society that his usual rate of remuneration was 2s. 6d. a working day or less, in which case his rate of remuneration will be deemed to be such usual rate (*c*).

SECT. 6.  
Benefits  
in Special  
Cases.

Members of  
approved  
societies.

SUB-SECT. 3.—*Inmates of Institutions.*

**1643.** No sickness, disablement, or maternity benefit is payable to or in respect of any person while such person is an inmate of any workhouse, hospital, asylum, convalescent home, or infirmary, supported by any public authority or out of any public funds or by a charity or voluntary subscriptions, or while an inmate of a sanatorium or similar institution as the recipient of sanatorium benefit (*d*).

Inmates of  
institutions.

The money so withheld is to be applied in one or other of the following ways, namely (*e*):—for the maintenance of the dependants (*f*) of the person in question in such manner as the body administering the benefit (*g*), after consultation, if possible, with such person, may think fit, or for the general purposes of the sanatorium or similar institution in which the person in question is receiving treatment, if he has no dependants (*h*) and is a member of an approved society (*i*); or towards the maintenance of the person in question in the institution of which he is an inmate if an agreement to that effect has been entered into between the institution and the body administering the benefit (*k*), and if the person in question is a member of an approved society (*l*) and has no dependants (*m*), provided that the institution is supported by a charity or by voluntary subscriptions. Any such sum as is not so applied may be applied

Application  
of money  
withheld.

(*a*) See pp. 911, 912, *ante*.

(*b*) See pp. 911, 912, *ante*.

(*c*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 7 (1). The Insurance Commissioners may make regulations for carrying this provision into effect (*ibid.*, s. 7 (3)). As to compensating financial arrangements between the societies and the Commissioners, see pp. 962, 963, *post*.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 12 (1). As to the benefits referred to, see pp. 919 *et seq.*, *ante*.

(*e*) *Ibid.*, s. 12 (2); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 15 (1).

(*f*) Namely, persons wholly or in part dependent upon his earnings (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79).

(*g*) See pp. 932 *et seq.*, *post*.

(*h*) See note (*f*), *supra*.

(*i*) See pp. 937, 938, *post*.

(*k*) See pp. 932 *et seq.*, *post*.

(*l*) See pp. 937, 938, *post*.

(*m*) See note (*f*), *supra*.



SECT. 6.  
Benefits  
in Special  
Cases.

by the body administering the benefit in providing the insured person with necessary surgical appliances or otherwise for his benefit after he ceases to be an inmate, or, if not so expended, is to be paid in cash to the person after leaving the institution, either in a lump sum or in instalments. Payments in any of these ways of money withheld as above are treated as payments in respect of sickness benefit for the purpose of determining the rate and duration of that benefit (*n*). In the case of an inmate who is a married woman or widow, to or in respect of whom payments would have been made or applied both on account of maternity benefit payable in lieu of sickness or disablement benefit and on account of maternity benefit not so payable, none of the sum representing such maternity benefit may be applied for the relief or maintenance of her dependants, but it may be paid to the institution of which she is an inmate as if she had no dependants (*a*).

Indoor relief.

**1644.** Admission to a workhouse infirmary (*b*) may not be refused for the reason that the applicant is entitled to any benefit under the provisions relating to health insurance, or because the applicant is a woman whose husband is entitled to maternity benefit in respect of her confinement (*c*).

Outdoor  
relief.

**1645.** In granting outdoor relief to a person receiving or entitled to receive any benefit a board of guardians must not take such benefit into consideration except so far as it exceeds 5s. a week (*d*).

SUB-SECT. 4.—*Compensation for Injury.*

Compensation  
for injury.

**1646.** Where an insured person has received or recovered (*e*) or is entitled to receive or recover (*e*), whether from his employer or any other person, any compensation or damages under the Workmen's Compensation Act, 1906 (*f*), or under the Employers' Liability Act, 1880 (*g*), or at common law (*h*), in respect of any injury or disease, no sickness (*i*) or disablement (*k*) benefit is paid to such person in respect of that injury or disease if the weekly sum or the weekly value of any lump sum paid or payable as compensation or damages is equal to or greater than the benefit otherwise payable. If such weekly sum or the weekly value of any such lump sum is less than such benefit, only such sum is paid as represents the difference between the weekly sum or the weekly value of the lump sum and the full benefit (*l*).

(*n*) See p. 920, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 12 (2) (ii.); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 15 (2).

(*b*) See title POOR LAW, Vol. XXII., p. 559.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 12 (2) (iii.).

(*d*) *Ibid.*, s. 109.

(*e*) "Recover" appears here to mean recover as the consequence of an action or other legal proceeding.

(*f*) 6 Edw. 7, c. 58; see title MASTER AND SERVANT, Vol. XX., pp. 153 *et seq.*

(*g*) 43 & 44 Vict. c. 42; see title MASTER AND SERVANT, Vol. XX., pp. 134 *et seq.*

(*h*) See title NEGLIGENCE, Vol. XXI., p. 360.

(*i*) See p. 920, *ante*.

(*k*) See pp. 922, 923, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (1) (*a*).

The weekly value of any such lump sum is determined by the body administering the sickness or disablement benefit (*m*), but the insured person has a right of appeal to the Insurance Commissioners (*n*).

SECT. 6.  
Benefits  
in Special  
Cases.

Where, under the Workmen's Compensation Act, 1906 (*o*), an agreement is arrived at for the payment of compensation at the rate of less than 10s. a week or as to the redemption of a weekly payment by a lump sum (*a*), the employer must send to the Insurance Commissioners or to the body administering the benefit in question, within three days or other prescribed period, written notice and particulars of such agreement (*b*). The statutory provisions which enable the registrar of the county court to refuse to record certain memoranda of agreements entered into under the Workmen's Compensation Act, 1906 (*c*), and to refer the matter to the county court judge, apply to agreements as to the amount of compensation, in cases where the workman is an insured person, as if the agreement were for the redemption of a weekly payment by a lump sum (*d*).

If an insured person unreasonably refuses or neglects to enforce his claim for compensation or damages, the society or committee administering the benefit in question (*e*) may take proceedings in his name and at its own expense, in which case it will hold any compensation or damages recovered as trustee for the insured person, and in the event of failure will be responsible for the costs of the proceedings (*f*); or it may simply withhold any benefit to which the insured person may be entitled (*g*).

Proceedings  
by society or  
committee.

The body administering the benefit may make advances of benefit pending the settlement of any such claim as aforesaid for compensation or damages, such advances to be recovered out of future benefits, but without prejudice to any other mode of recovery (*h*).

Advances.

(*m*) See p. 954, *post*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 11 (1) (b), 67.

(*o*) 6 Edw. 7, c. 58.

(*a*) See title MASTER AND SERVANT, Vol. XX., p. 224.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (1) (c). The National Health Insurance (Compensation Agreements) Regulations, 1913, specify the particulars to be included in the notice, and require such notice to be sent by the employer within seven days from the date of the agreement.

(*c*) 6 Edw. 7, c. 58, Sched. II. (9); see title MASTER AND SERVANT, Vol. XX., p. 226.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (1) (c). An approved society is at liberty to give information to the registrar of the county court under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II., (9) (d), but the society does not thereby become a party to the proceedings; for it is not a "party interested" and has no *locus standi* to appear in the county court and object to the registration of a memorandum (*Bonney v. Hoyle (Joshua) & Sons, Ltd.*, [1914] 2 K. B. 257, C. A.).

(*e*) See p. 954, *post*.

(*f*) As to the order in such a case, see *Clapp v. Carter* (1914), 110 L. T. 491, C. A.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (2); see *Rushton v. Skey (Geo.) & Co., Ltd.* (1914), *Times*, 18th June.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 11 (3). As to setting off against his transfer value advances owing to the society by a member on his ceasing to be a member of the society, see National Health Insurance (Transfer Values) Regulations, 1914.

## SECT. 6.

Benefits  
in Special  
Cases.Schemes for  
additional  
benefits.Extension of  
benefits.Benefits for  
exempted  
persons.SUB-SECT. 5.—*Variation of Benefits.*

**1647.** Any approved society (*i*) may submit to the Insurance Commissioners a scheme substituting any of the additional benefits (*k*) for sickness (*l*) and disablement (*m*) benefits or either or any part of them. The scheme must be confirmed by the Commissioners before it can become operative, and before confirming it the Commissioners must satisfy themselves that the value of the additional benefits conferred by the scheme is equivalent to the value of the benefits surrendered, and that, in view of the special circumstances of the members or class of members intended to come under the scheme, there is good reason for the substitution (*a*).

**1648.** As soon as the sums credited to approved societies as reserve values in respect of persons entering into insurance before the 15th July, 1913, have been written off (*b*), the benefits payable to insured persons are to be extended in such manner as may be determined by Parliament (*c*).

SUB-SECT. 6.—*Exempted Persons.*

**1649.** The contributions paid in respect of persons who hold certificates of exemption from compulsory health insurance (*d*) are to be applied, in accordance with regulations made by the Commissioners, in providing medical benefit and sanatorium benefit for such persons, and in paying the cost of administering those benefits. On fulfilling such conditions as those regulations may impose, such persons become entitled to those benefits as if they were members of approved societies (*e*). Such conditions may not require payment of upwards of twenty-six weekly contributions before the person becomes entitled to such benefits (*f*). Where the total income from all sources of any such person exceeds £160 a year, he must make his own arrangements for receiving medical attendance and

(*i*) See pp. 937, 938, *post*.

(*k*) See pp. 924, 925, *ante*.

(*l*) See p. 920, *ante*.

(*m*) See pp. 922, 923, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 13. Such a scheme has no effect (*ibid.*, s. 13 (4)) on the reserve value (see pp. 961, 962, *post*) to be credited to a society in respect of a member. A model scheme has been approved for providing pensions through a superannuation fund in substitution for sickness or sickness and disablement benefits [Cd. 6292 of 1912].

(*b*) See p. 962, *post*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8 (9).

(*d*) See p. 911, *ante*. Contributions so paid are carried to the Exempt Persons' Fund (National Health Insurance (Exempt Persons' Benefits) Regulations, 1913).

(*e*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 9. All the foregoing provisions with respect to the payment of benefits, and the succeeding provisions as to their administration (see pp. 944 *et seq.*, *post*), including those relating to the application of moneys provided by Parliament towards their cost and the expenses of their administration (see p. 958, *post*), are applied, subject to modifications by regulations (*ibid.*). See, generally, National Health Insurance (Exempt Persons' Benefits) Regulations, 1913.

(*f*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 9; and see p. 920, *ante*.



treatment, contributions towards the cost thereof being made by the insurance committee (*g*).

SECT. 6.  
Benefits  
in Special  
Cases.

SUB-SECT. 7.—*Deposit Contributors.*

**1650.** Contributions by or in respect of a deposit contributor, that is to say, an insured person who is not a member of an approved society (*h*), are credited to a special fund called the Deposit Contributors Fund. Out of the amount standing to the credit of each deposit contributor in that fund are paid any sickness, disablement, or maternity benefits payable to him (*i*), and if the sum so standing to his credit becomes exhausted his rights to benefits are suspended, save that his right to medical and sanatorium benefits continues to the end of the then current year, or longer if the insurance committee administering those benefits (*k*) has funds available for the purpose and sees fit to allow him to continue to receive them (*l*). Moreover, certain sums are deducted each year from the amount standing to the deposit contributor's credit for the expenses of medical and sanatorium benefits and the expenses of administration, and if the sum standing to his credit is insufficient to meet those sums, he is only entitled during the year to those benefits to which the insurance committee may consent (*m*).

Deposit  
Contributors  
Fund and  
benefits.

SUB-SECT. 8.—*Benefits not Assignable.*

**1651.** Benefits under the foregoing provisions relating to health insurance are inalienable to the same extent as unemployment benefit (*n*).

Benefits not  
assignable.

SECT. 7.—*Exemptions from Stamp Duty.*

**1652.** Stamp duty is not chargeable upon the following documents in connexion with national health insurance business, namely:—any draft, or order, or receipt given by or to an approved society, or branch, or insurance committee in respect of money payable in pursuance of the statutory provisions relating to national health insurance or of the rules of the society or branch; any letter or power of attorney granted by any person as trustee for the transfer of any money of an approved society, or branch, or insurance committee invested in his name in the public funds; any bond or other security given to, by, or on account of an approved society or branch, or by the treasurer or other official thereof; any appointment or revocation of appointment of agent, or other document required or authorised by or in

Exemptions  
from stamp  
duty.

(*g*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 9. The provisions of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (3) (see p. 948, *post*), are applied.

(*h*) As to deposit insurance, see, further, pp. 943, 960, 973, *post*. The provisions in regard thereto only hold good until the 1st January, 1915 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42). The name of the fund was changed from Post Office Fund to Deposit Contributors Fund by the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 36.

(*i*) See pp. 919 *et seq.*, *ante*.

(*k*) See pp. 933 *et seq.*, *post*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42 (*b*).

(*m*) *Ibid.*, s. 42 (*e*).

(*n*) *Ibid.*, s. 111; and see p. 895, *ante*.

SECT. 7.  
Exemptions  
from Stamp  
Duty.

pursuance of the statutory provisions relating to national health insurance or by the rules of an approved society or branch; or any agreement entered into between an approved society or branch and an insurance committee in regard to medical benefit under the statutory provisions relating to national health insurance (o).

SECT. 8.—*Administrative Bodies.*

SUB-SECT. 1.—*Insurance Commissioners.*

Appointment  
and powers.

**1653.** The central administration of national health insurance in England (*p*) is in the hands of the Insurance Commissioners, a body appointed by the Treasury. One Commissioner at least must be a duly qualified medical practitioner (*q*). The Insurance Commissioners appoint the necessary officers, inspectors (*r*), referees, and servants, subject to the approval of the Treasury as to numbers and remuneration (*s*). The Insurance Commissioners may sue and be sued in that name; they have an official seal which is officially and judicially noticed, and every document purporting to be their duly sealed or signed order or other instrument is deemed to be their order or instrument without further proof, unless the contrary is shown, and is received in evidence (*t*).

The power of the Insurance Commissioners to make regulations is subject to the provision that any such regulations shall be laid before Parliament, and either House may within twenty-one days present an address to His Majesty praying for the annulment of any such regulation (*u*).

Joint com-  
mittee.

**1654.** A joint committee of the several bodies of Commissioners

(*o*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 37. As to stamp duties, generally, see title REVENUE, Vol. XXIV., pp. 700 *et seq.*

(*p*) There are separate bodies of Commissioners for Wales (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 82 (1)), of which Monmouthshire is deemed to form part (*ibid.*, s. 79), Scotland (*ibid.*, s. 80), and Ireland (*ibid.*, s. 81).

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 57 (1).

(*r*) The powers of an inspector appointed for the purposes of national health insurance are the same as those of an inspector appointed for the purposes of unemployment insurance (see p. 904, *ante*). The form of his certificate of appointment is prescribed in the National Health Insurance (Inspectors' Certificates) Regulations (England), 1913 (Stat. R. & O., 1913, p. 928).

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 57 (3).

(*t*) *Ibid.*, s. 57 (2), (4).

(*u*) *Ibid.*, s. 65. Whether or not the Commissioners are a rule-making authority within the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), they have power under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 65, to make regulations to come into force with the Act itself, and regulations so made are not invalid for the reason that they have been called Provisional Regulations (*E. v. Baggallay, Hurlock v. Shinn*, [1913] 1 K. B. 290). By the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 78, and the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 40 (2), the Insurance Commissioners are given powers, until the 31st December, 1914, under which they may, by orders made with the consent of the Treasury, do anything which appears to them necessary or expedient for bringing the provisions relating to national health insurance into operation, "and any such order may modify the provisions of this Act, so far as may appear necessary or expedient for carrying the order into effect."

is constituted in accordance with regulations made by the Treasury (*w*), and incorporated by regulations (*x*), with powers and duties provided by regulations (*w*).

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trative  
Bodies.

The several bodies of Commissioners and also the joint committee are included in the list of public departments to which the Documentary Evidence Act, 1868 (*y*), as amended by the Documentary Evidence Act, 1882 (*a*), applies (*b*).

**1655.** For the purpose of securing for themselves advice and assistance in regard to the making and altering of regulations, the Insurance Commissioners must appoint an advisory committee, and must include among its members representatives of associations of employers and approved societies, medical practitioners, and at least two women (*c*).

Advisory  
committee.

SUB-SECT. 2.—*Insurance Committees.*

**1656.** An insurance committee must be constituted for every county and county borough (*d*). The number of the members of the various committees is determined by the Insurance Commissioners, but within maximum and minimum limits of eighty and forty respectively. Three-fifths of the committee are appointed in accordance with regulations of the Insurance Commissioners so as to secure representation of insured persons who are members of approved societies (*e*), and who are deposit contributors (*f*), in proportion to their respective numbers (*g*); one-fifth are appointed by the council of the county or county borough, and of such members two at least must be women; two members are elected

Constitution.

(*w*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 83. For the constitution and powers of the joint committee, see the National Insurance (Joint Committee) Regulations, 1912 (Stat. R. & O., 1912, p. 609) and 1913.

(*x*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 29 (1); National Insurance (Incorporation of Joint Committee) Regulations, 1913. As to the validity of documents issued by the joint committee before the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), see *ibid.*, s. 29 (2).

(*y*) 31 & 32 Vict. c. 37.

(*a*) 45 & 46 Vict. c. 9.

(*b*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 29 (3); and see title EVIDENCE, Vol. XIII., pp. 525, 526.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 58; see the National Health Insurance (Advisory Committee) Order, 1912 (Stat. R. & O., 1912, p. 618).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (1). The insurance committee is a body corporate with perpetual succession and a common seal, and may sue and be sued and (subject to the consent of the Insurance Commissioners) may (without any licence in mortmain) take, purchase, and hold land for health insurance purposes (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 30 (1); and see title CORPORATIONS, Vol. VIII., pp. 356 *et seq.* The expression "county" means administrative county (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79). The Scilly Isles are deemed a county (*ibid.*), but the insurance committee therefor is constituted in accordance with the National Health Insurance (Scilly Isles Insurance Committee) Regulations, 1913 (Stat. R. & O., 1913, No. 828).

(*e*) See pp. 937, 938, *post*.

(*f*) See p. 931, *ante*.

(*g*) The regulations must provide for the appointment of such representatives by the approved societies or by associations of deposit



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trative  
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by the medical practitioners resident in the county or county borough; one member (or two if the committee is sixty or upwards, or three if eighty) must be a duly qualified medical practitioner appointed by the council of the county or county borough; and the remaining members are appointed by the Insurance Commissioners, one at least being a duly qualified medical practitioner and two at least being women (*a*). Where the county or county borough defrays any part of the cost of medical benefit (*b*) or sanatorium benefit (*c*), its representation may be increased, and that of insured persons correspondingly diminished (*d*). Insurance committees may combine, and the Insurance Commissioners may require them to combine, for all or any of the purposes of national health insurance (*e*); and they may subscribe to the funds of any association of insurance committees whose objects are approved by the Insurance Commissioners (*f*). The Insurance Commissioners may make regulations governing the appointment, procedure, and proceedings of the committees, including the appointment of sub-committees consisting wholly or partly of members of the committee (*g*), but at least one woman must be on every sub-committee for dealing with the administration of any benefit (*h*).

For the purpose of assisting insurance committees in the exercise and performance of their powers and duties, and with a view to promoting co-operation between the committees and county, borough and district councils, any medical officer of health may be requested to attend meetings of the committee, subject to the consent of the council by whom he is appointed (*i*).

Expenses.

Members of insurance committees may be paid travelling expenses (*k*), subsistence allowance, and compensation for loss of remunerative time (*l*), and representative members, not exceeding

contributors (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (2) (*i*)). For the mode of election of such representatives for the period to July, 1916, see National Health Insurance (Insurance Committees: Representation of Insured Persons) Regulations (England), 1913 (Stat. R. & O., 1913, p. 930), and National Health Insurance (Representation of Approved Societies) Order, 1913 (Stat. R. & O., 1913, p. 740). The Commissioners publish lists of representatives of insured persons on insurance committees; see List 24, dated the 31st December, 1913.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (2). As to the election of the two medical representatives, see National Health Insurance (Insurance Committees: Election of Medical Representatives) Regulations (England), 1914 (Stat. R. & O., 1914, No. 160), by which the methods of proportional representation are applied, and National Health Insurance (Insurance Committees: Election of Medical Representatives) Regulations (No. 2), 1914.

(*b*) See p. 960, *post*.

(*c*) See pp. 953, 960, *post*.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (3).

(*e*) *Ibid.*, s. 59 (5).

(*f*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 31 (3). Such subscription is limited to £10 per annum for any one committee (*ibid.*).

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (4); and see the National Health Insurance (Insurance Committees) Regulations (England), 1912.

(*h*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 30 (2).

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 60 (2).

(*k*) *Ibid.*, s. 61 (2).

(*l*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 31 (1).

four in the case of any one committee, attending meetings of associations of insurance committees(*m*) may be paid their reasonable expenses(*n*).

**1657.** In addition to the administration of medical(*o*) and sanatorium benefits(*p*), and, in the case of insured persons who are not members of approved societies(*q*), sickness, disablement, and maternity benefits(*r*), an insurance committee has the following powers and duties, namely(*s*):—it must make such provision as it thinks necessary or desirable for the giving of lectures and the publication of information on questions relating to health, and for that purpose may make arrangements with local education authorities(*t*), universities, and other institutions; it must make such reports as to the health of insured persons within the county or county borough as the Insurance Commissioners, after consultation with the Local Government Board, may prescribe, and it must furnish such statistical and other returns as they may require. It may also make such other reports as to the health of such insured persons and the conditions affecting the same as it may think fit, and may add suggestions with regard thereto. The reports and returns must be such as will enable an analysis and classification of deposit contributors(*a*) to be made. Copies of such reports, returns and suggestions are forwarded by the Insurance Commissioners to the county, borough(*b*), and district councils concerned or affected(*c*).

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trative  
Bodies.

Powers of  
insurance  
committees.

SUB-SECT. 3.—*District Insurance Committees.*

**1658.** The regulations which the Insurance Commissioners may make concerning insurance committees(*d*) must include provisions requiring the insurance committee of every county, save where special circumstances make it unnecessary, to prepare and submit for approval to the Commissioners, after consultation with the county council, a scheme for the appointment of district insurance committees for the county, and prescribing the area to be assigned to each. In particular, the scheme must provide for a district insurance committee for each borough, including the City of London and the metropolitan boroughs, within the county having a population of not less than 10,000, and for each urban district within the county with a population of not less than 20,000.

Areas  
affected.

(*m*) See pp. 933, 934, *ante*.

(*n*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 31 (3). As to the sources of these payments, see p. 961, *post*.

(*o*) See p. 946, *post*.

(*p*) See p. 952, *post*.

(*q*) As to "deposit contributors," see p. 931, *ante*; and pp. 943, 960, 973, 974, *post*.

(*r*) See pp. 957, 958, *post*.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 60 (1).

(*t*) See title EDUCATION, Vol. XII., pp. 15 *et seq*.

(*a*) See p. 943, *post*.

(*b*) For this purpose the council of a borough includes the Common Council of the City of London and the metropolitan borough councils (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 60 (3)).

(*c*) *Ibid.*, s. 60 (1) (*a*).

(*d*) See pp. 933, 934, *ante*.

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trative  
Bodies.

Adjoining areas may be grouped with any such borough (outside London) or urban district for the purpose of the appointment of a district insurance committee (*e*). Regulations may be made by the Insurance Commissioners providing for the apportionment among the several district insurance committees of any of the powers and duties of the insurance committee as well as providing for the constitution of such district insurance committees and for their relations to the insurance committee and to one another (*f*).

SUB-SECT. 4.—*Local Committees.*

Medical  
practitioners.

**1659.** The Insurance Commissioners must recognise such local medical committees as have been formed for any county or county borough or district committee area, and are representative of the duly qualified medical practitioners resident in the area. Local medical committees so recognised must, subject to regulations made by the Insurance Commissioners, be consulted by the insurance committee or district committee, as the case may be, on all general questions affecting the administration of medical benefit, including the arrangements made with medical practitioners attending and treating insured persons (*g*), and have such other

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 59 (4).

(*f*) *Ibid.* The provisions to be included in the scheme are prescribed in the National Health Insurance (District Insurance Committees) Regulations (England), 1913 (Stat. R. & O., 1913, p. 944), by which it is laid down that there is to be on the district committee a majority of representatives of insured persons in the area, also at least two women, and persons appointed by each of the following bodies, namely:—(i.) the insurance committee; (ii.) the council of every borough, urban district, or rural district whose area is included in that of the district committee; (iii.) any association of approved societies or any class of approved societies which, in the opinion of the committee, is representative of the insured persons or classes of insured persons resident in the area of the district committee; (iv.) any local medical committee recognised by the Commissioners under the Act which has been formed for any area including or corresponding to that of the district committee; (v.) any association of deposit contributors which has been formed for any area including that of the district committee; (vi.) any committee, representative of chemists and other persons, firms and bodies corporate undertaking the supply of drugs, medicines and appliances under the arrangements made by the committee to insured persons in the area of the district committee. The following powers and duties may not be assigned or delegated to the district committee, namely:—(a) the completion of arrangements for the treatment of tuberculosis and other prescribed diseases; (b) negotiations with approved societies in respect of the cost of the medical benefit of their members resident in the county and of the administration thereof; (c) the determination of the amount to be paid in respect of the cost of the medical benefit of deposit contributors; (d) the decision of the terms on which medical practitioners are to be invited to undertake treatment and of the method and amount of their remuneration; (e) the determination of the method and amount of the remuneration of persons, firms and bodies corporate undertaking the supply of drugs, medicines and appliances.

(*g*) See p. 946, *post*. The insurance committee must consult with the local medical committee in conjunction with the panel committee (see note (*i*), p. 937, *post*) before determining the conditions of service and remuneration of medical practitioners undertaking the treatment of persons entitled to



powers and duties as the Insurance Commissioners may determine (*h*).

**1660.** Where it is the duty of an insurance committee, under either the statutory provisions or the statutory regulations relating to national health insurance, to ascertain, in respect of any matter affecting the administration of medical benefit in the area, the opinions and wishes of the medical practitioners on its panel, it must do so through a committee appointed by such practitioners in accordance with regulations. Such committees have such powers and duties as the Commissioners determine (*i*).

A local committee must be elected in every county or county borough by the persons, firms, and bodies corporate who have agreed to supply drugs, medicines and appliances to insured persons. Such committee must be consulted by the insurance committee on all general questions affecting such supply. It performs such duties and exercises such powers as the Insurance Commissioners determine, and is elected in accordance with regulations made by those Commissioners (*k*).

SECT. 8.

Adminis-  
trative  
Bodies.

Panel  
practitioners.

Persons  
supplying  
drugs.

#### SUB-SECT. 5.—*Approved Societies.*

**1661.** Approved societies administer sickness benefit (*l*), disablement benefit (*m*), and maternity benefit (*n*) in the case of insured

Duties.

medical benefit (National Health Insurance (Medical Benefit) Regulations (England), 1913 (Stat. R. & O., 1914, No. 5), regulation 5), before altering those terms (regulation 16), and before preparing rules for the approval of the Commissioners under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14, with regard to the administration of medical benefit (National Health Insurance (Medical Benefit) Regulations (England), 1913 (Stat. R. & O., 1914, No. 5), regulation 81); and with the local medical committee in conjunction with the panel committee and the pharmaceutical committee (see note (*k*), *infra*) before fixing, varying, or abolishing an income limit in regard to medical benefit (National Health Insurance (Medical Benefit) Regulations (England), 1913 (Stat. R. & O., 1914, No. 5), regulation 14), or before preparing or altering the list showing the prices of drugs and prescribed appliances (*ibid.*, regulations 8, 18).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 62. Any complaint made by one medical practitioner on the panel against another involving any question as to the efficiency of the medical service which may recommend removals from the panel (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 48) is considered by the local medical committee.

(*i*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 32. Committees so elected may be recognised as the local medical committees (p. 936, *ante*) for those areas in which no local medical committee was recognised before the 15th February, 1914 (*ibid.*). For the method of appointing these committees (called panel committees), see National Health Insurance (Panel Committee) Regulations, 1914.

(*k*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), 33(1). For the method of electing these committees (called pharmaceutical committees), see National Health Insurance (Pharmaceutical Committee), Regulations, 1914. The committee must be consulted by the insurance committee before settling agreements as to the supply of drugs (*ibid.*, regulation 10). As to finance, see p. 961, *post*.

(*l*) See p. 920, *ante*.

(*m*) See pp. 922, 923, *ante*.

(*n*) See pp. 923, 924, *ante*.

SECT. 8.  
Adminis-  
trative  
Bodies.

Conditions  
of approval.

persons who are members thereof (*a*). Other administrative functions are also imposed upon approved societies in respect of their members, notably in regard to the issue and collection of insurance cards (*b*).

**1662.** Any body of persons corporate or unincorporate (not being a branch (*c*) of another such body) registered or established under any Act of Parliament, or by Royal Charter, or, if not so registered or established, having a constitution of the prescribed character (*d*), may be approved by the Insurance Commissioners for the purposes of national health insurance (*e*), provided that it fulfils the following conditions, namely:—it must not be a society carried on for profit; its constitution must provide for its affairs being subject to the absolute control of its members, whether insured persons or not; and, if the society has honorary members, its constitution must provide for excluding them from the right of voting on questions relating to national health insurance (*f*).

Any society may establish a separate section, consisting of insured persons, whether with or without honorary members not being insured persons, for the purposes of national health insurance, and such separate section may become an approved society in the manner and subject to the conditions aforesaid (*g*).

Approval may be granted at any time and either unconditionally or subject to the condition of the society taking the steps necessary for compliance with the foregoing requirements relating to approved societies (*h*).

A society may not be required to be approved in respect of any part of the United Kingdom other than that in which its registered office is situated because among its members there are persons for the time being resident in that part of the United Kingdom (*i*).

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (1). In other cases these benefits are administered by the insurance committees, as to which see pp. 933 *et seq.*, *ante*.

(*b*) See note (*a*), p. 918, *ante*.

(*c*) The expression "branch," in relation to a society, does not include any branch of the society which is not itself separately registered (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79).

(*d*) The National Insurance (Constitution of Unregistered Societies) Regulation, 1912 (Stat. R. & O., 1912, p. 948), requires that societies not so registered or established shall be regulated by written or printed rules or by some other instrument providing for certain specified matters relative to their constitution, powers, and procedure.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 23 (1); see also title TRADE AND TRADE UNIONS, Vol. XXVII., p. 670.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 23 (2).

(*g*) *Ibid.*, s. 23 (1). The National Insurance (Constitution of Sections) Regulations, 1912 (Stat. R. & O., 1912, p. 950), make for sections provisions corresponding to those of the regulation noted in note (*d*), *supra*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 23 (3).

(*i*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (2). A society which has received approval for more than one part of the United Kingdom (see National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 83 (3), repealed by National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (1)) may relinquish approval for any part or parts other than that in which its registered office is situate, provided none of its members

The Insurance Commissioners may withdraw their approval, so that the society will cease to be an approved society, if such society or a branch thereof fails to comply with the statutory provisions relating to approved societies, or if the society or branch or the parent body of a separate section is convicted of any offence under any statute (*k*). They may also make regulations authorising the withdrawal of approval on account of maladministration of the society's national health insurance affairs where it appears expedient in the interests of the members of the society to do so (*a*).

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Adminis-  
trative  
Bodies.Withdrawal  
of approval.

**1663.** Every approved society and every society desirous of becoming an approved society must give such security as the Insurance Commissioners think sufficient to provide against malversation or misappropriation of national health insurance funds by officers of the society. Security must also be given by an approved society in respect of any branches which it may have with insured persons among their members. No security is required from any society which proves that the only national health insurance funds coming into its hands are such as are required for reimbursing to the society sums previously expended (*b*).

Security.

**1664.** Approved societies and their branches must comply with any regulations made by the Insurance Commissioners as to their place of meeting, and such regulations may provide for the use, for that purpose, of the offices of a Government department (including a labour exchange), or of a local authority, subject to the consent of the department or authority concerned (*c*).

Regulations.

**1665.** Every approved society must make proper rules to the satisfaction of the Insurance Commissioners for the government of the society. If the society has branches, rules must be made for the government of the society and its branches, for the determination of disputes between the society and a branch or between branches, for the administration of benefits by the branches in regard to their insured members, for the keeping of proper accounts by the branches where separate accounts are usually kept by them, and for depriving of or suspending from the right of administering benefits any branch guilty of maladministration thereof, or which is convicted of any offence under any statute, and for providing for

Rules.

reside in the parts of the United Kingdom in respect of which approval is to be relinquished, or that any members who are so resident were at the time when they were admitted to membership for any purpose of the society resident in a part of the United Kingdom in which the society will remain an approved society (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (3)).

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 29. The Insurance Commissioners must make the necessary provision with respect to insured members of the society (*ibid.*).

(*a*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.; National Health Insurance (Withdrawal of Approval) Regulations, 1914.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 26. The Commissioners may vary the security from time to time, and may permit deposited securities to be changed. Dividends or interest arising from deposited securities are paid to the society (*ibid.*).

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 27 (2).



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their administration by the society or otherwise (*d*). Where any statute requires the rules of a society to be registered, rules approved by the Insurance Commissioners must be forthwith registered, but such rules have effect pending registration as if duly registered (*e*).

Infant  
members.

**1666.** A member of an approved society who is a minor may execute instruments and give acquittances under the rules of the society, but may not be a member of the committee, or a trustee, manager, or treasurer thereof (*f*).

Dissolution.

**1667.** An approved society or a branch thereof may only be dissolved with the sanction of the Insurance Commissioners and in the prescribed manner (*g*); and no branch may be expelled from the society unless proper provision is made with respect to its members who are insured persons. No branch having insured persons among its members may secede or withdraw from the society without the consent of the Insurance Commissioners; such consent is not given unless the branch complies with the conditions of approval requisite in the case of approved societies. On such consent being given the branch is subject to all provisions and requirements relating to approved societies. Such consent is unnecessary if the branch makes satisfactory provision for the transfer of its insured members to other branches or other approved societies (*h*).

Inspection  
of affairs.

**1668.** The Insurance Commissioners may empower any inspector appointed by them to exercise in respect of any approved society or branch of an approved society the powers of an inspector appointed under s. 76 of the Friendly Societies Act, 1896 (*i*), for the purpose of inspecting the affairs of a society, but any complaint or report as to any branch made by an inspector under this provision must be communicated to the central body of the society (*j*).

Superannua-  
tion fund.

**1669.** A society consisting of persons entitled to rights in a superannuation or other provident fund established for the benefit

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 27 (1).

(*e*) *Ibid.*, s. 27 (3). Where there is urgent need for the immediate amendment or variation of the rules of a society, the Commissioners may authorise the amendment or variation, if rendered necessary by the passing of the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), so that it may not be necessary to incur the delay and expense which would be consequent upon getting authority from the society itself (*ibid.*, s. 17).

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 74.

(*g*) The Commissioners may make regulations with respect to the manner and conditions in and upon which the dissolution of approved societies may be effected (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.); see National Health Insurance (Dissolution of Societies) Regulations, 1914; as to the financial arrangements on such dissolution, see pp. 971, 972, *post*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 28. The foregoing provisions as to secession or withdrawal have effect notwithstanding anything in any statute regulating the constitution of the society (*ibid.*).

(*i*) 59 & 60 Vict. c. 25; and see title FRIENDLY SOCIETIES, Vol. XV., pp. 174, 175.

(*j*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 57 (5).

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of persons employed by one or more employers may become an approved society, notwithstanding that the employer is entitled to representation on the body administering the fund to an extent not exceeding one quarter of the total number of the body, if the employer, in addition to the insurance contributions payable by him (*k*), is responsible for the solvency of the fund or for the benefits payable thereout, or is liable to pay a substantial part of, or to make substantial contributions to, or substantially to supplement the benefits payable out of the fund. The following are the conditions of approval in respect of such a society, namely:—it must be prohibited, so far as concerns national health insurance benefits, from refusing to allow a member to transfer to another approved society, and from refusing to allow a member who is discharged from or leaves his employment and is unable to join another approved society on account of his health to continue his membership; the members of the committee of management, other than the employer's representatives, must be elected by ballot; and membership of the society must not be a condition of employment. Where in order to become an approved society it is necessary to alter the existing rules or constitution of the society, and it is not competent, under the existing constitution, for the alteration to be made, the Insurance Commissioners may approve a scheme submitted to them for the purpose, provided that the members have had an opportunity of voting thereon by ballot, and that proper provision has been made for safeguarding existing rights and interests. The Act or deed constituting the fund has effect subject to the provisions of the scheme approved (*l*).

**1670.** Existing societies desirous of transacting national health insurance business were enabled, for the space of a year after the commencement of the Act (*m*), to do anything necessary to qualify for that purpose, notwithstanding anything in their governing instruments (*n*). Existing societies.

**1671.** Any society for the purpose of carrying on national health insurance business either alone or together with any of the purposes which enable a society to become a registered friendly society (*o*) may be registered as a friendly society (*p*), notwithstanding that the contributions in regard to national health insurance are not voluntary (*q*). Registration as friendly society.

**1672.** Apart from national health insurance matters, the rights or liabilities of approved societies and their members remain unaffected by the statutory provisions relating to such insurance, and, subject Position of societies in other matters.

(*k*) See pp. 911, 912, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 25.

(*m*) Namely, until the 15th July, 1913.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 24; as to existing societies, see, further, pp. 972, 973, *post*.

(*o*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 124, 125.

(*p*) See *ibid.*, p. 129. For form of application for registration by a friendly society, see Encyclopædia of Forms and Precedents, Vol. VI., p. 20.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 75.

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to such statutory provisions, the force and effect of all rules of a society which becomes an approved society or any branch thereof remain as before (*r*). Except in so far as may be inconsistent with the statutory provisions relating to national health insurance, any national health insurance business transacted by any approved society, including any approved society which is a separate section of another body (*s*), is treated as part of the ordinary business of societies of its class, and statutory provisions applying to the society in relation to such ordinary business apply in relation to its national health insurance business (*t*).

Amalgama-  
tion of  
societies.

**1673.** The Commissioners may make regulations as to the manner in and conditions upon which may be effected the amalgamation for national health insurance purposes of any two or more approved societies, or of an approved society with a society which is not an approved society, or of any branches of an approved society; and as to the transfer by one approved society or branch of its engagements as to health insurance, or such of its engagements as relate to members resident in a particular part of the United Kingdom, to another approved society or branch (*u*).

Qualification  
for member-  
ship.

**1674.** Any insured person (*w*) and any person entitled to become an insured person may apply to an approved society for membership therein (*a*). No such application may be refused solely on the ground of the applicant's age, and a society may not admit as a member any person resident in any part of the United Kingdom in respect of which the society is not an approved society (*b*); but otherwise an approved society is entitled, in accordance with its rules, to admit or reject any applicant, or to expel any member who is an insured person (*c*). The suspension of a member of an approved society from national health insurance benefits does not deprive him of his membership (*d*).

Prohibition  
of double  
insurance.

**1675.** A person may not, for the purposes of national health insurance, be or attempt to become a member of more than one approved society at the same time, nor may a deposit contributor (*e*) be or attempt to become at the same time a member of an approved society for the purposes of such insurance. There is no such pro-

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(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 34.

(*s*) See p. 938, *ante*.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 76.

(*u*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.; National Health Insurance (Amalgamation and Transfer of Engagements) Regulations, 1914. As to financial adjustments on such amalgamation, see p. 966, *post*.

(*w*) See p. 905, *ante*.

(*a*) Membership of an approved society means membership for the purposes of national health insurance (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 79).

(*b*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (2).

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 30.

(*d*) *Ibid.*, s. 79.

(*e*) See p. 943, *post*.



hibition in regard to joining such a society independently of national health insurance purposes (*f*).

SUB-SECT. 6.—*Deposit Contributors.*

**1676.** Insured persons (*g*) who have not joined an approved society within the prescribed time (*h*), or who have been members of but have left such society, and have not within the prescribed time (*i*) joined another, become “deposit contributors” (*k*). Their contributions are credited to a special fund called the Deposit Contributors Fund and their benefits are paid out of that fund (*l*) and administered by the insurance committees (*m*).

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contributors.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 34. The rights and liabilities of approved societies and their members arising outside the provisions relating to national health insurance remain unaffected (*ibid.*).

(*g*) See p. 905, *ante*.

(*h*) The time within which a person may join an approved society is as follows:—(i.) In the case of a person (other than a person included in (ii.), *infra*) of the age of sixteen and upwards who enters into insurance as an employed contributor, any time before the expiration of three months and fourteen days from the date of his entry into insurance; (ii.) in the case of a person who enters into insurance on becoming employed as a master, seaman, or apprentice on a foreign-going ship, or a ship engaged in regular trade on foreign stations, or who becomes employed as a master, seaman, or apprentice, on any such ship as aforesaid within three months after his entry into insurance as an employed contributor, any time before the expiration of three months and fourteen days from the date of the termination of the voyage made by him on such a ship as aforesaid, which first terminates after his entry into insurance; (iii.) in the case of a person who enters into insurance as a voluntary contributor, any time before the date of his entry into insurance; (iv.) in the case of a person who has been expelled or has resigned from an approved society, any time before the expiration of three months from the date on which he ceases to be a member of the society. But if, before the expiration of the time within which a person may by virtue of the foregoing provisions join an approved society, any person (*a*) makes a claim for benefit under the Act, or (*b*) dies or ceases permanently to reside in the United Kingdom, or otherwise ceases to be an insured person, or (*c*) being a woman, becomes suspended from benefits on marriage, the time expiring on the day immediately preceding the day on which the claim is made, or the day of that person's death, or the day on which that person so ceased to reside in the United Kingdom, or to be an insured person, or the day of that person's marriage, as the case may be, is deemed to have been the time allowed in the case of that person for joining an approved society, instead of the time which would otherwise have been allowed (National Health Insurance (Time for Joining an Approved Society) Regulations, 1914 (Stat. R. & O., 1914, No. 415)). As to the position of insured persons who, owing to misapprehension, purported to become members of societies which had not been approved for that part of the United Kingdom in which such persons were then resident, with the result that such admissions to membership were, strictly speaking, inoperative, see the National Health Insurance (Membership of Approved Societies) Order, 1913 (Stat. R. & O., 1913, No. 1030).

(*i*) See note (*h*), *supra*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42. The provisions as to deposit contributors only apply until the 1st January, 1915 (*ibid.*).

(*l*) See p. 931, *ante*.

(*m*) See pp. 933 *et seq.*, *ante*.

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trative  
Bodies.Powers of  
Local  
Government  
Board.SUB-SECT. 7.—*Local Government Board.*

**1677.** The Local Government Board may, for the purpose of its powers and duties in regard to national health insurance(*n*), hold such local inquiries and investigations as it thinks fit, and the Board and its inspectors have for the purposes of such an inquiry the same powers as they have for the purposes of an inquiry under the Public Health Acts(*o*). Expenses incurred by the Board in respect of proceedings in regard to health insurance are paid as the Board directs(*p*).

SECT. 9.—*The Administration of Benefits.*SUB-SECT. 1.—*In General.*Rules of  
approved  
societies.

**1678.** Subject to statutory provisions relating to national health insurance and to the consent of the Insurance Commissioners, approved societies may provide for the application of their existing rules, or make new rules, or alter or repeal their rules with regard to the following matters, namely(*q*):—the manner and time of paying or distributing, and mode of calculating, benefits; the suspension of benefits (but no rule may provide for the suspension of any benefit for a period exceeding one year); notices and proof of disease or disablement(*r*); behaviour during disease or disablement (but any such rule must be in the prescribed form(*s*)); the visiting of sick or disabled persons (but when visitors are appointed by the society, every such rule must provide that women are to be visited by women); and the infliction and enforcement of penalties, whether by fine, suspension of benefits or otherwise, in the case of members who are insured persons and who are guilty of any breach of rules or of imposition or attempted imposition in regard to benefits. No fine may exceed 10s., or, for repeated breaches of rules, 20s.; no penalty may be imposed on account of the insured person's refusal to submit to vaccination(*t*) or inoculation of any kind, or to a surgical

(*n*) As, for instance, in the case of sanatorium benefit; see p. 924, *ante*. The present provision does not refer to inquiries with respect to excessive sickness, as to which see pp. 954 *et seq.*, *post*.

(*o*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 375.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 77.

(*q*) *Ibid.*, s. 14 (2).

(*r*) Where a rule provided for payment of sickness benefit only on a medical certificate of incapacity, it was held that an approved society had no right to limit by resolution the certificates which it would accept to those of doctors on the panel (*Heard v. Pickthorne*, [1913] 3 K. B. 299, C. A.). Where it was provided by rules that no member should be entitled to sickness benefit until he had sent to the society a medical certificate of the cause of incapacity, and that disputes should be settled by a delegates' meeting, in a dispute as to the sufficiency of a medical certificate, a county court has no jurisdiction (*Bailey v. Co-operative Wholesale Society (Insurance Section)*, [1914] 2 K. B. 233).

(*s*) For the prescribed form, see the National Health Insurance (Behaviour during Disease) Regulations (England), 1912 (Stat. R. & O., 1912, p. 738).

(*t*) See title MEDICINE AND PHARMACY, Vol. XX., p. 340.

operation unless such operation is of a minor character and the refusal is considered unreasonable (*a*) by the society or by the Insurance Commissioners on appeal, and suspension of maternity benefit may not be inflicted as a penalty where the wife whose confinement is concerned has not herself been guilty of the offence for which the penalty is imposed. Where, under any rule, sickness or disablement benefit is suspended on the ground that the disease or disablement has been caused by the misconduct of the person claiming the benefit, such person cannot become thereby disentitled to medical benefit (*b*).

Where there is a statutory requirement that the rules of a society becoming an approved society are to be registered, any rules approved by the Insurance Commissioners must forthwith be registered, and in the meantime have effect as if duly registered (*c*).

**1679.** Insurance committees (*d*) have similar powers of making rules with regard to the administration by them of benefits, subject to the Postmaster-General's consent in the case of rules relating to anything to be done by, to, or through the Post Office (*e*).

The Commissioners have power to make regulations enabling approved societies and insurance committees to appoint a person to exercise on behalf of any insured person of unsound mind any right of election which that person has in regard to national health insurance, and to appoint a person to receive on behalf of and for the benefit of such person any sums by way of benefit which would otherwise have been payable to him (*f*).

**1680.** An approved society or insurance committee may subscribe or give donations to hospitals, dispensaries, and other charitable institutions, or for the support of district nurses, and may appoint nurses for visiting and nursing insured persons; and expenditure so incurred is treated as expenditure on sickness benefit (*g*).

#### SUB-SECT. 2.—*Medical Benefit.*

##### (i) *Administration.*

**1681.** Medical benefit (*h*) is administered by and through the insurance committees (*i*), and for that purpose every insurance

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Rules of  
insurance  
committees.

Persons of  
unsound  
mind.

Subscriptions  
to hospitals  
etc.

Duty of  
insurance  
committees.

(a) See title MASTER AND SERVANT, Vol. XX., p. 235.

(b) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (4).

(c) *Ibid.*, s. 14 (5).

(d) See pp. 933 *et seq.*, *ante*. Rules so made by the insurance committee for the administration of medical benefit must be made after consultation with the local medical committee (see pp. 936, 937, *ante*) and panel committee (see note (i), p. 937, *ante*) and submitted for the Commissioners' approval (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 81).

(e) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (3).

(f) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, and Sched. I.

(g) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 21; National Health Insurance (Subscriptions and Donations) Regulations (England), 1914 (Stat. R. & O., 1914, No. 459).

(h) For the definition, see p. 920, *ante*.

(i) See pp. 933 *et seq.*, *ante*.



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committee must, in accordance with regulations made by the Insurance Commissioners (*j*), make arrangements with duly qualified medical practitioners (*k*) and make provision for the supply of proper and sufficient drugs, medicines, and the prescribed appliances (*l*).

The regulations must provide for the arrangements being made subject to the approval of the Insurance Commissioners (*m*), and must secure that insured persons shall, unless it is otherwise provided, receive adequate medical attendance and treatment from the medical practitioners with whom arrangements are made, and be able to obtain such drugs, medicines and appliances as the medical practitioner in attendance may order, from any persons, firms, or bodies corporate with whom arrangements have been made (*n*).

(ii.) *Medical Attendance.*

Panel of  
medical  
practitioners.

**1682.** With regard to medical attendance and treatment, the regulations must provide for a system which will secure the preparation and publication of lists of medical practitioners who have agreed to attend and treat insured persons whose medical benefit is administered by the committee; a right on the part of any duly qualified medical practitioner of being included in such a list, subject to the power of removal from the list by the Insurance Commissioners in the interests of the efficiency of the medical service of the insured; a right on the part of any insured person of being attended and treated by the practitioner whom he selects from the appropriate list, subject to the consent of the practitioner so selected; and the distribution amongst the several practitioners on the lists of insured persons who have failed to make any selection, or who have been refused by their selected practitioner, such distribution, so far as practicable, to be arranged by the several practitioners (*o*).

(*j*) See the National Health Insurance (Medical Benefit) Regulations (England), 1913.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (1).

(*l*) *Ibid.*, s. 15 (5).

(*m*) See National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 82. The Commissioners may authorise the committee to make provisional arrangements in lieu of arrangements under these regulations (*ibid.*, regulation 83).

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (1), (5).

(*o*) *Ibid.*, s. 15 (2) (a), (b), (c), (d); see *E. v. County of London Insurance Committee* (1914), *Times*, 24th June (removal from panel). The National Health Insurance (Medical Benefit) Regulations (England), 1913, provide as follows:—Approved societies must supply to the insurance committee lists of their members resident in the county or county borough, and the committee must prepare therefrom a list of members of societies and further lists of deposit contributors and exempt persons, these lists being collectively known as the "Register" (*ibid.*, regulation 3). After consultation with the local medical committee and panel committee (see pp. 936, 937, *ante*) the insurance committee must embody in draft agreements and submit to the Commissioners for approval the conditions of service of medical practitioners included in its panels (*ibid.*, regulations 4, 5), and for the purpose of providing treatment for insured persons must enter into written agreements with such practitioners as are willing to treat insured persons on those terms. Every draft agreement must include among the conditions of service the following points (*ibid.*, Sched. I.):—the practitioner

must give the patients treatment "of a kind which can consistently with the best interests of the patient be properly undertaken by a general practitioner of ordinary professional competence and skill," but he may not be required to give or charge for treatment in respect of a confinement, or (unless the practitioner agrees to give domiciliary treatment) of tuberculosis or any other disease in regard to which the patient is entitled to sanatorium benefit; where the patient requires treatment beyond the competence of an ordinary practitioner, the practitioner must advise the patient how to obtain the necessary treatment; where the patient's condition so requires, the practitioner must visit him at his residence or at any other place within the county or county borough within a definite distance from the practitioner's residence; the practitioner must attend at specified places and times and treat patients who attend there for the purpose; the drugs and appliances necessary for any patient must be ordered by the practitioner in the form provided by the insurance committee, save those which the practitioner may be under arrangement himself to supply (see note (d), p. 951, *post*); the practitioner must give personal treatment save where prevented by urgency of other professional duties, temporary absence from home, or other reasonable cause, when he must provide a deputy; and the practitioner must keep the required records of cases. The insurance committee may recover from the practitioner any sum of which it has been deprived which otherwise it would have received for medical benefit or any expense incurred by the committee or by any patient by reason of the medical practitioner's breach of agreement, but before so doing the matter must be referred to the medical service sub-committee (see *infra*). Every draft agreement must also include one of the following methods of remuneration, namely: a rate per quarter in respect of each person included in the practitioner's list (the "capitation system"); the capitation system plus special rates for certain specified special services; the capitation system plus certain rates for all services; specified rates for special services plus the capitation system; or payment at certain specified rates for the various different services rendered ("payment by attendance"). The committee may combine any of these methods of remuneration. Remuneration to practitioners is paid out of the Practitioners Fund (see note (b), p. 959, *post*) (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulations 35, 36). As to the calculation of remuneration, see *ibid.* For the treatment of temporary residents there is a special scale payable out of a special fund established by the Commissioners, called the Central Medical Benefit Fund (*ibid.*, regulations 41, 42). If a question arises or may arise whether an operation or other service is comprised in the treatment which the practitioner has by his agreement undertaken to give, it is referred by the practitioner to the local medical committee, and in the event of disagreement between that body and the insurance committee the matter is referred to referees (*ibid.*, regulation 50). The committee may agree to additional payments in respect of mileage (*ibid.*, regulation 77). The committee may compile the "medical list," which consists of the practitioners who have entered into agreements with the committee and who are collectively known as "the panel" (*ibid.*, regulation 6). If a practitioner (other than one whose name has been removed from any "medical list") at any time applies to the committee for that purpose, the committee must include him in the "medical list." Ordinarily, a practitioner who desires to withdraw from the panel must give written notice four weeks before the commencement of any year. Any person acting in the interests of the estate of a deceased practitioner on the panel may be authorised by the committee to appoint temporarily a practitioner to treat insured persons on the deceased practitioner's list (*ibid.*, regulation 17). Their rights in regard to medical treatment must be brought to the notice of insured persons by the publication in local newspapers of the arrangements made by the committee (*ibid.*, regulation 15). Insured persons, other than those required or allowed to make their own arrangements for treatment (see p. 949, *post*), are entitled to obtain treatment either from a practitioner on the panel or through an approved institution (see pp. 949, 950, *post*) (*ibid.*, regulation 20). In the former case, insured persons desiring and being entitled to select a practitioner

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persons.

**1683.** Provision for medical attendance and treatment must also be made, on the same terms as to remuneration as those arranged for insured persons, for the benefit of such members of any friendly society which, or a separate section of which, becomes an approved society (*p*), as were members thereof on the 16th December, 1911, and are not entitled to medical benefit (*q*), by reason of being of the age of sixty-five or upwards on the 15th July, 1912, or are not qualified to become insured persons by reason of permanent disablement, at the same date (*r*). Such provision must be made, in like manner and subject to the like conditions, for the benefit of members of societies, other than the foregoing friendly societies, who were on the 16th December, 1911, entitled as such members to medical attendance and treatment (*s*).

Other  
arrangements.

**1684.** If the medical service in any area is inadequate, the Commissioners may dispense with the necessity of adopting any such system as aforesaid and themselves make other arrangements or authorise the insurance committee so to do, or may pay to insured persons a sum equal to the estimated cost of medical benefit in lieu of medical benefit, money payable to the committee in respect of medical benefit being applied for that purpose (*t*). If the Insurance Commissioners are satisfied that the insured persons or any

apply to the chosen practitioner, and the latter intimates to the insurance committee whether the applicant is accepted or rejected by him (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 21). Lists of persons accepted by or assigned to each practitioner on the panel are forwarded to the practitioner, and he will be responsible for their treatment (*ibid.*, regulation 25). An insured person desiring to change his medical attendant during the course of a year, while in the same area, can only do so by agreement with his present practitioner, and notice of the transfer must be given to the committee by the practitioner to whose list the insured person is transferred (*ibid.*, regulation 26). As to the transfer of insured persons whose medical practitioner dies, or ceases practice, or withdraws from the list, see *ibid.* An insured person desiring to change his practitioner or his method of treatment during the succeeding year must give notice of such desire before the 1st December (*ibid.*, regulation 30). As to arrangements on the temporary removal of insured persons, see *ibid.*, regulation 27; and as to persons frequently removing, *ibid.*, regulation 78. Change of address by an insured person entitled to medical benefit must be notified to his society or, if a deposit contributor, to the Insurance Commissioners (*ibid.*, regulation 28). Every insurance committee must establish a special "medical service sub-committee" for the investigation of questions arising between insured persons and their medical attendants (*ibid.*, regulation 45). If representations are made to the Commissioners by an insurance committee or a local medical committee or panel committee that the continuance of a practitioner on the panel will be prejudicial to the efficiency of the medical service of insured persons, the Commissioners must, and in the case of similar representations by other persons or bodies may, hold an inquiry in regard thereto in the manner prescribed (*ibid.*, regulations 52—74).

(*p*) See pp. 937, 938, *ante*.

(*q*) See p. 920, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (2) (e); National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 79.

(*s*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 10 (2). As to the provision of parliamentary contributions for the purpose of such medical attendance and treatment, see p. 959, *post*.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (2).



considerable proportion of them within an area, or part of an area, are not receiving satisfactory medical treatment under the panel system (*u*), the Commissioners may authorise the insurance committee to make, or may themselves make, such other arrangements as will secure to insured persons within the area, or part, such better medical service as is practicable having regard to the funds available for the purpose, or arrangements whereunder insured persons within the area, or part of the area, may be required to make their own arrangements for receiving medical attendance and treatment, including medicines and appliances, and whereunder the insurance committee or Insurance Commissioners undertake to pay the cost of such medical attendance and treatment upon such scale as they may determine with the approval of the Commissioners so calculated that the medical attendance and treatment so secured shall be of a quality not inferior to that provided under the panel system (*x*).

The regulations must also authorise the insurance committee to require any persons whose income exceeds a limit to be fixed by the insurance committee, and to allow any other persons, to make their own arrangements for receiving medical attendance and treatment, including medicines and appliances, in lieu of receiving medical benefit under such arrangements as aforesaid. In such cases the committee contributes towards the cost of medical attendance and treatment amounts not exceeding those which otherwise would have been expended by the committee in providing medical benefit for the persons in question (*a*).

**1685.** The regulations must further provide that, in the case of persons entitled to medical attendance and treatment under any system or through any institution existing on the 16th December,

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(*u*) See note (*o*), p. 946.

(*x*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 11.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (3). The insurance committee may exempt from the necessity of making their own arrangements by reason of the income limit any persons or class of persons who ought, in the opinion of the committee, to be so exempted. The local medical committee and panel and pharmaceutical committees (see note (*i*), p. 937, *ante*) must be consulted in regard to the fixing or varying of the income limit. Persons with incomes above the income limit who are not exempted are not entitled to medical benefit under the arrangements made by the insurance committee (see the text, *supra*), and persons or bodies interested may, by notice to the committee, dispute the right of any insured person to receive medical benefit under those arrangements, and if the insured person fails to satisfy the committee that his income does not exceed the limit or that he is entitled to exemption, or that, being an exempt person, his income does not exceed £160 a year, the committee must require him to make his own arrangements (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 14). Insured persons desiring or being required to make their own arrangements must apply to the committee (*ibid.*, regulation 24). As to exchanging methods of treatment, see note (*o*), p. 946, *ante*. If the committee considers the arrangements made by a person making his own arrangements are satisfactory, a contribution is made towards the cost of that treatment out of the Special Arrangements Fund (see note (*b*), p. 959, *post*) (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 44). As to the calculation of such contribution, see *ibid.*

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1911, and approved by the insurance committee and Commissioners, such medical attendance and treatment may be treated as, or as part of, their medical benefit, and may provide for the committee contributing towards the expenses thereof the whole or part of the sums which would be contributed in the case of persons making their own arrangements as aforesaid; but no person may be deprived of his right of selecting his own medical practitioner (b).

(iii.) *Supply of Drugs.*

Supply of  
drugs etc.

**1686.** With regard to the supply of drugs, medicines and appliances, the regulations must require the adoption by every insurance committee of such a system as will secure the preparation and publication of lists of persons, firms and bodies corporate who have agreed to undertake such supply according to a scale of prices fixed by the committee, and a right to any person, firm, or body corporate of being included in any such list for such purpose, provided that such inclusion would not be prejudicial to the service (c). No arrangement may be made with a medical

(b) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (4). The board of management of or person administering any such institution may apply to the committee for approval; the committee must consider the application and then communicate with the Commissioners; the Commissioners may approve any institution approved by the committee; such approval has effect subject to the observance by the institution of conditions imposed by the Commissioners (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 13). Insured persons desiring or being entitled to treatment through an approved institution must apply in the prescribed manner to the institution, and the institution notifies the committee as to acceptance or rejection of the application (*ibid.*, regulation 23). Moneys for the benefit of persons obtaining treatment through an approved institution come out of the Institutions Fund; see *ibid.*, regulation 43; note (b), p. 959, *post*.

(c) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (5) (a), (b). The National Health Insurance (Medical Benefit) Regulations (England), 1913, prescribe the medical and surgical appliances to be provided as part of medical benefit (*ibid.*, regulation 7, Sched. II.). The insurance committee, after consultation with the local medical committee (see pp. 936, 937, *ante*), the panel committee (see note (i), p. 937, *ante*), and the pharmaceutical committee (see note (k), p. 937, *ante*), must prepare "the drug tariff," or a list of the prices upon which the sums to be paid for drugs and appliances are to be calculated. Such prices and the prescribed conditions of supply must after consultation with the pharmaceutical committee be embodied in draft agreements, which must be submitted to the Commissioners for approval, and must include (subject to any necessary modifications), among others, the following conditions:—drugs and appliances of good quality must be supplied free of charge to persons presenting the necessary prescribed order signed by a medical practitioner on the panel or his deputy; substances to which the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 5, or the Regulations under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 1, relate, must be provided with proper bottles and other vessels; and dispensing must be done by or under the direct supervision of a registered pharmacist or a person who for three years immediately prior to the 16th December, 1911, has acted as dispenser to a medical practitioner or a public institution. The insurance committee must enter into written agreements on those terms with chemists and others willing to undertake the supply of drugs or appliances or both, and must then prepare a list of those with whom such agreements have been made (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulations 8—11, 22, Sched. III.). Moneys for drugs and appliances are



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practitioner unless authorised by regulations (*d*), under which he will supply drugs or medicines to any insured person (*e*); and, subject to regulations to the contrary, arrangements for the dispensing of medicines may only be made with persons, firms, or bodies corporate entitled to carry on the business of a chemist and druggist under the Pharmacy Act, 1868 (*f*), as amended by the Poisons and Pharmacy Act, 1908 (*g*), who undertake that all medicines supplied by them to insured persons shall be dispensed by or under the direct supervision of a registered pharmacist (*h*), or by a person who, for three years immediately prior to the 16th December, 1911, has acted as a dispenser to a duly qualified medical

paid out of the Drug Fund; see *ibid.*, regulation 39; note (*b*), p. 959, *post*. Cases where there has been alleged excessive ordering of drugs by any practitioner may be investigated by the panel committee, and, if the charge is established, deductions in respect thereof may be made from the amount payable to the practitioner out of the Panel Fund (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 40). As to revision of the drug tariff, see *ibid.*, regulation 18. The insurance committee must include in the list any person supplying drugs or appliances who applies for that purpose. A person may withdraw from the list on giving four weeks' notice before the commencement of any year, or at any other time by agreement with the committee (*ibid.*, regulation 19). Every chemist or other person on the list must exhibit at his place of business a notice in the form prescribed in *ibid.*, Sched. IV., indicating that he has undertaken to supply drugs etc. under the aforesaid arrangements (*ibid.*, regulation 11). The insurance committee must constitute a pharmaceutical service sub-committee for dealing with complaints against persons supplying drugs or appliances (*ibid.*, regulations 46, 49). The insurance committee must furthermore constitute a joint services sub-committee consisting of members appointed by and from the medical service sub-committee, the pharmaceutical service sub-committee, and the insurance committee itself. One member must be a woman. If a matter referred to the medical service sub-committee involves a question relating to a person supplying drugs, or if a matter referred to the pharmaceutical service sub-committee involves a question relating to a practitioner on the panel, such matter is to be referred to the joint services sub-committee (*ibid.*, regulation 47). For the purpose of holding an inquiry as to whether the inclusion or continuance of a person supplying drugs or appliances on the list is or would be prejudicial to the efficiency of the service, the Commissioners must constitute an inquiry committee in the manner prescribed (*ibid.*, regulations 75—76).

(*d*) Where an insured person resides in a rural area more than one mile from the place of business of the nearest chemist on the list, or by reason of distance or inadequacy of means of communication has difficulty in obtaining drugs and appliances from a chemist on the list, arrangements may be, and if the practitioner so desires are to be, made whereby his medical practitioner supplies him instead. Moreover, arrangements must be made by the insurance committee for the supply by practitioners on the panel of all or any of the drugs necessarily or ordinarily administered by a practitioner in person and of the drugs and appliances required for immediate administration or application, or required for use before a supply can conveniently be obtained otherwise (*ibid.*, regulation 12). In such cases the committee may, instead of paying him for the drugs and appliances actually supplied, pay to the practitioner a capitation fee from the Drug Fund (*ibid.*, regulations 38, 39).

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (5) (ii.).

(*f*) 31 & 32 Vict. c. 121.

(*g*) 8 Edw. 7, c. 55; and see title MEDICINE AND PHARMACY, Vol. XX., p. 355.

(*h*) See title MEDICINE AND PHARMACY, Vol. XX., p. 353.



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practitioner or a public institution (*i*); but the rights and privileges of a person under the Apothecaries Act, 1815 (*k*), to act as assistant to an apothecary in compounding and dispensing medicines are not affected (*l*).

If the Commissioners are satisfied that the fixed rate of prices is reasonable, but that an adequate and convenient supply of drugs, medicines, and appliances is not secured in any area, they may dispense with the necessity of any such system as aforesaid and authorise the committee to make, subject to approval, other arrangements (*m*).

SUB-SECT. 3.—*Sanatorium Benefit.*

Arrangements  
by insurance  
committees.

**1687.** Sanatorium benefit (*n*) is administered by and through the insurance committees (*o*). For that purpose insurance committees must make arrangements, to the satisfaction of the Insurance Commissioners, with a view to providing treatment for insured persons suffering from tuberculosis or any such other diseases as the Local Government Board with the approval of the Treasury may appoint (*p*), firstly, in sanatoria and other institutions, and, secondly, otherwise than in sanatoria or other institutions (*q*).

For the purpose of such treatment insurance committees must arrange with persons or local authorities (other than poor law authorities) having the management of sanatoria or other institutions approved by the Local Government Board; a local authority may provide such treatment as respects insured persons resident outside as well as within their area (*r*).

Provision of  
sanatoria.

**1688.** If a grant is made by the Local Government Board to a county council out of sums made available by statute for the provision of, or as grants in aid to, sanatoria and other institutions for the treatment of the aforesaid diseases (*s*), the Local Government

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (5) (iii.).

(*k*) 55 Geo. 3, c. 194.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (5) (iv.).

(*m*) *Ibid.*, s. 15 (5) (i.).

(*n*) For the definition, see p. 924, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (1); as to insurance committees, see pp. 933 *et seq.*, *ante*.

(*p*) See p. 924, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 16 (1).

(*r*) *Ibid.* In administering the benefit insurance committees may not themselves provide institutions. The Metropolitan Asylums Board (see title METROPOLIS, Vol. XX., p. 411) may agree with local authorities to receive insured persons and their dependants into hospitals or sanatoria provided by the Board (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 39). In Wales the Welsh Insurance Commissioners are substituted for the Local Government Board as the approving authority (*ibid.*, s. 42 (1)).

(*s*) See National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (1). By the Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 16 (1), the sum of £1,500,000 was made available for this purpose. The Welsh Insurance Commissioners distribute the part of the grant apportioned to Wales (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 82 (3); see also *ibid.*, s. 82 (4), and, as to agreements between local authorities and King Edward the

Board may authorise the county council to provide and maintain any such institution (*t*). Any expenses of the county council not defrayed out of the grant are defrayed out of the county fund (*u*). To facilitate co-operation amongst local authorities for the provision of such sanatoria and other institutions the Local Government Board may, by order, provide for the constitution of joint committees or boards for the joint exercise of powers in relation thereto (*v*).

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**1689.** For the purpose of treatment outside sanatoria or other institutions, insurance committees must arrange with persons and local authorities, other than poor law authorities, undertaking such treatment in a manner approved by the Local Government Board; and the Local Government Board may authorise a local authority to undertake such treatment and, if necessary, to appoint officers for the purpose (*a*).

Treatment  
outside  
sanatoria.

**1690.** An insurance committee may, with the consent of the Insurance Commissioners, enter into agreements with any person or authority, other than a poor law authority, that, in consideration of treatment being provided in a sanatorium or other institution or otherwise for persons recommended by the committee for sanatorium benefit (*b*), the committee will contribute towards the maintenance of the institution or the provision of such treatment out of the funds available for sanatorium benefit (*c*). Any such agreement is binding on the committee and its successors. Any sums so payable by the committee may be paid by the Insurance Commissioners and deducted from any sums payable to the committee for sanatorium benefit (*d*).

Contribu-  
tions by  
insurance  
committees.

**1691.** The Insurance Commissioners may retain the whole or any part of the sums payable out of moneys provided by Parliament

Research.

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Seventh's Welsh National Memorial Association, see National Insurance Act, 1913 (3 & 4 Geo. 5 c. 37), s. 42 (2)).

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (2).

(*u*) *Ibid.*; and see title LOCAL GOVERNMENT, Vol. XIX., p. 358.

(*w*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (3).

(*a*) *Ibid.*, s. 16 (1) (*b*). As to the conditions of approval, see *ibid.*, s. 77 (2), (3). By the Order of the Local Government Board dated the 26th July, 1912 (Stat. R. & O., 1912, p. 994), as to the domiciliary treatment of tuberculosis, treatment otherwise than in sanatoria etc. is approved when undertaken in accordance with the regulations therein laid down. The regulations provide for treatment by a registered medical practitioner, who must keep a continuous record of the clinical history of the illness of each patient on the prescribed form, and of the treatment given, and report to and confer with the consulting officer of a dispensary approved by the Local Government Board under the National Insurance Act for tuberculosis treatment. The medical practitioner in attendance must also inform the local medical officer of health of any circumstances adversely affecting the sanitary conditions under which any patient is living in regard to which action by the medical officer of health or the sanitary authority may be desirable.

(*b*) See p. 924, *ante*.

(*c*) See p. 959, *post*.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 64 (4).

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The  
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Administered  
by approved  
societies and  
insurance  
committees.

Excessive  
sickness.

Inquiry.

for sanatorium benefit(e) and apply such money for purposes of research(f).

SUB-SECT. 4.—*Sickness and Disablement Benefit.*

(i.) *Administration.*

**1692.** Sickness benefit(g) and disablement benefit(h) are administered, in the case of insured persons who are members of an approved society(i), by and through the society or a branch thereof, and in other cases by and through the insurance committees(k).

(ii.) *Excessive Sickness.*

**1693.** Where it is alleged by the Insurance Commissioners that there has been excessive sickness among any insured persons, or by any approved society(l) or insurance committee that there has been excessive sickness among the persons for the administration of whose sickness and disablement benefits the society or committee is responsible, and that such excess is due to the conditions or nature of the employment of such persons, or to bad housing or insanitary conditions in any locality, or to an insufficient or contaminated water supply, or to neglect to observe or enforce statutory provisions or regulations relating to the health of workers in factories, workshops(m), mines, quarries(n), or other industries, or relating to public health, or the housing of the working classes(o), or to observe or enforce any public health precautions, the Commissioners or the society or committee making such allegations, or the insurance committee on behalf and at the expense of any association of deposit contributors resident in its area(p), may send to the person or authority alleged to be in default a claim for the payment of any extra expenditure alleged to have been incurred by reason of such cause. Failing agreement on the subject, the Secretary of State(q) or the Local Government Board may order

(e) See p. 959, *post*.

(f) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 16 (2). A Medical Research Committee has been appointed, with executive functions, for the purpose of dealing with the money so available for research. Its duties are primarily to formulate and control the general plan of research and to control expenditure. An Advisory Council for research has also been appointed, its duty being to consider the scheme of the Medical Research Committee which is to be referred to it, and to formulate criticisms and suggestions in regard thereto. The funds retained for research are paid into the Medical Research Fund; see, generally, National Health Insurance (Medical Research Fund) Regulations, 1914 (Stat. R. & O., 1914, No. 418).

(g) For the definition, see p. 920, *ante*.

(h) For the definition, see pp. 922, 923, *ante*.

(i) See pp. 937, 938, *ante*.

(k) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (1).

(l) See pp. 937, 938, *ante*.

(m) See title FACTORIES AND SHOPS, Vol. XIV., pp. 447 *et seq*.

(n) See title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 593 *et seq*.

(o) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 516 *et seq*.

(p) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (9); and see p. 943, *ante*.

(q) See title CONSTITUTIONAL LAW, Vol. VII., p. 65.



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an inquiry and appoint for that purpose a competent person (*r*) with the same powers as those possessed by a Local Government Board inspector for the purposes of an inquiry under the Public Health Acts (*s*) and power to make orders as to costs. The order may include the costs of the Secretary of State and the Local Government Board, but a society or committee may not be ordered to pay the costs of the other party to the inquiry if the person holding the inquiry certifies that the demand for an inquiry was reasonable in the circumstances, and on such certificate being given the Treasury may repay to the society or committee all or any part of the costs incurred by it. An order made by the person holding the inquiry may, by leave of the High Court, be enforced in the same manner as a judgment or order of the court to the same effect (*a*).

**1694.** If at such inquiry it is proved that the amount of sickness has, during a period of not less than three years before the date of the inquiry, or, if there has been an outbreak of any epidemic, endemic, or infectious disease, during any less period, been more than 10 per cent. in excess of the average expectation of sickness as calculated in accordance with tables prepared by the Commissioners (*b*), and that such excess was wholly or in part due to any of the above-mentioned causes, the person holding the inquiry must order any extra expenditure incurred by societies or committees by reason of such cause to be made good by the responsible employer, local authority, owner, lessee, or occupier of premises, or, in the case of insufficient or contaminated water supply, by the local authority, company, or person responsible for supplying the water, unless such local authority, company, or person can prove that it is not in default (*c*).

Liability of  
person or body  
responsible.

Where any such inquiry is held in respect of bad housing or insanitary conditions in any locality, the local authority may serve notice upon the owner, lessee, or occupier of any premises which are the subject of the inquiry, and upon proof of the service of such notice, and that any such extra expense as aforesaid or any part thereof has been caused by the act or default of such owner, lessee,

Powers of  
local  
authority.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (1).

(*s*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 375. As to the Public Health Acts, see *ibid.*, p. 361, note (*a*).

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (5). The Insurance Commissioners may make regulations as to procedure on such inquiries (*ibid.*).

(*b*) Any excessive sickness attributable to any disablement or disease due to injury or disease for which damages or compensation are payable under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), or the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), or at common law (see title MASTER AND SERVANT, Vol. XX., pp. 134, 153, 169), is not taken into account (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (4)).

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (2). (4). When any sum is so ordered to be paid by a local authority, such sum may be paid, without prejudice to any other method of recovery, by deduction from any sums due to the local authority out of the Local Taxation Account (*ibid.*, s. 63 (6)); and see title LOCAL GOVERNMENT, Vol. XIX., p. 351).

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expenditure.

or occupier, the latter may be ordered by the person holding the inquiry to repay such extra expenditure to the local authority (*d*).

**1695.** For the purposes of the provisions relating to excessive sickness, any expenditure on any benefit administered by an insurance committee is deemed expenditure of that committee, but any sum paid to any committee under those provisions to meet extra expenditure on sickness or disablement benefit is dealt with for the benefit of deposit contributors (*e*) in accordance with regulations made by the Commissioners (*f*). Where any sum is paid to the Insurance Commissioners under these provisions, they must apply it in discharging expenses incurred by them thereunder and distribute any balance among the societies and committees which have incurred extra expense through the excessive sickness (*g*).

(iii.) *Protection against Distress.*Certificate  
of medical  
practitioner.

**1696.** Where the medical practitioner attending on any insured person in receipt of sickness benefit certifies that the levying of any distress (*h*) or execution (*i*) upon such person's goods or chattels on premises occupied by him, or the taking of any proceedings in ejectment (*k*), or for the recovery of any rent (*l*), or to enforce any judgment in ejectment against such person, would endanger his life, and such certificate has been sent to and recorded in the prescribed manner by the insurance committee (*m*), it is not lawful during the period named in the certificate for any person to levy any such distress or execution or to take any such proceedings against the insured person (*n*). A person knowingly contravening this provision is liable to a penalty, on summary conviction, not exceeding £50 (*o*).

The accuracy of the certificate may be disputed before the registrar of the county court, who may cancel or modify such certificate, and from his decision there is no appeal (*p*).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (3).

(*e*) See pp. 931, 943, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 63 (7).

(*g*) *Ibid.*, s. 63 (8).

(*h*) See title DISTRESS, Vol. XI., pp. 117 *et seq.*

(*i*) See title EXECUTION, Vol. XIV., pp. 3 *et seq.*

(*k*) See title COUNTY COURTS, Vol. VIII., p. 435.

(*l*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 485 *et seq.*

(*m*) The certificate is recorded in a special register without fee, and is open to inspection. Where so recorded, its genuineness may not be questioned in any proceedings against a sheriff or other officer for failure to levy any distress or execute any warrant. The committee is not obliged to record a certificate the genuineness of which it suspects (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 68 (4)).

(*n*) *Ibid.*, s. 68 (1); see County Court Rules, Ord. 42A, r. 6, which provides for suspending the issue of proceedings, or for the stay of proceedings, as the case may be, during the currency of the certificate, and for giving notice to the person at whose instance the proceeding or execution issued.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 68 (3).

(*p*) *Ibid.*, s. 68 (1); as to the procedure before the registrar, see County Court Rules, Ord. 42A, r. 7.

In computing the time within which a warrant may be executed, where such time is limited, any period of delay due to the foregoing provisions must be disregarded (*q*).

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Duration of  
protection.

**1697.** A certificate continues in force for one week or such less period as may be therein named, but may be renewed from time to time for any period not exceeding one week, but not beyond the expiration of three months from the date of the grant of the original certificate. Each renewal must be recorded by the insurance committee (*r*).

If the protection of such a certificate is to extend beyond one month from the date of the grant of the original certificate, the person desirous of taking proceedings may demand proper security for rent thereafter to become due from the insured person, or for the amount of the judgment debt, as the case may be. Any dispute as to the sufficiency of the security is determined by the registrar of the county court, whose decision is final (*s*).

SUB-SECT. 5.—*Maternity Benefit.*

**1698.** Maternity benefit (*t*) is administered, in the case of insured persons who are members of an approved society (*a*), by and through the society or a branch thereof, and in other cases by and through the insurance committees (*b*).

By whom  
administered.

**1699.** Maternity benefit is in every case the mother's benefit. Where it is payable in respect of the husband's insurance, the wife's receipt, or his receipt on her behalf, if authorised by her, is a sufficient discharge. If it is paid to the husband he must pay it to his wife (*c*). Where the mother is herself an insured person and is not the wife (or, in the case of a posthumous child, the widow) of an insured person, maternity benefit is administered in cash or otherwise as a benefit for her. In any other case the benefit is administered in the interests of the mother and child in cash or otherwise, and in respect of a posthumous child as if the husband were still alive (*d*).

Mother  
entitled to  
benefit.

The mother has liberty of choice whether she shall be attended by a duly qualified medical practitioner or by a duly certified midwife, and in the selection of either she has free choice (*e*).

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 68 (5).

(*r*) *Ibid.*, s. 68 (2); as to the record of certificates, see p. 956, *ante*.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 68 (2). If, upon demand, security is not forthcoming, the person demanding it may, on proof before the registrar of the county court of such failure to give security, proceed as if the certificate had ceased to be in force (County Court Rules, Ord. 42A, r. 8). As to disputes before the registrar in regard to the sufficiency of security, see *ibid*.

(*t*) For the definition, see p. 923, *ante*.

(*a*) See pp. 937, 938, *ante*.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (1); as to insurance committees, see pp. 933 *et seq.*, *ante*.

(*c*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 14 (1).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 18 (1); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 14 (1).

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 18 (1).



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tration of  
Benefits.Duty of  
husband.

**1700.** Where maternity benefit is given or paid to the husband, it becomes his duty to make adequate provision to the best of his power for the maintenance and care of his wife during her confinement and for four weeks after her delivery. For neglect or refusal to do so he is liable upon summary conviction to imprisonment with or without hard labour for a term not exceeding one month without prejudice to any other legal liability (*f*).

Reinsurance.

**1701.** The Insurance Commissioners may by special order provide for the reinsurance with them of the liabilities of all approved societies in respect of maternity benefit (*g*).

SUB-SECT. 6.—*Additional Benefits.*By whom  
administered.

**1702.** Additional benefits (*h*) are administered by the approved society or branch (*i*) of which the persons entitled thereto are members, except in cases where such benefits are in the nature of medical benefits (*k*), when they are administered by and through the insurance committees (*l*).

SECT. 10.—*Financial Provisions.*SUB-SECT. 1.—*In General.*Moneys  
available.

**1703.** Towards the cost of any of the aforesaid benefits, or the expenses of their administration or otherwise for the purposes of health insurance, Parliament may contribute such sums as may from time to time be determined, such contributions being herein referred to as additional sums. After such additional sums have been applied for the purpose for which they have been provided, the balance of the cost of the various benefits (*m*) and the expenses of their administration (*n*) are provided as to seven-ninths, or, in the case of women, three-fourths, from contributions of insured persons and their employers (*o*), and as to the remainder from moneys provided by Parliament (*p*). The salaries or remuneration of the Insurance Commissioners and their staff (*q*), together with any expenses incurred by the Treasury or Commissioners in carrying out the statutory provisions relating to national health insurance, are defrayed out of moneys provided by Parliament (*r*).

National  
Health  
Insurance  
Fund.

**1704.** All moneys received as above for the purpose of benefits and their administration are paid into the National Health

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 19.

(*g*) *Ibid.*, s. 20.

(*h*) For the definition, see p. 924, *ante*.

(*i*) See pp. 937, 938, *ante*.

(*k*) See p. 920, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14 (1); as to insurance committees, see pp. 933 *et seq.*, *ante*.

(*m*) See pp. 919, 920, *ante*.

(*n*) See pp. 944 *et seq.*, *ante*.

(*o*) See pp. 911, 912, *ante*.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 3; National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 1 (1).

(*q*) See p. 932, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 57 (3).

Insurance Fund, which is controlled by the Insurance Commissioners, and out of that fund is met the expenditure incurred by approved societies and insurance committees for the purpose of benefits and their administration (s). Any contributions by Parliament in the form of additional sums (t) for the purpose of medical benefit are applied towards the payment of medical attendance and treatment of members of friendly and other societies who, on account of age or permanent disablement, are not insured persons (u) in like manner and to the like extent as if such medical attendance and treatment were medical benefit (w). The fund is audited by the Comptroller and Auditor-General (x).

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**1705.** For the purpose of medical benefit (a) there is paid yearly to the insurance committee for each county or county borough, out of moneys credited to a society (b) with members resident in the area, such sum in respect of the medical benefit of such members, and the cost of the administration thereof, as may be agreed between the society and committee, or, failing agreement, as may be determined by the Commissioners (c).

Medical  
benefit.

**1706.** For the purpose of sanatorium benefit (d) there is provided out of the National Health Insurance Fund (e) a sum of 1s. 3d. in respect of each insured person resident in the area of the insurance committee, and a further sum of 1d. in respect of each such insured person is provided by Parliament (f).

Sanatorium  
benefit.

**1707.** If in any year the amount payable to an insurance committee in respect of all persons for the administration of whose medical benefit it is responsible (g), or the amount available for defraying the expenses of sanatorium benefit (h) is insufficient to

Excess  
expenditure.

(s) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (1). There is a separate Welsh National Health Insurance Fund (*ibid.*, s. 82 (2)) ; see also National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (4).

(t) See p. 958, *ante*.

(u) See p. 948, *ante*.

(w) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 1 (2).

(x) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (5) ; and see title PARLIAMENT, Vol. XXI., p. 684.

(a) See p. 920, *ante*.

(b) See p. 962, *post*. Sums payable by societies in respect of the cost of medical benefit are credited in the books of the Commissioners to the General Medical Benefit Fund (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 32). All moneys payable to the committee out of the General Medical Benefit Fund are carried each year to the Medical Benefit Fund Account of the committee. This latter fund is divided into the Panel Service Fund, the Institutions Fund, and the Special Arrangements Fund. The Panel Service Fund is divided into the Practitioners Fund and the Drug Fund (*ibid.*, regulation 33).

(c) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 15 (6). The committee must furnish to each society through the Commissioners an estimate of the amount required for such purposes (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 32),

(d) See p. 924, *ante*.

(e) See p. 958, *ante*.

(f) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 16 (2).

(g) *Ibid.*, s. 15 (7), (8).

(h) *Ibid.*, s. 17 (2), (3).

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meet the estimated expenditure on those respective benefits, the committee may, through the Insurance Commissioners, transmit to the Treasury, and to the council of the county or county borough, accounts showing the amounts available and the estimated expenditure, and those bodies may sanction such expenditure, whereupon the Treasury and the council, respectively, become liable to make good one-half of any such excess expenditure (i).

The council of any borough or urban or rural district may agree with the county council to repay to the latter the whole or any part of the sum payable by it towards the excess expenditure on medical or sanatorium benefit, so far as such excess is properly attributable to the borough or district. The agreement may provide that the county council is not, during the continuance of such agreement, to raise any sum on account of any expenditure incurred by it for the purpose to which the agreement relates within the borough or district the council of which has entered into such agreement (k).

Deposit  
contributors.

**1708.** In regard to deposit contributors (l) there is payable annually a prescribed sum in respect of each deposit contributor towards the expenses incurred by the insurance committee in the administration of benefits (m), together with such sum as the insurance committee may, with the consent of the Insurance Commissioners, determine, in respect of each deposit contributor for the cost of medical benefit. The sums payable in respect of a deposit contributor for the purposes of medical and sanatorium benefits and towards administration expenses are deducted at the commencement of each year from the amount standing to his credit in the Deposit Contributors Fund (n), except so far as they are payable out of moneys provided by Parliament (o).

Payments to  
insurance  
committees.

**1709.** The foregoing sums are paid or credited to the insurance committee at the commencement of each year, but the

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(i) The Treasury contribution comes out of moneys provided by Parliament, and that of the council out of the county fund or borough fund or borough rate (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 15 (8), 17 (3)).

(k) *Ibid.*, s. 22. Sums payable under such an agreement are met, in the case of a borough, out of the borough fund or borough rate, and in other cases as part of the general expenses incurred in executing the Public Health Acts (*ibid.*).

(l) See p. 931, *ante*.

(m) This prescribed sum is (i.) in the case of a person who was seventy before the 12th January, 1914, the sum of 3*d.*; and (ii.) in the case of any other person, the sum of 1*s.* 9*d.*; but nothing is payable in the case of a married woman who was at the date of her marriage a deposit contributor, and who is, by reason of her marriage (see p. 975, *post*), suspended from benefits (National Health Insurance (Deposit Contributors' Administration Expenses) Regulations, 1914 (Stat. R. & O., 1914, No. 679)).

(n) See p. 973, *post*. The amount payable in respect of the medical benefit of deposit contributors is carried from the Deposit Contributors Fund to the credit of the General Medical Benefit Fund (National Health Insurance (Medical Benefit) Regulations (England), 1913, regulation 32).

(o) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42; and see p. 973, *post*.



Commissioners may make regulations for enabling such sums to be paid or credited at such time or times and in such instalments and proportions as may, with the consent of the Treasury, be prescribed (*a*). There is also paid to the insurance committee in every year by each approved society in respect of each of its members resident in the county or county borough the sum of 1*d.* towards the administration expenses of the committee, and if the Insurance Commissioners allow travelling expenses to the members of the committee the 1*d.* may be increased, but not so as to exceed 2*d.* (*b*).

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If, as it is empowered to do, the insurance committee pays to its members, in addition to travelling expenses, subsistence allowance and compensation for loss of remunerative time, there is paid out of moneys provided by Parliament towards the expense thereof such sum as the Insurance Commissioners, with the consent of the Treasury, may determine (*c*). Subscriptions to associations of insurance committees and the reasonable expenses of representative members of committees attending their meetings are paid as general expenses (*d*).

**1710.** Any local authority may subscribe such sums as it may think fit towards the general purposes of the insurance committee out of any fund or rate out of which the expenses of the authority are payable (*e*).

Subscriptions  
by local  
authorities.

**1711.** The insurance committee must keep proper accounts in the prescribed form and submit them to auditors appointed by the Treasury (*f*).

Accounts.

**1712.** For the administrative expenses of any local committee elected by the persons, firms and bodies corporate who have agreed to supply drugs, medicines and appliances to insured persons (*g*), the insurance committee may, on the request of such local committee and of any committee of medical practitioners on their panel, be authorised by the Commissioners to allot a sum not exceeding 1*d.* per insured person on the lists of such medical practitioners out of moneys available for medical benefit (*h*).

Expenses  
of local  
committees.

#### SUB-SECT. 2.—*Reserve Values.*

**1713.** To meet any loss arising through the acceptance by an

Reserve  
values.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 61 (1); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 61 (2); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 31 (2).

(*c*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 31 (1). The aggregate amount so paid may not exceed £30,000 per annum (*ibid.*).

(*d*) *Ibid.*, s. 31 (3); and see pp. 934, 935, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 61 (3).

(*f*) *Ibid.*, s. 60 (1) (*c*). For the prescribed books and accounts, see National Health Insurance (Accounts of Insurance Committees) Regulations, 1913.

(*g*) See p. 937, *ante*.

(*h*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 33 (2).

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approved society (*i*) of persons over the age of sixteen (*k*) as members upon the foregoing conditions as to contributions (*a*) and benefits (*b*), a capital sum, termed his "reserve value," is credited to the society in respect of each person who, on entering into insurance, is of a greater age than sixteen, which sum carries interest at the rate of 3 per cent. per annum (*c*). Such reserve values are the capital sums shown in the various Tables of Reserve Values (*d*).

Payments in  
respect of  
reserve values.

**1714.** Towards the discharge of their liabilities in respect of reserve values thus created there is retained by the Insurance Commissioners the sum of  $1\frac{5}{9}d.$ , or in the case of women  $1\frac{1}{2}d.$ , out of each weekly contribution paid by or in respect of an insured person who is a member of an approved society (*e*), other than a voluntary contributor (*f*) who entered insurance within sixty-five weeks after the 15th July, 1912, and was at entry of the age of forty-five or upwards (*g*). The sums so retained are periodically apportioned amongst and credited to the several societies in proportion to the amount of reserve values for the time being credited to them, and any balance of such sums so credited to a society, after providing for interest on the reserve values for the time being credited, are written off the amount of the reserve values so credited (*h*).

Payments in  
respect of  
arrears.

Where in any year a society or branch proves to the Commissioners that the total number of weekly contributions which accrued due as arrears during the preceding year in respect of all its

(*i*) See p. 942, *ante*.

(*k*) This being the minimum age for national health insurance (see p. 905, *ante*), and the age from which calculations for the purposes of such insurance have been made.

(*a*) See pp. 911, 912, *ante*. It will be seen that contributions are not graduated according to age at entering insurance. Moreover, no approved society may refuse a member solely on the ground of age (see p. 942, *ante*).

(*b*) See pp. 919, 920, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (1), (2). The purpose of this provision is to place all societies on an equal footing financially, notwithstanding the acceptance of insured persons of advanced age whose contributions are the same as in the case of younger men. Persons applying for membership of an approved society are, in effect, placed in all cases in the financial position of an applicant of the minimum age of sixteen, at which age no reserve value is necessary.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (1). For the appropriate tables, see National Health Insurance (Tables of Reserve Values) Regulations, 1914 (Stat. R. & O., 1914, No. 1119), First Schedule (which refers to members of approved societies who entered into insurance within sixty-five weeks after 15th July, 1912) and Third Schedule (which refers to members entering into insurance after the expiration of sixty-five weeks from 15th July, 1912, and are entitled to reduced benefits only). There are other tables for females (see note (*l*), p. 976, and notes (*h*), (*l*), p. 978, *post*) and for seamen, marines, and soldiers (see note (*g*), p. 982, *post*).

(*e*) See pp. 937, 938, *ante*.

(*f*) See p. 911, *ante*.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (3); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 2 (2).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (4).

members who were employed contributors (*i*) exceeded three for every such member, there is paid to the society, or to the society on behalf of the branch, as the case may be, the prescribed amount for every week by which the aforesaid three contributions for each member was exceeded. The maximum so paid is the total amount lost to the society by reason of excusing the payment of that portion of the arrears of its members who are employed contributors which would have been payable by the employer had the members not been unemployed (*k*). Such payments are met out of the sums retained by the Insurance Commissioners for discharging their liabilities in respect of reserve values (*l*); but if the aggregate amount so payable in any year exceeds £100,000, the excess is paid out of moneys provided by Parliament (*m*).

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**1715.** Any person convicted of knowingly making any false statement as to his age in any declaration made for the purpose of obtaining a reserve value in respect of him (*a*) is treated as if he had entered into insurance after the expiration of sixty-five weeks from the 15th July, 1912 (*b*), and the reserve value is cancelled (*c*).

False  
statement  
as to age.

**1716.** Where an employed contributor (*d*) within five years from his entry into insurance ceases to be qualified as such and becomes a voluntary contributor (*e*), the difference between any reserve value credited to his approved society in respect of him and the reserve value, if any, which would have been so credited had he originally become a voluntary contributor is cancelled (*f*).

Employed  
contributor  
becoming  
voluntary  
contributor.

**1717.** The Commissioners may make regulations with respect to the crediting or variation, whether by way of increase or decrease, and cancellation of reserve values (*g*).

Regulations.

#### SUB-SECT. 3.—*Investment of Funds.*

**1718.** The Insurance Commissioners must ascertain periodically what sums in the National Health Insurance Fund (*h*) standing to the credit of the several societies are available for investment, and any such sums not required to be otherwise disposed of are carried to the Investment Account and paid over to the National Debt Commissioners for investment under Treasury regulations (*i*)

Sums to be  
invested.

(*i*) See p. 905, *ante*.

(*k*) See p. 927, *ante*.

(*l*) See p. 962, *ante*.

(*m*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 7 (2). The Commissioners may make regulations for carrying this provision into effect (*ibid.*, s. 7 (3)).

(*a*) As to penalties generally, see pp. 998 *et seq.*, *post*.

(*b*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 2 (1), and see p. 922, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (5).

(*d*) See p. 905, *ante*.

(*e*) See p. 911, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 6 (4).

(*g*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.

(*h*) See pp. 958, 959, *ante*.

(*i*) See Regulations dated the 12th August, 1912 (Stat. R. & O., 1912, p. 998), under which (*inter alia*) the National Debt Commissioners must



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in securities authorised as investments for Savings Banks funds (*k*), preference, however, being given to stocks or bonds issued for the purposes of the Housing of the Working Classes Acts, 1890—1909 (*l*), under the statutory provisions relating to the local loans fund (*m*). Any sum may be so paid over for temporary investment pending the ascertainment as above of the amount available for permanent investment (*n*).

An account of the securities in which investment has been made is presented annually to Parliament (*a*).

Regulations.

**1719.** Regulations must be made in regard to financial transactions between the Insurance Commissioners and the societies, and in particular providing for crediting to each society the contributions paid by or in respect of its members after deducting the amounts retained for discharging the Commissioners' liability in respect of reserve values (*b*); requiring the Commissioners, on carrying any sum to the credit of an approved society in the Investment Account, to pay over to the society for investment, or at its request to retain for investment on its behalf, four-sevenths, or so far as the sums are attributable to women one-half, of the amount so credited; providing for crediting to each society interest on the sums credited to it in the Investment Account (*c*); and providing for the discharge of debit balances, either by the reduction of reserve values, or out of the proceeds of the realisation of securities and the sums standing to the society's credit in the Investment Account proportionately. A society is, however, to be allowed to require that the whole amount shall remain to its credit in the Investment Account and no part be invested (*d*).

Approved  
societies.

**1720.** Approved societies must invest sums paid over for that purpose in trustee securities (*e*) or in securities issued by any local authority within the meaning of the Local Loans Act, 1875 (*f*), and charged on rates levied by or on the order or precept of such authority, or in any other securities approved by the Insurance Commissioners (*g*).

carry to an Income Account the interest on investments, and from time to time to pay over thereout sums required to enable the Insurance Commissioners to discharge their liabilities to societies in respect of the interest on moneys standing to their credit, any sums not being so required being re-invested.

(*k*) See title BANKERS AND BANKING, Vol. I., pp. 579, 580.

(*l*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 516, note (*g*).

(*m*) *Ibid.*, pp. 541, 542.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (3).

(*a*) *Ibid.*, s. 54 (6).

(*b*) See pp. 961, 962, *ante*.

(*c*) By the National Health Insurance (Rate of Interest on Sums in Investment Account) Regulations, 1913 (Stat. R. & O., 1913), the rate of interest is fixed at  $3\frac{1}{4}$  per cent. per annum.

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 56 (1); and see the National Health Insurance (Transactions between Insurance Commissioners and Societies) Regulations, 1913.

(*e*) See title TRUSTS AND TRUSTEES, p. 132, note (*h*), *ante*.

(*f*) 38 & 39 Vict. c. 83; see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 61 *et seq.*

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 56 (2).

Where the Insurance Commissioners retain sums for investment on the society's behalf the foregoing limitations as to the nature of the securities to be invested in apply; and such investment must be made or varied according to the directions of the society. Sums received for interest or as dividends on such investments are paid over to the society (*h*).

Approved societies must apply interest or dividends on their investments towards the cost of the benefits of their members and of their administration, or otherwise, as the Commissioners may prescribe (*i*).

Approved societies and their branches are exempt from income tax in respect of income derived from their funds or credits or any investment thereof (*j*).

SUB-SECT. 4.—*Transfer of Members.*

**1721.** In the event of the transfer of a member of an approved society or a branch thereof to another society or branch thereof, or to another branch of the same society, there is transferred to such other society or branch in respect of him his "transfer value" calculated in accordance with tables prepared by the Insurance Commissioners. This provision does not apply in cases where the insured person left his society without the society's consent, such consent not having been unreasonably withheld (*k*).

**1722.** If an insured person ceases to be permanently resident in the United Kingdom and becomes a member of any society or institution abroad approved by the Insurance Commissioners as being similar to an approved society, or of any branch of an approved society established outside the United Kingdom, his transfer value is to be paid to such society, institution or branch, provided that it gives corresponding rights to any of its members who become resident in the United Kingdom (*l*).

If a person who has for at least five years been a member of an approved society for the purposes of national health insurance has ceased permanently to reside in the United Kingdom, and does not join a similar society or institution or a branch abroad, his approved society may permit him, independently of the National Insurance Act, to remain a member and to become entitled to benefits, and may, subject to regulations, transfer from the account of the society under the provisions relating to national health insurance to the credit of the society independently of the Act the sum which would have been transferred to the Deposit Contributors Fund, and must cancel such reserve value as would have been cancelled (*m*)

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Transfer  
value.

Persons  
going abroad.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 56 (3).

(*i*) *Ibid.*, s. 56 (4).

(*j*) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 7 (1). Such exemption is claimed and allowed in the same way as in the case of income applied to charitable purposes (*ibid.*, s. 7 (2)); see title INCOME TAX, Vol. XVI., p. 664.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 31. For Tables of transfer values, see the National Health Insurance (Transfer Values) Regulations, 1914.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 32 (1). The Insurance Commissioners may make the necessary arrangements in cases where members of foreign institutions or societies are transferred to approved societies (*ibid.*, s. 32 (2)).

(*m*) See p. 974, *post*.

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 Financial Provisions.

SUB-SECT. 5.—*Accounts and Audit.*

Amalgama-  
 tion of  
 societies.

**1723.** The Insurance Commissioners may make regulations in regard to the financial adjustments to be made on the amalgamation of societies or branches and on the transfer of the engagements of a society or branch in regard to national health insurance (o).

Statutory  
 provisions.

**1724.** Every approved society and every branch of an approved society must keep its books and accounts, so far as they relate to national health insurance, separate from all other books and accounts, and in the prescribed form (p), and submit them to audit by auditors appointed by the Treasury; such returns must also be rendered as the Insurance Commissioners may require (q). In accordance with the prescribed regulations (r), a separate account must be kept showing the amount expended on administration (s), and the amount which may be carried to that account out of contributions received is limited (t), any deficiency in such account, unless otherwise defrayed, being required to be met forthwith by a special levy (u).

Separation  
 of funds.

**1725.** In the case of a society (a) or branch transacting other business besides that of national health insurance, its funds and

(n) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 33.

(o) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 38, Sched. I.; and see p. 942, *ante*.

(p) For the prescribed books to be kept by approved societies, see the National Health Insurance (Accounts of Approved Societies) Regulations, 1913.

(q) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 35 (1).

(r) *Ibid.*, s. 35 (2). By *ibid.*, s. 35 (3), these provisions as to accounts, and those as to audit and returns (see the text, *supra*) and valuation (see p. 967, *post*), override other statutory provisions dealing with like matters in respect of approved societies.

(s) See the National Health Insurance (Societies' Administrative Expenses) Regulations, 1913.

(t) *Ibid.*, regulation 3, Schedule, where it is prescribed that, as respects any quarter after the 12th January, 1913, the maximum sums which may be carried to the Administration Account out of contributions shall be the sum computed as follows: (i.) for every member of the society or branch during that quarter who is a seaman, marine, or soldier in the service of the Crown (see pp. 979 *et seq.*, *post*), the amount of 2*d.*; (ii.) for every member of the society or branch during that quarter who is a voluntary contributor at the special rates applicable to married women (see pp. 975, 976, *post*), the amount of 7½*d.*; (iii.) for every other member of the society or branch, not being an insured person over the age of seventy, a married woman suspended from benefits on account of marriage, an inmate of an institution within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 51, suspended from benefits, or other member who is not liable to pay contributions or to receive benefits under the Act during that quarter, the amount of 10½*d.*

(u) National Health Insurance (Societies' Administrative Expenses) Regulations, 1913, regulation 6. Such levy is not to be made on members of the society who are insured persons over the age of seventy, married women suspended from benefits on account of marriage, inmates of any institution within the meaning of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 51, while suspended from benefits, and other members of the society who are for the time being not liable to pay contributions and not entitled to receive benefits under the Act.

(a) The term "society" in this connexion does not include a separate



credits which relate to such insurance must be kept and applied strictly for the purposes thereof and not for any other business of the society or branch whatever (*b*).

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SUB-SECT. 6.—*Valuation of Assets.*

(i.) *Procedure.*

**1726.** Every approved society and every branch of an approved society must submit to have its assets and liabilities, so far as they relate to national health insurance, valued; and, in the event of a surplus or deficiency being shown upon such valuation, must comply with certain statutory requirements in regard thereto (*c*).

Necessity for  
valuation.

Such valuation is made by a valuer (*d*) appointed by or with the approval of the Treasury, on a prescribed basis, at the end of every three years from the 15th July, 1912, or at such other times or intervals as the Insurance Commissioners may appoint (*e*). Regulations may be made by the joint committee of the several bodies of Commissioners as to the valuation of societies and branches which have members resident in England, Scotland, Ireland and Wales or any two or three of such parts of the United Kingdom (*f*).

(ii.) *Application of Surplus.*

**1727.** If, upon the valuation of a branch of an approved society, a surplus is shown, there is transferred to the central authority of the society of which it is a branch one-third of the surplus, and the branch may, with the approval of the society, submit to the Insurance Commissioners a scheme for distributing out of the remaining two-thirds, together with any part of the surplus of the parent society which may be transferred to the branch (*g*), any one or more additional benefits (*h*). Subject to the foregoing provisions, any surplus in the central fund of the parent society, including any surplus transferred from its branches as above provided, is applied towards making good any deficiency shown by any of its branches (*i*), after which the society may distribute any surplus still remaining amongst such branches as have a surplus, in proportion to the amounts of such surpluses (*k*).

Provisions  
in case of  
surplus.

If the society is not a society with branches, and, upon valuation, a disposable surplus is found, the society may submit to the Insurance Commissioners, for their approval, a scheme for distributing additional benefits among insured persons who are its members (*l*).

section which is an approved society, but only the parent society (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 35 (4)).

(*b*) *Ibid.*, s. 35 (4).

(*c*) *Ibid.*, s. 35 (1).

(*d*) Namely, a person possessing actuarial qualifications as may be approved by the Treasury (*ibid.*, s. 79).

(*e*) *Ibid.*, s. 36.

(*f*) *Ibid.*, s. 83 (3); and see p. 938, *ante*.

(*g*) See the text, *infra*.

(*h*) As to additional benefits, see pp. 924, 925, *ante*.

(*i*) See p. 968, *post*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 37 (1) (b), (c).

(*l*) *Ibid.*, s. 37 (1) (a).

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Contents of scheme.

**1728.** A scheme made under the foregoing provisions must, so far as practicable, provide for loss or diminution of the additional benefits in the case of a member being in arrears (*m*), and may prescribe other conditions, including a corresponding reduction in the amount deemed to be arrears for the purpose of reckoning the rate of sickness benefit (*n*). If, after a scheme has been sanctioned, there is found to be a deficiency in the funds of the society or branch, additional benefits under the scheme must be suspended until the deficiency is extinguished and a surplus again shown (*o*).

No surplus may be applied to the payment of death benefits (*p*).

(iii.) *Making Good Deficiency.*

Provisions in case of deficiency.

**1729.** If, upon a valuation, a deficiency is shown by a branch of an approved society, three-quarters or, if the society think fit, the whole thereof is, so far as possible, to be made good out of any surplus available for that purpose in the hands of the central authority of the society (*q*), but such assistance may be withheld, with the consent of the Commissioners, if the deficiency is due to maladministration on the part of the branch in question (*r*).

Contents of scheme.

**1730.** If a society or branch shows a deficiency it must be made good, subject to the foregoing provisions in the case of a branch, by a scheme submitted to the Commissioners, in the case of a branch, with the approval of the parent society, for their sanction, providing for making good the deficiency within three years from the date of the valuation, in any of the following ways, namely (*s*) : By reducing the rate of sickness benefit ; by deferring the day from which it becomes payable ; by reducing the period during which it is payable ; by increasing the period which is required to elapse between two periods of disease or disablement to prevent the one being treated as a continuation of the other (*t*) ; by a compulsory levy in the form of an increase of the weekly rate of contributions (*a*) upon members of the society or branch who are insured persons ; or by any other method approved by the Insurance Commissioners.

The scheme must not affect any person who becomes a member of the society or branch after the date of valuation, or who is over seventy years of age (*b*).

Transferred member.

If an insured person who is a member of the society or branch at the date at which the valuation disclosing the deficiency is made is transferred to another society or branch before the deficiency is made good, he remains liable to any levy or reduction of benefits in respect of the deficiency, and if he is transferred

(*m*) See p. 926, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 37 (2) ; and see p. 920, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 27 (1) (d).

(*p*) *Ibid.*, s. 37 (3).

(*q*) See p. 967, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (a).

(*s*) *Ibid.*, s. 38 (1) (b).

(*t*) See pp. 920 *et seq.*, *ante*.

(*a*) See pp. 911, 912, *ante*.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (h).

before the scheme is sanctioned, the transfer value paid in respect of him is adjusted (c).

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Financial  
Provisions.

**1731.** Payment of a compulsory levy may be enforced in accordance with rules made by the society or branch; and such rules may be made as enable the society or branch to give notice to the employer requiring him to pay the levy as if it were part of the contribution payable by the employer on behalf of the member (d).

Compulsory  
levy.

If a member chargeable with a levy falls into arrears, his arrears reckon as though their total sum, including the levy, consisted of the contributions payable by or in respect of him had no levy been made (e).

A member liable to a levy payable at intervals may relieve himself of the liability thereto, and a member subject to a diminution of benefits under a scheme may, with the consent of the society or branch, enjoy undiminished benefits, by paying the capitalised value of the levy or diminution of benefits (f).

**1732.** If within six months after the declaration of a deficiency (g) a scheme as aforesaid has not been submitted and sanctioned, or if it appears that the scheme is not being enforced by the society or branch, the Insurance Commissioners may themselves take over the administration of the affairs of the society or branch and take steps to make good the deficiency (h); but arrangements must be made, within three years, for restoring self-government to the society or branch, or, failing that, for transferring its members to other societies or branches or to the Deposit Contributors Fund (i).

Failure to  
deal with  
deficiency.

Disputes between the Commissioners and the society or branch as to the amount of the deficiency or as to the adequacy of any scheme proposed for making it good are to be submitted to an independent valuer appointed by the Lord Chief Justice, whose decision is final and conclusive (k).

(iv.) *Grouping of Societies.*

**1733.** Where an approved society, not being a society with branches, includes among its members both men and women, its rules may provide that the statutory provisions relating to valuations, surpluses, and deficiencies are to apply as if it were a society consisting of two separate branches for male and female members respectively (l).

Society  
including  
men and  
women.

(c) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (i).

(d) *Ibid.*, s. 38 (1) (c), which makes applicable all the provisions as to the payment of such contributions and the recovery thereof from members (see p. 913, *ante*).

(e) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (d). As to arrears, see p. 926, *ante*.

(f) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (2).

(g) If an inquiry as to excessive sickness (see p. 954, *ante*) is pending, the period may be extended (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (e)).

(h) *Ibid.*

(i) *Ibid.*, s. 38 (1) (f); as to such fund, see p. 931, *ante*.

(k) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 38 (1) (g). The powers of a valuer so appointed include questions as to costs (*ibid.*).

(l) *Ibid.*, s. 41.



## SECT. 10.

Financial  
Provisions.Grouping of  
branches.

**1734.** The rules of a society with branches may provide that the branches shall be grouped in geographical areas for the purposes of the statutory provisions relating to valuations, surpluses, and deficiencies, and that the branches in any area are to be treated, for such purposes, as if they formed a separate society, provided that the number of members who are insured persons in the area exceeds five thousand (*m*).

Members of a society with branches who are not members of any branch, and whose benefits are administered by the society itself, must be treated, for the purposes of the statutory provisions as to valuations, surpluses, and deficiencies, as if they formed a separate branch (*n*).

Grouping of  
societies.

**1735.** Approved societies may, with the consent of the Insurance Commissioners, form, for the purposes of valuation, an association, with a central financial committee, but so that such association shall have an aggregate membership of not less than five thousand (*o*). Any such approved societies as have not at the date of any valuation joined such an association will be grouped together for the purposes of valuation according to the county or county borough in which they carry on business (*p*). A society is deemed to carry on business only in the county or county borough in which its registered office or other principal place of business is situate; but where more than one hundred or more than one-sixth of the insured persons who are members of a grouped society at the date of any valuation reside in some other county or county borough, the proper proportion of any surplus or deficiency of the society is, on application, to be apportioned to the insurance committee (*q*) of that other county or county borough. In default of agreement between the insurance committees concerned the proportion is to be determined by the Insurance Commissioners (*r*). In calculating, for the purpose of association, the number of persons who are members of societies for the purposes of national health insurance, no account is to be taken of members who by reason of marriage are suspended from ordinary benefits and are not special voluntary contributors (*s*) or who are not insured persons (*t*).

Application  
of statutory  
provisions.

**1736.** The statutory provisions as to the application of surpluses of branches (*u*) apply to associated and grouped societies as if all the

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(*m*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 40 (1). During a period which ended on the 15th February, 1914, members of any society resident in a part of the United Kingdom other than that in which the registered office of the society was situated were at liberty to ask to be treated as a separate society for the purposes of valuations, surpluses, deficiencies, and transfers (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 16 (1)).

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 40 (3).

(*o*) *Ibid.*, s. 39 (1), (2); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 18.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 39 (1), (3).

(*q*) See pp. 933 *et seq.*, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 39 (6).

(*s*) See pp. 975, 976, *post*.

(*t*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 18.

(*u*) See p. 967, *ante*.

societies in any association or group were branches of a single society, the central financial committee in the case of an association, and the insurance committee in the case of a group, being substituted for the central authority of the society. The approval of the central financial committee or insurance committee is not required to any scheme prepared by an associated or grouped society for the distribution of any surplus (*w*).

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Financial  
Provisions.

Where an associated or grouped society is a society with branches, the statutory provisions requiring the approval of a society to a scheme prepared by a branch as to the distribution of a surplus or the making good of a deficiency are applicable (*a*); but the other provisions relating to surpluses and deficiencies of societies with branches do not apply to the society, but each branch, for the purposes of the statutory provisions as to association and grouping, is deemed to be a separate society (*b*).

**1737.** A central finance committee or insurance committee has no powers of control over the administration of associated or grouped societies beyond the power of refusing to make good a deficiency due to maladministration (*c*).

Extent of  
control.

**1738.** Exemption from the statutory provisions as to associating and grouping small societies may be allowed in the case of any society consisting of persons entitled to rights in a superannuation or other provident fund established for the benefit of persons employed by one or more employers, if the employer, in addition to the contributions payable by him (*d*), is responsible for the solvency of the fund, or for the benefits payable thereout, or is liable to pay a substantial part of, or to make substantial contributions to, or substantially to supplement the benefits payable out of the fund (*e*).

Exemptions.

(v.) *Dissolved Societies.*

**1739.** The Insurance Commissioners may make regulations providing for the valuation of the assets and liabilities of dissolved societies and the reduction, either permanently or temporarily, in the event of a deficiency being disclosed, of the rates of benefits payable to members and the periods during which those benefits or any of them are payable, and for the establishment of a special fund to which contributions of such members are to be paid, and out of which their benefits are to be paid, and the application, subject to the prescribed modifications, adaptations and exceptions, to such fund and the members thereof, of the statutory provisions relating

Regulations

(*w*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 39 (4); and compare p. 967, *ante*.

(*a*) See pp. 967, 968, *ante*.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 39 (5).

(*c*) *Ibid.*, s. 39 (8); and see p. 968, *ante*. The purpose of this association or grouping of small societies is solely the pooling of surpluses and deficiencies.

(*d*) See pp. 911, 912, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 39 (7).

SECT. 10. to approved societies and the membership of and transfer to and  
Financial from approved societies (*f*).  
Provisions.

SUB-SECT. 7.—*Reinsurance.*

Reinsurance. **1740.** A society with branches may provide, in its rules, for the branches reinsuring with the society their liabilities in respect of any of the benefits under the provisions relating to national health insurance (*g*), or, if the society is so organised that the branches in different geographical areas are grouped for the purposes of valuations, surpluses, and deficiencies (*h*), for such reinsurance either with the society or with the group (*i*).

SUB-SECT. 8.—*Friendly Societies and Superannuation Funds.*

Friendly societies.

**1741.** Registered friendly societies (*j*) in existence at the passing of the National Insurance Act, 1911 (*k*), which provided benefits similar to any of those conferred by the provisions of that Act relating to national health insurance (*l*), were required to submit to the Registrar of Friendly Societies a scheme for continuing, abolishing, reducing, or altering such benefits as respects members who became insured persons (*m*), and for continuing, abolishing, or reducing the contributions of such members, so, however, as not prejudicially to affect the solvency of the society. If on actuarial valuation it was shown that, by reason of the scheme or a supplementary scheme, any part of the existing funds of the society would be set free as not being required to meet the liabilities of the society, the scheme was required to include provisions for applying the funds so set free either towards providing other or increased benefits payable by the society to existing members, whether insured persons (*m*) or not, independently of the statutory provisions relating to national health insurance; or in reduction of such members' contributions in respect of such benefits; or towards the payment or repayment of contributions payable under the statutory provisions relating to national health insurance by such of its existing members as were entitled and elected to receive benefits under those provisions through the society (*n*).

A society with branches might also submit a scheme applicable to all its branches, and provide for the application of the whole or any part of the funds set free as above towards the discharge of any deficiencies in any of its branches revealed by the actuarial valuation. The rules of the society might, however, confer on

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(*f*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.; and see p. 940, *ante*.

(*g*) See pp. 919, 920, *ante*.

(*h*) See p. 969, *ante*.

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 40 (2). As to reinsurance by approved societies in respect of maternity benefit, see p. 958, *ante*.

(*j*) See title FRIENDLY SOCIETIES, Vol. XV., pp. 123 *et seq.*

(*k*) Namely, the 16th December, 1911.

(*l*) See pp. 919, 920, *ante*.

(*m*) See p. 905, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 72 (1), (5).



branches the right of disposing of any of their funds for the benefit solely of the members of the branch. Otherwise branches of registered societies were in the same position as societies (*o*).

SECT. 10.  
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Provisions.

A scheme duly confirmed by the Registrar of Friendly Societies is deemed to be incorporated in the registered rules of the society or branch and may be amended accordingly (*p*).

**1742.** The statutory provisions as to existing friendly societies apply, with the necessary adaptations, to superannuation or other provident funds established at the passing of the Act for the benefit of the persons employed by one or more employers, subject, however, to the modification that, where under the Act, deed, or other instrument establishing the fund or otherwise any sum is payable by the employer towards benefits secured by the Act or deed, and those benefits include benefits similar to any of those conferred by the statutory provisions relating to national health insurance (*q*), the scheme might provide for allowing the employer to deduct from any contributions payable by him as aforesaid towards benefits of a nature similar to those under national health insurance provisions an amount not exceeding the employer's contributions payable by him under those provisions (*r*). If the fund was one out of which were payable pensions or superannuation allowances which would be prejudicially affected by the foregoing requirements, the Insurance Commissioners were empowered to grant a certificate authorising the value of the prospective extension of national health insurance benefits, when the reserve values had been written off (*s*), to be brought into account in the valuation of the assets available for the discharge of the liabilities of the fund in respect of pensions and superannuation allowances (*t*).

Super-  
annuation  
funds.

SUB-SECT. 9.—*Deposit Contributors.*

**1743.** Contributions by or in respect of deposit contributors (*a*) are credited to a special fund called the Deposit Contributors Fund (*b*). Sums standing to the credit of the Deposit Contributors Fund in the National Health Insurance Fund are invested and interest on the investments credited as in the case of societies (*c*). In the event of a deposit contributor going abroad and joining a society or institution abroad of a kind similar to an approved

Provisions  
applicable.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 72 (2).

(*p*) *Ibid.*, s. 72 (3); and see title FRIENDLY SOCIETIES, Vol. XV., pp. 139 *et seq.*

(*q*) See pp. 919, 920, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 73 (1); and see pp. 911, 912, *ante*.

(*s*) See p. 962, *ante*.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 73 (2).

(*a*) For the definition, see p. 943, *ante*. The provisions as to deposit contributors only apply until the 1st January, 1915 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42).

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42. Originally this was termed the Post Office Fund, which name was changed by the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 36, as above.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (3), (4). As to the rate of interest, see note (*c*), p. 964, *ante*.

SECT. 10.  
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Provisions.

society, the amount standing to his credit in the Deposit Contributors Fund is to be paid to such society or institution (*d*).

Upon the death of a deposit contributor, four-sevenths, or in the case of a woman one-half, of the amount standing to his or her credit in the Deposit Contributors Fund is to be paid to his or her nominee or, in default of a nomination, to the person who would be entitled to receive the sum if it were money payable on the death of a member of a registered friendly society (*e*), and the balance is forfeited (*f*).

Where a deposit contributor proves to the insurance committee (*g*) that he has permanently ceased to reside in the United Kingdom, the same proportion of the amount standing to his credit may be paid to him (*h*).

Persons  
leaving  
approved  
societies.

**1744.** If an insured person who is a member of an approved society leaves that society, whether voluntarily or by expulsion, and fails to become a member of another approved society within the prescribed time (*i*), his transfer value (*k*), if he does not become a deposit contributor, is dealt with as may be prescribed. If he becomes a deposit contributor, his transfer value is credited to him in the Deposit Contributors Fund; but if a reserve value (*l*) has been credited to the society in respect of him, such part thereof as is still outstanding, or, if the outstanding amount exceeds the transfer value, such part of the reserve value as is equal to the transfer value, is cancelled, and the amount, if any, by which the transfer value exceeds the amount so cancelled is carried to the credit of the deposit contributor (*m*).

Persons  
joining  
approved  
societies.

**1745.** If an insured person who is a deposit contributor becomes a member of an approved society for the purposes of national health insurance, there is transferred to the society the amount standing to his credit in the Deposit Contributors Fund; but if that amount exceeds the value of the contributions paid by or in respect of him estimated on the assumption that he had been a member of an approved society since his entry into insurance (*n*), the excess is carried to the credit of the Deposit Contributors Fund, and if that amount is less than such value, the insured person is treated as being in arrear (*o*) to the amount of the deficiency (*p*).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 32 (1).

(*e*) See title FRIENDLY SOCIETIES, Vol. XV., p. 154.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42 (*f*), applying, subject to the prescribed adaptations, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 56—61; and see the National Health Insurance (Deposit Contributors, Payment on Death) Regulations, 1913 (Stat. R. & O., 1913, p. 926); and title FRIENDLY SOCIETIES, Vol. XV., pp. 151 *et seq.*

(*g*) See pp. 933 *et seq.*, *ante*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 42.

(*i*) See note (*h*), p. 943, *ante*.

(*k*) See p. 965, *ante*.

(*l*) See pp. 961, 962, *ante*.

(*m*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 43 (1).

(*n*) See p. 911 *et seq.*, *ante*.

(*o*) See p. 926, *ante*.

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 43 (2).

SECT. 11.—*Special Classes of Insured Persons.*SUB-SECT. 1.—*Married Women.*

**1746.** The statutory provisions relating to national health insurance apply, subject to certain modifications (*q*), to a woman who has been or is married, in like manner as if she had never been married (*r*).

**1747.** Where a woman who is an insured person (*s*) marries and ceases to be employed in an occupation which qualified her for insurance, she is suspended from receiving the ordinary benefits (*t*) until her husband's death (*u*), or in the case of a woman whose marriage has been dissolved or annulled, or who has, for not less than two years, been actually separated from or deserted by her husband, until the date when such dissolution or annulment takes effect, or the expiration of such period of two years, as the case may be (*w*). If she is a member of an approved society (*a*), one-third of her transfer value (*b*) is carried to the "married women's suspense account" (*c*); and if before marriage she was a voluntary contributor (*d*) she cannot continue to be such a contributor on the same conditions (*e*).

**1748.** Where a married woman is thus suspended from ordinary benefits and is a member of an approved society, two courses are open to her (*f*), namely:—

(1) She may elect within one month after such suspension, or subject to the consent of the society, at a later time, to become whilst so suspended a voluntary contributor on the following special terms, namely: (i.) the rate of contributions payable by her is 3*d.* a week (*g*); (ii.) the reduced benefits to which she is entitled are medical benefit (*h*), sickness benefit at the rate of 5*s.* a week during the first thirteen weeks, and 3*s.* a week during the second thirteen weeks, and disablement benefit at the rate of

SECT. 11.

Special  
Classes of  
Insured  
Persons.Application  
of statutory  
provisions.Suspension  
of benefits.Where  
member of  
approved  
society:(1) Voluntary  
contributor.

(*q*) See the text, *infra*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (13). As to obtaining marriage certificates, see note (*p*), p. 910, *ante*.

(*s*) For the definition, see p. 905, *ante*.

(*t*) See pp. 919, 920, *ante*.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (1).

(*w*) *Ibid.*, s. 44 (14).

(*a*) See pp. 937, 938, *ante*.

(*b*) As to transfer value, see p. 965, *ante*. Transfer value for this purpose is calculated in such manner as the Commissioners may prescribe (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (10)). Tables have been issued showing the transfer value under *ibid.*, s. 44 (1), of a woman at the date of her suspension from ordinary benefits on or after marriage (National Health Insurance (Married Women's Transfer Value) Regulations, 1914).

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (1).

(*d*) As to voluntary contributors, see p. 911, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (7).

(*f*) It is the duty of the society to give her full information as to the nature of her rights (*ibid.*, s. 44 (11)).

(*g*) *Ibid.*, s. 44 (2) (a).

(*h*) See p. 920, *ante*.



SECT. 11.  
Special  
Classes of  
Insured  
Persons.

(2) Payment  
of benefit.

3s. a week, sickness and disablement benefits, however, not being payable during the two weeks before and four weeks after confinement (*i*), except in respect of disease or disablement not connected with childbirth (*k*); and (iii.) no part of her contributions may be retained by the Insurance Commissioners for the purpose of discharging their liabilities to approved societies in respect of reserve values (*l*);

(2) If she elects not to become a voluntary contributor as above, she may have a sum equal to the remaining two-thirds of her transfer value (*m*) applied, in accordance with regulations (*n*), and until the same is exhausted, towards any of the following benefits, namely: payment of 5s. a week for four weeks on confinement, and payments during any period of sickness or distress, subject to the regulations of the Commissioners and the discretion of the society or committee administering the benefit (*o*); where, however, a reserve value was credited to the society in respect of such woman at her entry into insurance (*p*), a prescribed portion of such sum is, instead, written off the amount of the reserve values credited to the society (*q*).

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(*i*) As to maternity benefit, see p. 923, *ante*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (2) (b), Sched. IV., Part I., Table D.

(*l*) *Ibid.*, s. 44 (2) (c); as to reserve values, see pp. 961, 962, *ante*. As to the calculation of the arrears to be debited on suspension to a married woman who was formerly an employed contributor and has become a voluntary contributor, see National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036). The National Health Insurance (Tables of Reserve Values) Regulations, 1914 (Stat. R. & O., 1914, No. 1119), include (Fourth Schedule) a table of reserve values for women married after the 15th July, 1912, who entered into insurance after the expiration of sixty-five weeks from the 15th July, 1912, and undertook to pay the differences between the voluntary and employed rates.

(*m*) As to the remaining one-third, see p. 975, *ante*. As to the calculation of transfer value, see National Health Insurance (Transfer Values) Regulations, 1914.

(*n*) The National Health Insurance (Married Women's Special Benefits) Regulations, 1914, provide that no benefit is to be payable until twenty-six weeks have elapsed since her entry into insurance.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (2), Sched. IV., Part III. An approved society or insurance committee may, with the approval of the Insurance Commissioners, make rules with respect to the payment of benefits during sickness or distress (National Health Insurance (Married Women's Special Benefits) Regulations, 1914).

(*p*) See pp. 961, 962, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (2). The amount so to be written off is determined as follows: there is deducted from an amount equal to two-thirds of the reserve value so credited to the society the sum of 9d. for every quarter contained in the period from her entry into insurance until her suspension, and the residue after such deduction is the amount to be written off the said reserve values. Where the reserve value credited in respect of a woman exceeds the amount of her transfer value at the date of her suspension as ascertained in accordance with any regulations made under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44, and for the time being in force, two-thirds of the excess must be added to the amount to be deducted as aforesaid. The date of entry into insurance is, in the case of a woman who was a British subject at the date of her first joining a society, deemed to be that

**1749.** Where a married woman is suspended from ordinary benefits and was at the date of her marriage a deposit contributor (*r*), two-thirds of the sum standing to her credit in the Deposit Contributors Fund (*s*) is applied in accordance with regulations (*t*) towards the payment of any of the reduced benefits as above until the same is exhausted (*a*).

SECT. 11.  
Special  
Classes of  
Insured  
Persons.

Where  
deposit con-  
tributor.  
Effect of  
being  
employed.

**1750.** Where a woman who has been employed before marriage in an occupation bringing her within the category of employed contributors (*b*) continues to be so employed after marriage she is not suspended as above from receiving benefits so long as she continues to be so employed (*c*).

Where a married woman suspended as above from ordinary benefits becomes employed before her husband's death in an occupation whereby she becomes an employed contributor (*d*), contributions again become payable in respect of her and the suspension from ordinary benefits ceases; but, for the purposes of those benefits, she is, subject to regulations, treated as if she had not previously been an insured person (*e*).

date, and, in the case of a woman who became a British subject subsequently to her joining a society, deemed to be the date upon which she became a British subject. For the purpose of these calculations each complete period of three months which has elapsed since the date on which the contributor entered into insurance is reckoned as a quarter, and any period of less than three months, if less than seven weeks, is disregarded, and, if seven weeks or more, is counted as a quarter (National Health Insurance (Married Women's Special Benefits) Regulations, 1914).

(*r*) See p. 943, *ante*.

(*s*) See p. 973, *ante*.

(*t*) The insurance committee administering the benefits may make rules with respect to payments to deposit contributors during any period of sickness or distress by way of benefit (National Health Insurance (Married Women's Special Benefits) Regulations, 1914); see note (*o*), p. 976, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (4).

(*b*) See p. 905, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (1).

(*d*) See p. 905, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (1). For the purpose of ascertaining the date at which she becomes entitled to receive benefits as such an employed contributor, she is treated as if she had entered into insurance for the first time at the date when she ceased to be suspended. If she elected to become, while so suspended, a voluntary contributor under *ibid.*, s. 44 (2) (see pp. 975, 976, *ante*), she continues to be entitled, until she becomes entitled to receive benefits as an employed contributor, to receive the sickness benefit and disablement benefit to which she would be entitled as such a voluntary contributor, and her rates of benefit during her husband's lifetime are such as would have applied if she had not been suspended. If she did not so elect she is, for the purpose of ascertaining such rates, treated as if she had entered into insurance for the first time at the date when she ceased to be suspended. Where a married woman to whom a certificate under *ibid.*, s. 44 (8), has been granted (see p. 978, *post*) surrenders that certificate, she is, for the purpose of these Regulations, treated as though she had become employed on the date when she surrendered the certificate, and as though during the period when the certificate was in force she had been a voluntary contributor under *ibid.*, s. 44 (2) (see p. 975, *ante*) (National Health Insurance (Employed Married

## SECT. 11.

Special  
Classes of  
Insured  
Persons.Effect of  
husband's  
death.

**1751.** Where the married woman whose ordinary benefits have been suspended as above is a member of an approved society she may, on the death of her husband, if qualified to become a voluntary contributor (*f*), and provided she elects to do so within one month after her husband's death, become an ordinary voluntary contributor paying contributions at the rate which would have been applicable had she become such a contributor at the date of her entry into insurance (*g*); or she may, whether so qualified or not, within the same period, elect to continue to be or become a voluntary contributor with reduced benefits as above provided in regard to married women. In either case there is transferred from the Married Women's Suspense Account to the society the reserve value calculated according to the appropriate tables (*h*). If at any time after her husband's death she becomes an employed contributor (*i*), the period between her marriage and the expiration of one month from her husband's death is disregarded for the purpose of reckoning arrears (*k*), and there is transferred from the Married Women's Suspense Account to her society the proper reserve value calculated according to the appropriate tables (*l*).

Age on  
becoming  
employed.

**1752.** Where a woman who was a married woman on the 15th July, 1912, at any time subsequently either before or within a year after her husband's death becomes an employed contributor (*m*) and a member of an approved society, she is entitled to full benefits although at the time of so becoming she is seventeen years of age or upwards (*n*).

Arrears.

**1753.** Any arrears of contributions in respect of a married woman which have accrued due during coverture are, on the husband's death, disregarded (*o*).

Exemption.

**1754.** If a woman, whilst a voluntary contributor at the above reduced benefits, becomes employed so as to qualify as an employed contributor (*p*), she is entitled to a certificate of exemption from

Women) Regulations, 1914 (Stat. R. & O., 1914, No. 773). Where a woman who has been suspended has ceased to be so suspended, no sum shall be paid to her under the provisions of these Regulations which would, when added to the benefits, if any, to which she may otherwise under the Act be entitled, exceed the amount to which she would have been entitled, if she had not been suspended (National Health Insurance (Married Women's Special Benefits) Regulations, 1914).

(*f*) See p. 911, *ante*.

(*g*) See p. 916, *ante*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (3). For the table, see National Health Insurance (Tables of Reserve Values) Regulations, 1914, Sched. V. As to transfer value, see the National Health Insurance (Transfer Values) Regulations, 1914.

(*i*) See p. 905, *ante*.

(*k*) See p. 926, *ante*.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (1). As to the table, see note (*h*), *supra*.

(*m*) See p. 905, *ante*.

(*n*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (5); and see p. 922, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (6).

(*p*) See p. 905, *ante*.



liability to become an employed contributor(*q*). The employer is not, however, exempt from his liability to pay contributions in respect of her(*r*) or deprived of his right to recover such part of the contributions as is payable on her behalf(*s*), but of each weekly contribution so paid by the employer, 3*d.* is treated as her contribution as a voluntary contributor, and the balance applied for her benefit in such manner as the society determines(*t*).

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**1755.** If at any time the Married Women's Suspense Account is insufficient to meet its liabilities, the Insurance Commissioners must make good the deficiency out of the sums retained by them for discharging their liabilities in respect of reserve values(*u*).

Deficiency  
of funds.

Where a deficiency has been found in respect of the society or branch of which a woman is a member at a valuation previous to her becoming suspended from ordinary benefits, and that deficiency has not been made good at the time of her marriage, or where a woman is in arrears at that time, the Commissioners prescribe the necessary adjustments in the sums transferred to the Married Women's Suspense Account, the balance of her transfer value, and her rates of benefit(*w*).

SUB-SECT. 2.—*Navy, Army, and Reserve Forces.*

**1756.** Employment in the naval or military service of the Crown, including service in officers' training corps, is an employment which is excepted from the general provisions relating to national health insurance(*a*), and special provisions apply to that employment.

Special  
provisions.

These special provisions do not apply to a seaman, marine, or soldier who entered or enlisted before the age of sixteen until he attains that age. On attaining that age those provisions apply to him as if he had entered and enlisted at the time he became sixteen(*b*).

(*q*) As to applying for and granting such a certificate, see National Health Insurance (Claims for Exemption, Married Women) Regulations (England), 1914. The certificate is granted by the applicant's society. If it is doubtful whether the employment in respect of which exemption is claimed is an insurable employment, the matter must be referred to the Commissioners for decision (*ibid.*).

(*r*) See pp. 911, 912, *ante*.

(*s*) See p. 913, *ante*.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (8). On obtaining such certificate, she must apply to her society for the appropriate contribution card (National Health Insurance (Collection of Contributions) Consolidated Regulations, 1914, Part I.); and see note (*a*), p. 918, *ante*. As to transfer value in such a case, see National Health Insurance (Transfer Values) Regulations, 1914.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 44 (9).

(*w*) *Ibid.*, s. 44 (12). For such adjustments where a married woman is in arrears, see National Health Insurance (Adjustment of Married Women's Transfer Value) Regulations, 1914.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1 (2), Sched. I., Part II. (*a*). As to naval and military service, generally, see title ROYAL FORCES, Vol. XXV., pp. 1 *et seq.*

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (6).

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Insured  
Persons.Amount of  
contributions.

**1757.** For the purposes of national health insurance (*c*), there is to be deducted from the pay of every seaman and marine (*d*) within the meaning of the Naval and Marine Pay and Pensions Act, 1865 (*e*), and of every soldier (*f*) of the regular forces (other than soldiers of His Majesty's Indian Forces, the Royal Malta Artillery, and native soldiers of any regiment raised outside the United Kingdom), the sum of  $1\frac{1}{2}d.$  per week. The Admiralty and Army Council respectively contribute out of Navy and Army funds the sum of  $1\frac{1}{2}d.$  per week in respect of every such seaman, marine, and soldier who has joined an approved society (*g*), and in respect of men who have not joined an approved society such weekly sum as may be prescribed (*h*). No such deduction is made from the pay of a seaman, marine, or soldier who has completed his first engagement and has re-engaged for pension unless he so elects within the prescribed time (*i*). No contribution is made by the Admiralty or Army Council in respect of any week in respect of which such a deduction is not made (*k*).

Members of  
approved  
societies.

**1758.** A seaman, marine, or soldier who was an insured person (*l*) at the date of his entry and enlistment, and who had joined and was at that date a member of an approved society, or who within six months from such date (if serving on the 15th July, 1912, within six months from that date), or within such longer period as may be prescribed, joins an approved society, is treated as an employed

(*c*) By the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (1), the purpose of these provisions is declared to be the provision of benefits for seamen, marines, and soldiers "during their term of service and after their return to civil life." As to the payment and collection of contributions in respect of the Navy and Army, see National Health Insurance (Collection of Contributions, Navy and Marine) Regulations, 1914 (Stat. R. & O., 1914, No. 872); National Health Insurance (Collection of Contributions, Soldiers) Regulations, 1914 (Stat. R. & O., 1914, No. 873).

(*d*) "Marine" includes every warrant officer of marines, except Royal Marine gunners (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 22).

(*e*) 28 & 29 Vict. c. 73.

(*f*) "Soldier" does not include a soldier who has not been finally accepted for service (National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 22).

(*g*) As to approved societies, see pp. 937, 938, *ante*. The provisions as to existing friendly societies (see pp. 972, 973, *ante*) apply to seamen, marines, and soldiers from whose pay deductions are made as above (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 72 (4) ).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (1). Such weekly contribution is to be "such as may from time to time be required to keep the Navy and Army Insurance Fund solvent" (*ibid.*, s. 46 (3) (*c*) ). By the National Health Insurance (Admiralty and Army Council Contributions) Regulations, 1912 (Stat. R. & O., 1912, p. 735), the sum is fixed at  $1\frac{1}{2}d.$  for the time being.

(*i*) As to the prescribed time, see the National Health Insurance (Naval and Military Forces) (Time Limits) Regulations, 1912 (Stat. R. & O., 1912, p. 925), as amended by the National Health Insurance (Naval and Military Forces) (Time Limits) Regulations, 1912, Amendment Regulations, 1913 (Stat. R. & O., 1913, p. 957); and Amendment Regulations, 1914.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (1).

(*l*) For the definition, see p. 905, *ante*.

contributor (*m*), subject, until his discharge (*n*), to the following modifications, namely (*o*): the employed rate (*p*) is 3*d.*, and the deductions from his pay and the contributions in respect of him by the Admiralty or Army Council are treated as the contributions paid in respect of him; he is not entitled to medical, sanatorium, sickness, or disablement benefits (*q*), but he is entitled to maternity benefit (*r*), although he and his wife are resident outside the United Kingdom at the time of the confinement (*s*); and the sum to be retained out of each weekly contribution by the Insurance Commissioners in respect of reserve values (*t*) is 1*d.*, the remaining five-ninths of a penny being paid out of the Navy and Army Insurance Fund (*u*).

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**1759.** The following provisions apply in the case of seamen, marines, and soldiers who have not joined an approved society, namely (*a*): the Navy and Army Insurance Fund is constituted, and into that fund is paid (1) the balance remaining after deducting from the amount of the deductions from their pay and the contributions in respect of them (which go in the first instance into the National Health Insurance Fund (*b*)) the like amount as would be retained by the Commissioners in respect of reserve values if the men were members of approved societies (*c*); and (2) a sum, annually, out of public funds equal to two-ninths of the amount which would have been payable in the year in respect of medical, sanatorium, sickness, and disablement benefits (including administration expenses) had the men concerned been members of approved societies and entitled to such benefits as employed contributors (*d*). If any such man was at the date of his entry or enlistment a deposit contributor (*e*), he is, for the purpose of dealing with the sum standing to his credit in the Deposit Contributors Fund (*f*), treated as if the Navy and Army Insurance Fund were an approved society, and he had at the date of his entry or enlistment become a member thereof. In the case of men serving on the 15th July, 1912, there is credited to the Navy and Army Insurance Fund such reserve value as would have been credited to an approved society

Navy and  
Army Insurance  
Fund.

(*m*) See p. 905, *ante*.

(*n*) Discharge in this connexion includes transfer to a reserve on the completion of any term of service (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (5)).

(*o*) *Ibid.*, s. 46 (2).

(*p*) See pp. 911, 912, *ante*.

(*q*) See pp. 919 *et seq.*, *ante*.

(*r*) See p. 923, *ante*.

(*s*) The society may arrange for the administration of the benefit through the Admiralty or Army Council (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (2) (iii)).

(*t*) See pp. 961, 962, *ante*.

(*u*) See the text, *infra*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (3).

(*b*) See pp. 958, 959, *ante*.

(*c*) See pp. 937, 938, *ante*.

(*d*) See the National Health Insurance (Navy and Army) Regulations, 1913 (Stat. R. & O., 1913, p. 959).

(*e*) See p. 931, *ante*.

(*f*) See p. 973, *ante*.



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had he at that date become a member of such society as an employed contributor (*g*); but no reserve value is so credited if at that date he had completed his first engagement and had re-engaged for pension, unless he elects to have deductions made from his pay, or unless, not having so elected, he becomes on discharge (*h*) entitled to benefits payable out of that fund (*i*). Until discharged (*h*) every such man is entitled to maternity benefit (*k*) out of the Navy and Army Insurance Fund, and this although he and his wife may be at the date of the confinement resident outside the United Kingdom (*l*).

Effect of  
discharge.

**1760.** On the discharge (*m*) of a seaman, marine, or soldier from whose pay deductions have been made up to the date of his discharge, there is debited to the Navy and Army Insurance Fund and if he becomes a member of an approved society within the prescribed time from his discharge (*n*) there is credited to that society the transfer value which would have been payable in respect of him had he been a member of an approved society throughout his period of service, or in the case of a man serving on the 15th July, 1912, since that date (*o*). If he does not so become a member of an approved society, such transfer value is carried to his credit in the Deposit Contributors Fund (*p*) unless he becomes entitled to benefits out of the Navy and Army Insurance Fund (*q*), and, if he becomes a deposit contributor (*r*), so much of the reserve value, if any, credited to that fund in respect of him is cancelled as would have been cancelled had he been transferred from an approved society to the Deposit Contributors Fund (*s*). A man discharged (*t*) from service who proves that the state of his health is such that he cannot obtain admission to an approved society may, if he so elects, on making application to the Insurance Commissioners within three months of his discharge (*u*), or such

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(*g*) See pp. 961, 962, *ante*; and table set out in the National Health Insurance (Tables of Reserve Values) Regulations, 1914, Sched. II. (seamen, marines, and soldiers entering into insurance within 65 weeks after the 15th July, 1912); Sched. III. (seamen, marines, and soldiers entering into insurance later).

(*h*) See note (*n*), p. 981, *ante*.

(*i*) See the text, *infra*.

(*k*) See p. 923, *ante*.

(*l*) The benefit is administered by the Admiralty and Army Council either directly or through insurance committees, as to which see pp. 933 *et seq.*, *ante* (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (3) (f)).

(*m*) See note (*n*), p. 981, *ante*.

(*n*) The period is, in the case of a man discharged in the United Kingdom, any time within three months of his discharge, and in the case of a man discharged outside the United Kingdom, any time within six months (National Health Insurance (Naval and Military Forces) (Time Limits) Regulations, 1912).

(*o*) See p. 965, *ante*; National Health Insurance (Transfer Values) Regulations, 1914.

(*p*) See p. 973, *ante*.

(*q*) See p. 981, *ante*.

(*r*) See p. 931, *ante*.

(*s*) See p. 973, *ante*.

(*t*) See note (*n*), p. 981, *ante*.

(*u*) See note (*n*), p. 981, *ante*.

longer time as may be prescribed (*a*), become entitled to the various benefits under the provisions relating to national health insurance (*b*) (other than additional benefits (*c*)) at the full rate, the cost thereof being payable out of the Navy and Army Insurance Fund, and any contributions paid by or in respect of him being paid into that fund (*d*); subject, however, to the following conditions, namely: no deductions are made from benefits on account of pension; sickness benefit is reduced, in the case of a man who entered into insurance at seventeen or upwards or who is in arrears, to the same extent as if he had been an employed contributor and a member of an approved society who entered into insurance at the like age (*e*) or is in arrears to the like extent (*f*), though sickness benefit must in no case be reduced below 5*s.* a week; if a man who is so entitled to benefits at any time becomes a member of an approved society for the purposes of national health insurance, he ceases to be so entitled to benefits, and there is debited to the Navy and Army Insurance Fund and credited to such society the transfer value which would have been so debited and credited if he had been at that time transferred from one approved society to another (*g*); and there is repaid each year to the Navy and Army Insurance Fund, out of moneys provided by Parliament, a sum equal to two-ninths of the amount expended out of the fund on such benefits as aforesaid, including administration expenses (*h*).

**1761.** In the foregoing special provisions relating to men who are or have been seamen, marines, or soldiers, the date of the man's entry or enlistment, or if serving on the 15th July, 1912, that date, is treated as the date of his entry into insurance, unless he was an insured person (*i*) at the date of his entry or enlistment; deductions from pay, with the corresponding contributions by the Admiralty and Army Council, are treated as payments of contributions at the employed rate (*k*) for the purpose of reckoning the number of contributions made in respect of him, arrears (*l*), and transfer value (*m*), and for the purpose of qualifying to become a

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Miscellaneous  
provisions.

(*a*) The period is six months in the case of a man discharged outside the United Kingdom (National Health Insurance (Naval and Military Forces) (Time Limits) Regulations, 1912, Amendment Regulations, 1913).

(*b*) See pp. 919, 920, *ante*.

(*c*) See pp. 924, 925, *ante*.

(*d*) The benefits are paid in accordance with regulations made by the Insurance Commissioners after consultation with the Admiralty and Army Council, and administered by the insurance committees or otherwise subject to those regulations (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (3) (*h*)); see National Health Insurance (Navy and Army Fund) Regulations, 1913; National Health Insurance (Navy and Army Fund) Regulations, 1914.

(*e*) See p. 922, *ante*.

(*f*) See p. 926, *ante*; and National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036).

(*g*) See p. 965, *ante*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (3).

(*i*) For the definition, see p. 905, *ante*.

(*k*) See pp. 911, 912, *ante*.

(*l*) See p. 926, *ante*; and National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036).

(*m*) See p. 965, *ante*.

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voluntary contributor (*a*); and a man is during his term of service, if he has joined an approved society as aforesaid before his entry or enlistment, deemed to reside in that part of the United Kingdom in which he resided immediately before entry or enlistment, or, if after his entry or enlistment, in that part of the United Kingdom in which the registered office or other principal place of business of his society or branch is situate, and in any other case in England, and all persons entitled to benefits payable out of the Navy and Army Insurance Fund are deemed to reside in England (*b*).

Reserve and  
Territorial  
Forces.

**1762.** The foregoing provisions relating to seamen, marines, and soldiers apply, subject to prescribed adaptations and modifications, to men belonging to the Naval Reserves when on service during war or any emergency, and to men of the Army Reserve when called out on permanent service, and to men of the Territorial Force when called out on embodiment (*c*).

Where a man of the Naval Reserves, the Army Reserve, or the Territorial Force is being trained and is in receipt of Navy or Army pay, he is, for the purposes of national health insurance, deemed, whilst so training, to be in an insurable employment (*d*) and in the sole employment of the Crown, but this provision does not apply to a man who was not immediately before the training an insured person (*e*), except where specified in a special order made by the Insurance Commissioners (*f*).

Investments.

**1763.** Sums standing to the credit of the Navy and Army Insurance Fund in the National Health Insurance Fund may be invested (*g*) and interest paid thereon (*h*), and the former fund participates in the apportionment of the sums retained by the Insurance Commissioners in respect of reserve values (*i*).

Regulations.

The Insurance Commissioners may make regulations enabling the Admiralty or Army Council to appoint a person to exercise on behalf of any insured person of unsound mind who is entitled to benefits out of the Navy and Army Insurance Fund any right of election that person may have in regard to national health insurance, and to appoint a person to receive on behalf and for the benefit of such person any sums by way of benefit which would otherwise have been payable to him (*k*); and applying to the Navy and Army Insurance Fund and to members of that fund such of

(*a*) See p. 911, *ante*.

(*b*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (4).

(*c*) *Ibid.*, s. 46 (7).

(*d*) See p. 905, *ante*.

(*e*) See p. 905, *ante*.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46 (8); and see the Reserves and Territorial Force (Training) Order, 1912 (Stat. R. & O., 1912, p. 691), which applied to every man in training on the 15th July, 1912, or within one month afterwards.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (3); and see pp. 963, 964, *ante*.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 54 (4). As to the rate of interest, see note (*c*), p. 964, *ante*.

(*i*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 55 (4); and see p. 962, *ante*.

(*k*) See National Health Insurance (Navy and Army Insurance Fund: Persons of Unsound Mind) Regulations, 1914.



the provisions relating to approved societies, and to membership of and transfer to and from approved societies, as the Commissioners think necessary for facilitating admissions to and transfer from the fund and for the proper administration of the fund, and for continuing the right to payment of maternity benefit out of that fund until the man is transferred to an approved society or becomes a deposit contributor, and for extending any of the foregoing provisions relating to men who have not joined an approved society to seamen, soldiers, and marines who are not members of an approved society (*l*).

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SUB-SECT. 3.—*Mercantile Marine.*

**1764.** The general statutory provisions relating to national health insurance apply to masters (*m*), seamen (*a*), and apprentices to the sea service and the sea-fishing service, subject to the following special provisions:—

Application  
of statutory  
provisions.

Neither sickness (*b*) nor disablement (*c*) benefits are payable to those persons when suffering from any disease or disablement in respect of any period during which the owner of the ship is under a legal liability to defray the expenses of surgical and medical advice and attendance and medicine, and of maintenance (*d*); but in respect of that part of such period during which the owner is not liable to pay wages to the master, seaman, or apprentice so suffering (*e*), sickness benefit may be paid in whole or part to or for the relief or maintenance of any dependants he may have, provided he was serving on a home-trade ship (*f*). Such benefit is paid or applied as the society or committee administering it thinks fit after consulting, whenever possible, with the master, seaman, or apprentice concerned (*g*). For the purpose of calculating the rate and duration of sickness benefit, such benefit is deemed to have been paid from the commencement of the disease or disablement until the determination of the aforesaid liability to defray expenses, and during such period the man is not entitled to medical benefit (*h*).

**1765.** A master, seaman, or apprentice who is neither domiciled nor has a place of residence in the United Kingdom is not deemed

Foreign  
seamen etc.

(*l*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 28, Sched. I.

(*m*) This expression has the same meaning as in the Merchant Shipping Acts, 1894—1907 (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (10)). By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, “master” includes every person (except a pilot) having command or charge of any ship.

(*a*) “Seaman” includes every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship” (*ibid.*); see, further, title SHIPPING AND NAVIGATION, Vol. XXVI., p. 14.

(*b*) See p. 920, *ante*.

(*c*) See pp. 922, 923, *ante*.

(*d*) See title SHIPPING AND NAVIGATION, Vol. XXVI., p. 45.

(*e*) *Ibid.*, p. 50.

(*f*) For the definition, see *ibid.*, p. 42, note (*f*); but in this connexion ships engaged in the sea fishing service are included (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (10)).

(*g*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 23 (1).

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (1).

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to be the subject of compulsory health insurance (*i*); but, except in cases where the ship is engaged in regular trade on foreign stations (*k*), the employer is liable to pay the same contributions in respect of him as would otherwise be payable by him as employer's contributions (*l*).

In the case of such persons serving on foreign-going ships (*m*) or ships engaged in regular trade on foreign stations (*k*), the employed rate (*n*) and the employer's contributions (*o*) are each reduced by 1*d.* a week, and every four weekly contributions paid in any calendar year by a master, seaman, or apprentice whilst serving on such a ship are, for the purposes of determining the number of contributions to be paid by him in that year (*p*) and of calculating arrears (*q*), treated as five such contributions. This provision does not affect the number of employer's contributions (*o*) to be paid in respect of those persons, but no employer's contributions paid in respect of any week for which no contribution is payable by the master, seaman, or apprentice are taken into account in reckoning the amount of his arrears (*q*); and there is credited to the approved society (*r*) of which the master, seaman, or apprentice is a member, or, if he is a deposit contributor (*s*), to his account in the Deposit Contributors Fund (*t*), a sum equal to two-fifths of the amount of the contributions actually paid in respect of him, and an equal sum is treated as having been expended as sickness benefit (*u*), and the proper proportion thereof is accordingly paid out of moneys provided by Parliament (*a*).

Seamen's  
National  
Insurance  
Society.

**1766.** Any master, seaman, or apprentice who is subject to compulsory insurance (*b*), or entitled to be or become a voluntary contributor (*c*), is entitled to join the Seamen's National Insurance Society constituted under a Board of Trade scheme and

(*i*) See pp. 905 *et seq.*, *ante*.

(*k*) That is, engaged regularly in trade between ports outside the British Islands when trading between such ports, but a ship is not deemed not to be engaged in such a trade by reason only that she puts into a port in the United Kingdom for the purpose of survey or repair (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (10)).

(*l*) *Ibid.*, s. 48 (3); and see pp. 911, 912, *ante*. As to the collection and remission of contributions in respect of men on both home-trade and foreign-going ships, also as to exemption books and the returns to be supplied to the Commissioners, see the National Health Insurance (Mercantile Marine) (Collection of Contributions) Regulations (England), 1912.

(*m*) Including ships engaged in the sea-fishing service (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (10)).

(*n*) See pp. 911, 912, *ante*.

(*o*) See pp. 911, 912, *ante*.

(*p*) See p. 913, *ante*.

(*q*) See p. 926, *ante*; and National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036).

(*r*) See pp. 937, 938, *ante*.

(*s*) See p. 943, *ante*.

(*t*) See p. 973, *ante*.

(*u*) See p. 920, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (2).

(*b*) See p. 905, *ante*.

(*c*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 23 (2); and see p. 911, *ante*.

managed by a committee comprising representatives of the Board, of shipowners, and of members of the society in equal proportions. The society is an approved society (*d*), but the persons concerned are at liberty to join any other approved society instead (*e*). To this society are credited all contributions paid by employers in respect of masters, seamen, or apprentices who are neither domiciled nor have a place of residence in the United Kingdom (*f*).

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**1767.** Members of the society are entitled to medical, sanatorium, sickness, disablement, and maternity benefits (*g*), and, in addition, to such other benefits as may be provided under a scheme to be prepared by the committee. Such other benefits include pensions for long sea service, and preference may be given by the scheme to those who have served in foreign-going ships (*h*) or ships engaged in foreign trade over those who have served in the coasting and home-trade (*i*) ships. The scheme provides for making a proper proportion of the sums credited to the society in respect of contributions paid by employers for men neither domiciled nor residing in the United Kingdom (*k*) applicable towards paying pensions or superannuation allowances granted by other approved societies to members with such sea service that, had they been members of the society, they would have been entitled to pensions under the scheme; and in the case of a transfer of a member of the society to another approved society, his transfer value (*l*) is calculated with reference to the liabilities of the society for benefits other than pensions as aforesaid (*m*).

Members of the society, for the purposes of national health insurance, are deemed to reside in England. Their medical and sanatorium benefits are administered by the society, but the society may agree with insurance committees (*n*) for the administration by the committees of those benefits in relation to individual members of the society (*o*).

(*d*) See pp. 937, 938, *ante*.

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (4), (5).

(*f*) *Ibid.*, s. 48 (6); and see pp. 985, 986, *ante*.

(*g*) See pp. 919 *et seq.*, *ante*.

(*h*) See note (*m*), p. 986, *ante*.

(*i*) "Home trade" ship includes ships engaged in the sea fishing service (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (10)). Such preference may be proportionate to the length of foreign service (*ibid.*, s. 48 (7)).

(*k*) See pp. 985, 986, *ante*.

(*l*) See p. 965, *ante*.

(*m*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (7).

(*n*) See pp. 933 *et seq.*, *ante*. Such arrangements are subject to the approval of the Commissioners so far as regards medical benefit (National Health Insurance (Seamen's Medical Benefit) Regulations, 1914 (Stat. R. & O., 1914, No. 1227), regulation 7).

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (12). The National Health Insurance (Medical Benefit) Regulations (England), 1913 (see note (*o*), p. 946, *ante*), only apply to members of the society where such agreement has been made (*ibid.*, regulation 84). The National Health Insurance (Seamen's Medical and Sanatorium Benefit) Regulations, 1913, modify, as regards members of the Seamen's National Insurance Society, the statutory provisions relating to the administration of medical benefit (see p. 945, *ante*) and sanatorium benefit (see p. 952, *ante*). As regards



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Insured  
Persons.

Person  
ceasing to  
serve at sea.

**1768.** The rules of the Seamen's National Insurance Society must provide for allowing a member who leaves the sea service and is unable to obtain admission to another approved society on account of his health to continue a member of the former society for the purposes of health insurance; and such rules may provide that a member of the society who has fulfilled the conditions entitling him to pension as aforesaid is not to be deprived of his right to the pension by reason only that he has ceased to be a member at the time when the pension first becomes payable or ceases to be so at any subsequent time (*p*).

Concurrent  
membership  
of approved  
society.

**1769.** If a master, seaman, or apprentice on the 15th July, 1912, belonged to a society which became an approved society (*q*), he may continue a member of that society for the purpose of benefits (*r*) other than pension, and become a member of the Seamen's National Insurance Society for the purposes of pension only, provided the two societies agree, in which case the balance of contributions payable in respect of him after deducting sums in respect of reserve values (*s*) is to be divided between the two societies in agreed proportions (*t*).

SUB-SECT. 4.—*Aliens*.

Modifications  
in case of  
aliens.

**1770.** The provisions relating to national health insurance apply to persons who are not British subjects, if they are of the age of seventeen or upwards at the date of entry into insurance, but subject to the following modifications, namely (*u*): No part of the benefits payable to aliens other than increased maternity benefit (*v*), or of the costs of administering benefits, is paid out of moneys provided by Parliament; the rate of sickness (*x*), disablement (*y*), and maternity (*a*) benefits, as regards deposit contributors (*b*), are reduced, in the case of men, to seven-ninths, or in the case of women to three-fourths, of the ordinary rates (*c*); and an alien may only become a member of an approved society for the purposes of national health insurance (*d*) on the conditions that the contributions payable by or in respect of him are credited to the society, that the society pays to the Insurance Commissioners each year the whole of the sums payable in respect of him for

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the administration of medical benefit of members of that society, see, further, the National Health Insurance (Seamen's Medical Benefit) Regulations, 1914 (Stat. R. & O., 1914, No. 1227).

(*p*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (8); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 23 (2).

(*q*) See pp. 937, 938, *ante*.

(*r*) See pp. 919, 920, *ante*.

(*s*) See pp. 961, 962, *ante*.

(*t*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 48 (9).

(*u*) *Ibid.*, s. 45 (1), (2).

(*v*) See p. 989, *post*.

(*x*) See p. 920, *ante*.

(*y*) See pp. 922, 923, *ante*.

(*a*) *Ibid.*; as to increased maternity benefits, see p. 989, *post*.

(*b*) See p. 931, *ante*.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 45 (1).

(*d*) See pp. 937, 938, *ante*.

medical and sanatorium benefits, that the rate and conditions of sickness, disablement, and maternity benefits are such as may be determined by the society, and that the provisions relating to reserve values (*e*) do not apply to him (*f*).

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Special  
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Insured  
Persons.

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Where  
modifications  
inapplicable.

**1771.** An insured woman who was a British subject before marriage, but ceased to be so on marrying an alien (*g*), is not subject to the foregoing limitations (*h*); and where the wife of an alien insured person who is subject to these limitations was before marriage a British subject, the maternity benefit payable in respect of his insurance is, subject to regulations to be made by the Commissioners, increased by two-sevenths, the amount of such increase being paid out of moneys provided by Parliament (*i*). Moreover, the limitations do not apply to any person who, on the 4th May, 1911, was a member of a society which, or a separate section of which, becomes an approved society (*j*), or which amalgamates with or transfers its engagements to an approved society (*k*), or which proves to the satisfaction of the Commissioners that it has organised, either solely or jointly with other bodies, an approved society for the benefit of its members (*l*), and had then been resident in the United Kingdom for five years or upwards; or to any person who is transferred to an approved society (*m*) or the Deposit Contributors Fund (*n*) in pursuance of an arrangement with a foreign State (*o*).

SUB-SECT. 5.—*Persons Receiving Wages during Sickness.*

**1772.** The Insurance Commissioners may make special orders (*p*) specifying classes of employment in which a custom or practice prevails, and, where the custom or practice is local, the locality where it prevails, under which the persons employed receive full remuneration (*q*) during the whole or any part of periods of disease or disablement (*r*). Any employer who employs persons

Special  
provisions.

(*e*) See pp. 961, 962, *ante*. As to transfer values in the case of aliens, see National Health Insurance (Transfer Values) Regulations, 1914.

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 45 (2).

(*g*) See title ALIENS, Vol. I., p. 318.

(*h*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 20 (1).

(*i*) *Ibid.*, s. 20 (2).

(*j*) See pp. 937, 938, *ante*.

(*k*) See p. 942, *ante*.

(*l*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 21.

(*m*) See pp. 937, 938, *ante*.

(*n*) See p. 973, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 45 (4).

(*p*) As to the procedure for making special orders, see note (*m*), p. 901 *ante*.

(*q*) As to the meaning of the term "remuneration," see title MASTER AND SERVANT, Vol. XX., p. 86; and note (*b*), p. 912, *ante*.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (1). The order may contain such incidental, supplemental, and consequential provisions as may be necessary for adapting the general provisions of the Act to such special cases (*ibid.*). By the National Health Insurance (Special Customs) Consolidated Order, 1914, the following employments are so specified, namely: Employment otherwise than by way of manual labour as a foreman, manager or assistant manager; or as a clerk; shop

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assistant; warehouseman, including a porter or packer employed in a warehouse; resident tutor or governess; journalist; press telegraphist; teacher; teacher or worker for religious or philanthropic purposes; commercial traveller, whose remuneration is wholly or mainly by way of salary or wages; domestic servant, including a menial servant employed in whole-time service in or about a private residence; porter, messenger, commissionaire or watchman in a club, hotel, office, shop or other place in which a trade or business is carried on; employment by or under a co-operative society; usher or messenger of a county court; employment by way of manual labour by or under any of the following bodies (such employment being deemed a separate employment and not including employment by or under any other body (including a combination of local authorities) or in any institution herein specified), namely:—a council of a county; a council of a borough (including a metropolitan borough); a council of an urban district; a council of a rural district; a poor law authority; a visiting committee constituted under the Lunacy Act, 1890; a joint board constituted under the Public Health Acts, 1875 to 1908; a joint committee appointed under s. 57 of the Local Government Act, 1894; a combination of two or more local authorities combining in providing a common hospital under s. 131 of the Public Health Act, 1875, or combining together for the purpose mentioned in s. 285 of that Act; a hospital committee constituted under the Isolation Hospital Acts; an education committee established under the Education Acts, 1870 to 1909; employment by way of manual labour in an institution certified under the Children Act, 1908, or the Inebriates Act, 1898, or the Elementary Education (Blind and Deaf Children) Act, 1893, or the Elementary Education (Defective and Epileptic Children) Act, 1899; employment otherwise than by way of manual labour by or under such body or in any such institution as aforesaid (in each of the foregoing cases provided that by the terms of the employment the person employed is entitled to not less than one week's notice of the termination of his employment); bailiff appointed to assist the high bailiff of a county court; employment as any kind of farm servant under a contract of not less than six months' duration (male persons only) in Northumberland; Durham; and Yorks, North Riding (North and North-Eastern parts); employment as a farm servant in charge of animals (male persons only) in Berks; Cambridgeshire (North); Dorset (East and South); Gloucestershire; Hampshire; Kent; Lincolnshire; Nottinghamshire; Oxfordshire; Rutlandshire; Warwickshire; Wiltshire; Worcestershire; and Yorks, East Riding, provided the person employed is entitled to not less than one week's notice of termination of employment; employment as a farm servant (male unmarried persons only) in Cumberland; parts of Lancashire, namely, the hundreds of North and South Lonsdale, Amounderness, Leyland and Blackburn; Westmoreland; and Yorks, West Riding, provided the person employed is entitled to not less than one week's notice of termination of employment; employment as a farm servant under a contract of not less than six months' duration where the terms of service include board and lodging in the farmhouse (male unmarried persons only) in Cheshire; Derbyshire; Hereford (West); Shropshire; and Staffordshire. To these employments the general provisions of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), are adapted by the following special provisions, namely: (i.) Where a scheme is made under *ibid.*, ss. 37 (see p. 967, *ante*) or 38 (see p. 968, *ante*), the provision made by the scheme with respect to persons to whom the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47, applies may be different from the provision made with respect to other insured persons. (ii.) Every person on entering any employment in which he will be a person to whom *ibid.*, s. 47, applies must, whether he was or was not previously such a person, give notice of the fact, if he is a member of an approved society (see pp. 937, 938, *ante*), to the society, and, if he is not a member of an approved society, to the insurance committee (see pp. 933 *et seq.*, *ante*), and every such notice must state whether the person giving the notice is engaged for a term of six months certain or not. (iii.) The employer of any person to whom the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47, applies and who



on employment included in such a special order may give notice to the Commissioners in the prescribed form of his desire to take advantage of the special provisions applicable to such cases (*s*).

**1773.** The employer thereupon becomes liable to pay full remuneration (*t*) to every such person during any period or periods not exceeding six weeks in the aggregate in any one year during which such person may suffer from any disease or disablement commencing while in his employment, although such person may have left his employment before the expiration of that time; while if the engagement is for not less than six months certain, the period of full remuneration is the whole period of any disease or disablement lasting less than six weeks, and the first six weeks of any disease or disablement lasting longer than six weeks even though the aggregate exceeds six weeks, but the liability ceases after the expiration of the term of the engagement (*u*).

**1774.** As regards the persons employed, the provisions relating to national health insurance apply to them (except to any employed at a rate of remuneration (*t*) of less than 10s. a week (*w*)), subject to certain modifications (*x*). Sickness benefit (*a*) is not payable for any period during which full remuneration is so payable by the employer, but, for the purpose of calculating the rate and

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Insured  
Persons.

Liability of  
employer.

Modifications  
as regards  
employees.

has been suffering from disease or disablement must, on the demand of that person, and also, if that person is a member of an approved society, on the demand of his society, or, if that person is not a member of an approved society, on the demand of the insurance committee, deliver to him, or to the society or insurance committee, as the case may be, particulars in writing of the date on which the disease or disablement commenced and terminated, together with a statement whether the employed person did or did not perform any work during the whole or any part of the period of the disease or disablement. By the National Health Insurance (Special Customs) Order, 1912 (No. 3) (Stat. R. & O., 1912, p. 701), the employments under the Crown included in *ibid.*, Scheds. I., III., and by the National Health Insurance (Special Customs) Provisional Order, 1913 (No. 1) (Stat. R. & O., 1913, p. 793), the Crown employments included in *ibid.*, Sched. I., are so specified and the general provisions of the Act are adapted thereto.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (2). For the prescribed form of notice, see the National Health Insurance (Special Customs Notice) Regulations (England), 1913 (Stat. R. & O., 1913, p. 987). The notice may be withdrawn by giving three months' notice to the Insurance Commissioners as from the commencement of the next calendar year, and the above special provisions then cease to apply as from that date (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (10)). Any question whether an employer is entitled to avail himself of these special provisions is determined by the insurance committee (see pp. 933 *et seq.*, *ante*), subject to appeal to the Commissioners (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (8)).

(*t*) See note (*q*), p. 989, *ante*.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (2), (3). Nothing in these provisions relieves any employer from any legal liability to pay wages during sickness to any person employed by him in accordance with any established custom (*ibid.*, s. 47 (12)).

(*w*) *Ibid.*, s. 47 (11).

(*x*) *Ibid.*, s. 47 (2), (4).

(*a*) See p. 920, *ante*.

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duration thereof, is deemed to have been paid for six weeks before the date as from which it becomes actually payable. The employed rate (*b*) is reduced by  $2d.$ , or in the case of a woman  $1\frac{1}{2}d.$ , the reduction in the employer's weekly contribution (*c*) being  $1d.$ , or  $\frac{1}{2}d.$  in respect of a woman, and in the employed contributor's weekly contribution  $1d.$  There is credited to the approved society of which any such person is a member (*d*), or to his account in the Deposit Contributors Fund (*e*) if he is a deposit contributor (*f*), the difference between the amount of contributions at such reduced rate actually paid in respect of him and the amount which would have been paid if those contributions had been at the full rate, and the difference is treated as having been expended on sickness benefit, the proper proportion thereof being paid out of moneys provided by Parliament (*g*). Contributions are not payable in respect of any period of disease or disablement during which full remuneration is payable if the prescribed notice has been given. The rules of an approved society (*h*) or insurance committee (*i*) as to notices and proof of disease and disablement may extend to periods of disease and disablement during which full remuneration is payable as above.

Voluntary  
contributors.

**1775.** Where a person on ceasing to be employed as above becomes temporarily unemployed or ceases to be employed in compulsorily insurable employment (*k*), and becomes a voluntary contributor paying contributions at the employed rate (*l*), the foregoing provisions as to the reduced employed rate and as to credits to his approved society or to his account in the Deposit Contributors Fund continue to apply in respect of him, and sickness benefit (*m*) is not payable in respect of the first six weeks of any period of disease or disablement commencing after he ceased to be so employed, or after he became a voluntary contributor, as the case may be, but, for the purpose of calculating the rate and duration thereof, is deemed to have been paid during those six weeks, and a disease or disablement is not, for the purposes of sickness benefit, treated as a continuation of a previous disease or disablement (*n*) unless the medical practitioner in attendance certifies that it is so in fact (*o*). A person

(*b*) See pp. 911, 912, *ante*.

(*c*) See pp. 911, 912, *ante*. Payment at such reduced rate is conclusive evidence that the employer is under the liability as to payment of full remuneration during disease or disablement as regards the persons in respect of whom the contributions are paid and all others employed by him in the same class in the same locality (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (9)).

(*d*) See pp. 937, 938, *ante*.

(*e*) See p. 973, *ante*.

(*f*) See p. 943, *ante*.

(*g*) See p. 958, *ante*.

(*h*) See pp. 944, 945, *ante*.

(*i*) See p. 945, *ante*.

(*k*) See p. 905, *ante*.

(*l*) See pp. 916, 917, *ante*.

(*m*) See p. 920, *ante*.

(*n*) Compare pp. 920, 921, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (5), (6).

so ceasing to be employed in a compulsorily insurable employment, and becoming a voluntary contributor at the employed rate, may become an ordinary voluntary contributor (*p*) after the payment of twenty-six contributions at the full rate, or after the payment of such less number of contributions as his society may appoint (*q*).

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**1776.** Any employers wishing to avail themselves of the foregoing provisions as respects the persons employed by them in a class of employment, or in a locality, in which no such custom or practice as aforesaid exists, may apply to the Commissioners for a special order extending those provisions as respects the applicants to the employment or locality in question, and the Commissioners may accede to the request if they think fit after ascertaining the views of the persons so employed (*r*).

Application  
for special  
order.

SUB-SECT. 6.—*Persons in the Service of the Crown.*

**1777.** The foregoing provisions as to reduced insurance in cases where the employer pays full remuneration during sickness extend, in respect of persons employed by or under the Crown, to cases where two-thirds only of the full remuneration are payable during periods or parts of periods of disease or disablement, if payable for not less than three months in any year (*s*).

Persons  
employed  
by Crown.

In other respects the general provisions relating to national health insurance apply to persons employed by or under the Crown (*t*). In the case of persons in the private service of the Crown, the head of the department of the Royal Household in which he is employed is deemed his employer (*a*).

SUB-SECT. 7.—*Certificated Teachers.*

**1778.** Where a public elementary school teacher ceases to be subject to compulsory health insurance by reason of becoming a teacher to whom the Elementary School Teachers (Superannuation) Act, 1898 (*b*), applies (*c*), and does not become a voluntary

Teachers  
ceasing to  
be subject  
to insurance.

(*p*) See pp. 916, 917, *ante*.

(*q*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (6); and see National Health Insurance (Arrears) Regulations (No. 2), 1914.

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 47 (7). For Special Order granted to particular employers under this provision, see National Health Insurance (Special Employers Custom) Consolidated Order, 1914.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 53 (2). By the National Health Insurance (Special Customs) Order, 1912 (No. 3), the employments under the Crown included in *ibid.*, Sched. II., are specified as being employments where the custom or practice prevails of so paying two-thirds remuneration during not less than three months of sickness in any one year. See also National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036).

(*t*) Save, of course, those otherwise specially provided for, as the Navy and Army (see p. 979, *ante*) and certificated teachers (see *supra*). As to excepted employment under the Crown, see p. 907, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 53 (1).

(*b*) 61 & 62 Vict. c. 57; see title EDUCATION, Vol. XII., pp. 127 *et seq.*

(*c*) As to the exemption of certificated teachers from the Act, see p. 908, *ante*.



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Persons.

contributor (*d*), there is to be paid to the Board of Education by his approved society (*e*) or out of the amount standing to his credit in the Deposit Contributors Fund (*f*), as the case may be, to be placed to the teacher's credit in the Deferred Annuity Fund (*g*), a sum equal to the value calculated in the prescribed manner of the contributions paid by or in respect of him under the provisions relating to national health insurance since he first began to teach in a public elementary school, or, if the amount standing to his credit is less than that sum, then the whole amount standing to his credit (*h*).

SUB-SECT. 8.—*Casual and Intermittent Employment.*

Modification  
of statutory  
provisions.

**1779.** The Insurance Commissioners may modify, by special order, the general statutory provisions as to national health insurance in their application to persons whose employment is of a casual or intermittent nature and to the employers of such persons. Any such order may apply either generally or to particular trades or industries or branches thereof, or to particular localities. Where any such order is restricted to a particular trade, industry or branch in a particular locality, it may extend to other persons if employed in the same class of employment as those persons to whom the order primarily relates (*i*).

Contents of  
order.

**1780.** The order may prescribe the amount of the employed rate (*k*), the respective contributions of employer and of employed contributor (*l*), the manner, proportions, and periods of payment, recovery and collection of contributions, and the apportionment among employers of the amounts payable by employers; but the employer's contributions must not exceed 6*d.*, or the employed contributor's (*l*) contributions (*m*) 4*d.* (or in the case of a woman 3*d.*) in any week; and if the contributions are payable day by day the employed contributor's (*l*) contribution must not exceed 1*d.* for any day (*n*).

Objections to  
draft order.

**1781.** Special orders relating to these particular matters must be laid before Parliament after the manner of regulations made under the Act by the Insurance Commissioners, so that either House may within twenty-one days present an address praying for the annulment of any such order (*o*). The proposed special order must also be first issued in draft and opportunity given for objection thereto (*a*).

(*d*) See p. 911, *ante*.

(*e*) See pp. 937, 938, *ante*.

(*f*) See p. 973, *ante*.

(*g*) See title EDUCATION, Vol. XII., p. 128.

(*h*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 52. See National Health Insurance (Value of Contributions, Teachers) Regulations, 1914 (Stat. R. & O., 1914, No. 1225), for the manner of calculating the value of contributions.

(*i*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 19 (1).

(*k*) See pp. 911, 912, *ante*.

(*l*) For the definition, see p. 905, *ante*.

(*m*) See pp. 911, 912, *ante*.

(*n*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 19 (2).

(*o*) *Ibid.*, s. 19 (3); and see p. 932, *ante*.

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 113 (1),

Failing agreement as to amendment of the draft order or its withdrawal, an inquiry will be held by one or more competent and impartial persons appointed by the Lord Chancellor on the demand of the person objecting to the draft order (*b*).

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Insured  
Persons.

SUB-SECT. 9.—*Inmates of Charitable Institutions.*

**1782.** A certificate of exemption from compulsory health insurance (*c*) may be granted by the Insurance Commissioners in respect of the inmates of any institution carried on for charitable or reformatory purposes who are inmates for such purposes and are employed by the managers thereof, if it is proved that such inmates receive maintenance and medical attendance when sick. It is, however, a condition of such exemption that the managers are to be liable to pay certain sums in respect of any such inmate who, having been an inmate for more than six months, leaves the institution. Such sums are, in the case of a person who was below sixteen years of age on entering the institution, such capital sum as will suffice to secure him benefits at the full rate (*d*), and, in the case of a person who was at the time of entering the institution of the age of sixteen or upwards and an insured person (*e*) and a member of an approved society (*f*), a sum equal to the value, calculated in the prescribed manner, of the contributions which would otherwise have been payable in respect of him during the time he was in the institution (*g*).

Certificate of  
exemption.

**1783.** Every such inmate, if he was an insured person (*h*) before entering the institution, is suspended from benefits while he is an inmate; and, if at that time he was a member of an approved society (*i*) and has been an inmate of the institution for more than six months, the time during which he is in the institution is disregarded for the purpose of reckoning arrears (*k*).

Suspension  
of benefits.

SUB-SECT. 10.—*Persons Employed in Seasonal Trades.*

**1784.** If it is proved that a trade or business is of a seasonal nature and subject to periodical fluctuation, and that the

Special  
provisions.

Sched. IX.; National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 19 (3). For form of demand for an inquiry on such a draft order, see National Health Insurance (Special Order Inquiry) Regulations, 1914.

(*b*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 19 (3). As to the procedure at such inquiry, see National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), Sched. IX.

(*c*) Compare pp. 907 *et seq.*, *ante*.

(*d*) See pp. 919, 920, *ante*.

(*e*) See p. 905, *ante*.

(*f*) See pp. 937, 938, *ante*.

(*g*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 51 (1); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 24; and see National Health Insurance (Value of Contributions, Exempted Institution) Regulations, 1913 (Stat. R. & O., 1913, p. 993).

(*h*) See p. 905, *ante*.

(*i*) See pp. 937, 938, *ante*.

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 51 (2). As to arrears, see p. 926, *ante*; and National Health Insurance (Arrears) Regulations (No. 2), 1914 (Stat. R. & O., 1914, No. 1036).

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employers systematically employ persons throughout the year and work short time during the season when trade or business is depressed, the Insurance Commissioners may make a special order (*l*) reducing, as respects such persons, the employed rate (*m*) and the contributions of employers and contributors (*n*) for a specified period of the year, and correspondingly increasing such rate and contributions during the remainder of the year (*o*).

SECT. 12.—*Determination of Questions and Disputes.*

Insurance  
Commis-  
sioners.

**1785.** The Insurance Commissioners determine, in accordance with regulations (*p*), any question which may arise as to the rate of contributions payable by or in respect of any insured person (*q*), or as to the rates of contributions payable in respect of an employed contributor (*r*) by the employer and contributor respectively (*s*). The same tribunal determines questions as to whether any employment or class of employment is or will be employment to which compulsory health insurance applies (*t*), or as to whether

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(*l*) As to the procedure for making special orders, see note (*m*), p. 901, *ante*. The order may contain such provisions as may be necessary for adapting the general provisions of the Act to the cases in question (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 50).

(*m*) See pp. 911, 912, *ante*.

(*n*) See pp. 911, 912, *ante*.

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 50.

(*p*) *Ibid.*, s. 66 (1); see National Health Insurance (Decision of Questions) Regulations (England), 1913 (Stat. R. & O., 1913, p. 914); National Health Insurance (Decision of Questions) Regulations (England), 1913, (No. 2), which prescribe the forms on which applications for the decision of questions are to be made. The Commissioners must give notice of the application to parties appearing to be interested, except where the question is whether a class of employment is within compulsory insurance, in which case public notice is given. The Commissioners may allow parties interested, as well as the applicant, to be heard at the hearing of the application, and either may, with the consent of the Commissioners, be represented. Persons interested are also permitted to make representations to the Commissioners in writing. The Commissioners may dispose of an application summarily, without giving notice of the application and without holding a hearing. The decision is given in writing in the prescribed form, and need not be accompanied with reasons. The Commissioners periodically publish their collected decisions under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66, and the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27 (2); see Memo. 151 (second edition) published in February, 1914.

(*q*) The regulations may provide for such questions being determined, in the case of any person who is or is about to become a member of an approved society, by the society (National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66 (1) (ii.)). The regulations (see note (*p*), *supra*) so provide, unless the question is one the decision on which may affect the interest of an employer, or involve the payment of a portion of any contribution out of moneys voted by Parliament, or affect the amount of any reserve value to be credited to any society.

(*r*) See pp. 911, 912, *ante*.

(*s*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66 (1) (b), (c). The determination of the Commissioners on such a question is not subject to review by a judicial tribunal (*Don Brothers, Buist & Co. v. Scottish National Insurance Commissioners*, [1913] 1 Scots Law Times, 221).

(*t*) See p. 905, *ante*.



a person is entitled to become a voluntary contributor (*u*), or as to who is the employer of an employed contributor (*x*), but in these cases there is a general right of appeal from the Insurance Commissioners to the county court (*y*), with a further right of appeal upon any question of law from the county court to a judge of the High Court, whose decision is final (*a*). Moreover, the Commissioners may, instead of themselves deciding whether any class of employment is or will be employment to which compulsory insurance applies, submit the question for the decision of the High Court (*b*).

SECT. 12.  
Determination  
of Questions  
and  
Disputes.

**1786.** Subject to the last preceding provisions, any dispute between an approved society or branch and a person who is or has been an insured person and member or anyone claiming through such person, or between an approved society and any person as to whether that person is or was at any date a member thereof for health insurance purposes, or between an approved society and any branch thereof, or between any branches of an approved society, relating to anything done or omitted by such person, society, or branch under the provisions relating to health insurance, is decided in accordance with the rules of the society, with a right of appeal to the Insurance Commissioners (*c*).

Approved  
societies.

**1787.** Any similar dispute between an insured person and the insurance committee, or any dispute between two or more approved societies or between an approved society and an insurance committee or between two or more insurance committees, is decided by the Insurance Commissioners (*d*), whose decision is final (*e*).

Insurance  
Commis-  
sioners.

(*u*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66 (1) (*a*). As to voluntary contributors, see p. 911, *ante*.

(*x*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27 (2); see *Down County Council v. Irish Insurance Commissioners*, [1914] 2 I. R. 110, where the question was whether the council or their contractor was the employer of an employed contributor.

(*y*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66 (1) (*i*). For the procedure, see County Court Rules, Ord. 42A, rr. 1—5. The appellant must proceed by petition in the county court in the district of which he resides, and the petition of appeal must be filed within one month from the date of the decision appealed against (*ibid.*, r. 2).

(*a*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 66 (1) (*i*).

(*b*) *Ibid.*, s. 66 (1) (*iii*). For the procedure, see R. S. C., Ord. 55B, and Appendix B, Form 18B. Proceedings are taken in the Chancery Division by originating notice of motion.

(*c*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 67 (1); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27. Where such rules provide for dealing with disputes, the county court has no jurisdiction (*Bailey v. Co-operative Wholesale Society (Insurance Section)*, [1914] 2 K. B. 233, where a question as to the adequacy of the description of the disease or disablement in the medical certificate sent to the society in support of a claim for sickness benefit was held to be a dispute within the meaning of the society's rules). But if no objection is taken to the jurisdiction of the county court at the hearing, the want of jurisdiction cannot be relied upon in an appeal to the High Court (*Taylor v. National Amalgamated Approved Society*, [1914] 2 K. B. 352).

(*d*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 67 (2); National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27 (1).

(*e*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 67 (4).

SECT. 12. **1788.** The Insurance Commissioners may appoint referees to determine any such appeal or dispute submitted to them (*f*), and may make regulations as to procedure on appeals (*g*) or disputes (*h*). The Arbitration Act, 1889 (*i*), only applies to such proceedings to the extent provided by such regulations (*j*).

Referees.

SECT. 13.—*Penalties and Civil Proceedings.*

False statements.

**1789.** For knowingly making any false statement or false representation for the purpose of obtaining any benefit or payment or the crediting of a reserve value, either for himself or any other person, a person is liable on summary conviction to imprisonment not exceeding three months with or without hard labour (*k*).

Non-payment of contributions.

For failure to pay any contributions in respect of an employed contributor an employer is liable on summary conviction to a fine not exceeding £10 for each offence, and to pay to the Insurance Commissioners the amount of the unpaid contributions in satisfaction thereof. Proceedings may be taken within one year from the commission of the alleged offence (*l*). Where an employer has

(*f*) National Insurance Act, 1911 (1 & 2 Geo. 5), c. 55, s. 67 (3).

(*g*) The National Health Insurance (Appeals and Disputes) Regulations (England), 1912, Parts I. and II., prescribe the procedure and forms in regard to appeals from decisions under rules of approved societies. The leave of the Commissioners is the necessary preliminary to such appeal except in certain specified cases included in *ibid.*, Sched. III. Notice of appeal must be sent to the Commissioners within one month from the date of the decision appealed from or the date of the receipt of notice of grant of leave to appeal, and must include a concise statement of the appellant's case. A notification of the appeal and a copy of the notice of appeal are sent by the Commissioners to the respondent, who must furnish a concise statement of the case on which he will rely. The parties will be bound by their particulars unless leave to amend is obtained. The Commissioners may extend the time for giving notice of appeal. At least fourteen days' notice of the hearing is given to the parties, and the decision is communicated to the parties in writing. Persons interested in the appeal, in addition to the parties, may be permitted to attend and be heard. Parties and persons entitled to be heard may be represented, but only with the consent of the tribunal. There is no appeal under these regulations from the decision of a dispute decided under the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 68 (6) (see title FRIENDLY SOCIETIES, Vol. XV., pp. 175 *et seq.*).

(*h*) The National Health Insurance (Appeals and Disputes) Regulations (England), 1912, Parts I. and III., prescribe the procedure and forms in regard to disputes between insured persons and insurance committees. Persons desiring the decision of the Commissioners on a dispute send them a notice of application in the prescribed form. No preliminary permission is necessary. The procedure on the notice of application is similar to that which follows the notice of appeal; see note (*g*), *supra*.

(*i*) 52 & 53 Vict. c. 49; see title ARBITRATION, Vol. I., pp. 438 *et seq.*

(*j*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 67 (4). The National Health Insurance (Appeals and Disputes) Regulations (England), 1912, apply the Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 7, 8, 12, 20, Sched. I. (*f*), (*i*).

(*k*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 69 (1); and see title MAGISTRATES, Vol. XIX., p. 589.

(*l*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 69 (2); National

been convicted of such an offence, then, if notice of the intention to do so is served with the summons or warrant, evidence may be given of failure or neglect by the employer to pay other contributions in respect of the same employed contributor during the year preceding the date when the information was laid, and the employer is then liable to pay to the Commissioners the total amount of the contributions he is proved to have failed or neglected to pay (*n*).

SECT. 13.  
Penalties  
and Civil  
Proceed-  
ings.

If an employer deducts or attempts to deduct the whole or any part of the employer's contribution from the wages or other remuneration of an employed contributor, or if any person buys, takes in exchange, or takes in pawn from an insured person, or any person acting on his behalf, on any pretence whatever, any insurance card or insurance book, he is liable to a fine not exceeding £10 (*n*).

Deduction of  
contributions.

For contravention of or non-compliance with any of the statutory provisions and regulations relating to national health insurance in respect of which no special penalty is provided, the maximum penalty is a fine of £10 (*o*).

General  
breach of  
statutory  
provisions.

No person is liable to any penalty if he has acted in conformity with any decision of the Insurance Commissioners or the Insurance Committee (*p*).

**1790.** If it is found at any time that a person has received any payment or benefit under the provisions relating to health insurance to which he is not lawfully entitled, he or his personal representatives are liable to repay the amount to the Insurance Commissioners. When recovered, the Commissioners carry the same to the credit of the society of which such person was a member, or if he was not a member of any approved society, to the credit of the Deposit Contributors Fund. Such amounts are recovered as debts due to the Crown (*q*).

Repayment  
of benefits.

**1791.** In addition to proceedings as aforesaid, a member of an approved society who has been deprived of benefits by reason of his employer's failure or neglect to pay contributions in respect of him may take civil proceedings against such employer for the value of the right he has lost. In any such proceedings the employer may be ordered to pay to the Insurance Commissioners any sum so found due, and by them it is credited to the society of which the person was a member. Such person thereupon becomes entitled

Employer's  
civil liability.

Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 34 (3). The duty of paying the weekly contributions may be delegated by the employer, but if the duty is neglected the employer may be convicted of this offence (*Godman v. Crofton* (1913), 110 L. T. 387).

(*m*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 34 (3), altering the law as laid down in *R. v. Baggallay, Hurlock v. Shinn*, [1913] 1 K. B. 290, where it was held that each failure to pay a contribution when due was a separate offence.

(*n*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 34 (1), (2).

(*o*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 69 (2).

(*p*) *Ibid.*

(*q*) *Ibid.*, s. 71; see, generally, title CROWN PRACTICE, Vol. X., pp. 4 *et seq.*



SECT. 13.  
Penalties  
and Civil  
Proceed-  
ings.

to the normal benefits from the society together with the amount of the loss of benefits already sustained (*r*).

Procedure.

SECT. 14.—*Inquiries.*

**1792.** At any inquiry held by the Insurance Commissioners or by any committee or person appointed by them under the statutory provision or regulations relating to national health insurance, the witnesses are examined on oath if the Commissioners think fit or any of the parties so demand. The committee or person appointed to hold an inquiry has power to administer oaths for the purpose (*s*).

APPENDIX.

TABLE I.

Table showing Rates of Contributions of Voluntary Contributors entering into insurance on or after 13th October, 1913 (National Health Insurance (Voluntary Rate) Regulations, 1914, Table II. (see pp. 916, 917, *ante*).

Age.				Weekly Contribution.		Age.				Weekly Contribution.	
				Male.	Female.					Male.	Female.
				s.	d.					s.	d.
16	and	under	17	0	7	43	and	under	44	0	10
17			18	0	7	44			45	0	10½
18			19	0	7½	45			46	0	10½
19			20	0	7½	46			47	0	11
20			21	0	7½	47			48	0	11
21			22	0	7½	48			49	0	11½
22			23	0	7½	49			50	0	11½
23			24	0	7½	50			51	1	0
24			25	0	7½	51			52	1	0½
25			26	0	8	52			53	1	0½
26			27	0	8	53			54	1	1
27			28	0	8	54			55	1	1½
28			29	0	8	55			56	1	2
29			30	0	8	56			57	1	2½
30			31	0	8	57			58	1	3
31			32	0	8½	58			59	1	3½
32			33	0	8½	59			60	1	4
33			34	0	8½	60			61	1	4½
34			35	0	8½	61			62	1	4½
35			36	0	9	62			63	1	5
36			37	0	9	63			64	1	5
37			38	0	9	64			65	1	5
38			39	0	9½	65			66	1	4½
39			40	0	9½	66			67	1	4½
40			41	0	9½	67			68	1	4½
41			42	0	9½	68			69	1	4½
42			43	0	10	69			70	1	4½

(*r*) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 70.  
(*s*) National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 38.

TABLE II.

Reduced rates of sickness benefit for employed contributors entering into insurance on or after 13th October, 1913, and the capital sums which must be paid in order to secure the full rates of benefits (10s. in the case of men and 7s. 6d. in the case of women) (National Health Insurance (Reduced Rate of Sickness Benefit etc.) Regulations, 1914 (Stat. R. & O., 1914, No. 731) ) (see p. 922, *ante*).

Age at Date of Entry into Insurance.	Men.					Women.							
	Reduced Rate of Sickness Benefit.		Capital Sums.			Reduced Rate of Sickness Benefit.	Capital Sums.						
							Spinsters and Widows.			Married Women.			
(1)	(2)		(3)			(4)	(5)			(6)			
	<i>s.</i>	<i>d.</i>	£	<i>s.</i>	<i>d.</i>	<i>s.</i>	<i>d.</i>	£	<i>s.</i>	<i>d.</i>	£	<i>s.</i>	<i>d.</i>
17 and under 18	*9	6	0	9	0	*7	0	0	5	0	0	9	6
18        "      19	*9	0	0	17	6	*6	6	0	10	6	0	19	0
19        "      20	*8	6	1	6	6	*6	0	0	15	6	1	8	6
20        "      21	*8	0	1	15	0	*5	6	1	0	6	1	18	0
21        "      22	8	0	2	2	0	5	0	1	1	6	2	8	0
22        "      23	7	6	2	9	6	5	0	1	2	6	2	8	0
23        "      24	7	0	2	15	6	5	0	1	3	6	2	8	0
24        "      25	7	0	3	1	0	5	0	1	5	0	2	8	6
25        "      26	6	6	3	7	0	5	0	1	6	6	2	8	6
26        "      27	6	6	3	12	6	5	0	1	8	0	2	8	6
27        "      28	6	0	3	17	6	5	0	1	10	0	2	9	0
28        "      29	6	0	4	3	0	5	0	1	11	6	2	9	0
29        "      30	5	6	4	8	0	5	0	1	13	6	2	9	0
30        "      31	5	0	4	13	0	5	0	1	15	0	2	9	6
31        "      32	5	0	4	18	0	5	0	1	17	0	2	9	6
32        "      33	5	0	4	18	0	5	0	1	18	0	2	10	0
33        "      34	5	0	4	18	6	5	0	1	19	6	2	10	0
34        "      35	5	0	4	18	6	5	0	2	0	6	2	10	0
35        "      36	5	0	4	18	6	5	0	2	2	0	2	10	0
36        "      37	5	0	4	19	0	5	0	2	3	0	2	10	6
37        "      38	5	0	4	19	0	5	0	2	3	6	2	10	6
38        "      39	5	0	4	19	0	5	0	2	4	6	2	10	6
39        "      40	5	0	4	19	0	5	0	2	5	0	2	10	6
40        "      41	5	0	4	18	6	5	0	2	5	6	2	10	6
41        "      42	5	0	4	18	6	5	0	2	6	0	2	10	6
42        "      43	5	0	4	18	0	5	0	2	6	6	2	10	0
43        "      44	5	0	4	18	0	5	0	2	6	6	2	10	0
44        "      45	5	0	4	17	6	5	0	2	7	0	2	10	0
45        "      46	5	0	4	17	0	5	0	2	7	0	2	9	6
46        "      47	5	0	4	16	6	5	0	2	7	0	2	9	6
47        "      48	5	0	4	15	6	5	0	2	7	0	2	9	0
48        "      49	5	0	4	15	0	5	0	2	7	0	2	8	6
49        "      50	5	0	4	14	0	5	0	2	6	6	2	8	0

\* The reduced rate of sickness benefit provided by the Act in the case of persons who are under the age of 21 and have no dependants is not affected by this Table.

## APPENDIX.

TABLE II.—*continued.*

Age at Date of Entry into Insurance.	Men.						Women.						
	Reduced Rate of Sickness Benefit.		Capital Sums.			Reduced Rate of Sickness Benefit.	Capital Sums.						
							Spinsters and Widows.			Married Women.			
(1)	(2)		(3)			(4)	(5)			(6)			
	s.	d.	£	s.	d.	s.	d.	£	s.	d.	£	s.	d.
50 and under 51	5	0	4	12	6	5	0	2	6	0	2	7	6
51 „ 52	5	0	4	11	6	5	0	2	5	6	2	6	6
52 „ 53	5	0	4	10	0	5	0	2	5	0	2	6	0
53 „ 54	5	0	4	8	6	5	0	2	4	0	2	5	0
54 „ 55	5	0	4	6	6	5	0	2	3	6	2	4	0
55 „ 56	5	0	4	4	0	5	0	2	3	0	2	3	0
56 „ 57	5	0	4	1	6	5	0	2	1	6	2	1	6
57 „ 58	5	0	3	19	0	5	0	2	0	0	2	0	0
58 „ 59	5	0	3	16	0	5	0	1	18	6	1	18	6
59 „ 60	5	0	3	12	6	5	0	1	16	6	1	16	6
60 „ 61	5	0	3	8	6	5	0	1	14	6	1	14	6
61 „ 62	5	0	3	4	0	5	0	1	12	0	1	12	0
62 „ 63	5	0	2	19	0	5	0	1	9	6	1	9	6
63 „ 64	5	0	2	13	6	5	0	1	6	6	1	6	6
64 „ 65	5	0	2	7	0	5	0	1	3	6	1	3	6
65 „ 66	5	0	2	0	0	5	0	1	0	0	1	0	0
66 „ 67	5	0	1	12	0	5	0	0	16	0	0	16	0
67 „ 68	5	0	1	3	0	5	0	0	11	6	0	11	6
68 „ 69	5	0	0	13	0	5	0	0	6	6	0	6	6
69 „ 70	5	0	0	6	0	5	0	0	3	0	0	3	0

## WORKHOUSE.

*See POOR LAW; RATES AND RATING.*

## WORKING DAYS.

*See SHIPPING AND NAVIGATION.*



## WORKING MEN'S CLUBS.

*See* CLUBS.

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## WORKMEN.

*See* AGENCY BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS ;  
FACTORIES AND SHOPS ; MASTER AND SERVANT ; WORK AND LABOUR.

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## WORKMEN'S COMPENSATION.

*See* MASTER AND SERVANT.

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## WORKMEN'S DWELLINGS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## WORKSHOPS.

*See* FACTORIES AND SHOPS.

---

## WOUNDING.

*See* CRIMINAL LAW AND PROCEDURE.

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## WRECK.

*See* ADMIRALTY ; CONSTITUTIONAL LAW ; COPYHOLDS ; CRIMINAL LAW  
AND PROCEDURE ; SHIPPING AND NAVIGATION ; WATERS AND  
WATERCOURSES.

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## WRIT OF RIGHT.

*See* ACTION ; REAL PROPERTY AND CHATTELS REAL.

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## WRITS.

*See* ACTION ; ADMIRALTY ; CROWN PRACTICE ; ELECTIONS ; EXECUTION ;  
JUDGMENTS AND ORDERS ; PARLIAMENT ; PRACTICE AND PROCEDURE.

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## WRONGFUL DISMISSAL.

*See* MASTER AND SERVANT.

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## YACHTS.

*See* SHIPPING AND NAVIGATION.

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## YARDS.

*See* METROPOLIS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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## YEAR.

*See* TIME.

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## YEARLY TENANCY.

*See* LANDLORD AND TENANT.

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## YEOMANRY.

*See* ROYAL FORCES

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## YORKSHIRE REGISTRY.

*See* MORTGAGE; REAL PROPERTY AND CHATTELS REAL; SALE OF  
LAND.

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## YOUNG PERSONS.

*See* FACTORIES AND SHOPS; INFANTS AND CHILDREN.

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( 1007 )

## YOUNGER CHILDREN.

*See* INFANTS AND CHILDREN ; SETTLEMENTS ; WILLS.

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## YOUTHFUL OFFENDERS.

*See* CRIMINAL LAW AND PROCEDURE ; INFANTS AND CHILDREN.

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## ZANZIBAR.

*See* DEPENDENCIES AND COLONIES.

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## ZINC WORKS.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

END OF VOL. XXVIII.





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